The Future of International Human Rights: An Introduction to the Conference Papers

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In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (Universal Declaration). The Universal Declaration sets forth a number of civil and political rights within the genre familiar to Americans under the United States Constitution. It adds some economic and social rights that are less familiar to Americans, at least at the level of constitutional norms. Nevertheless, when it was adopted it did not purport to be a statement of legal obligation. Instead, it was to be "a common standard of achievement for all peoples of all nations."

The first three introductory paragraphs of the preamble are worth recalling as statements of moral principle and pragmatic necessity:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, [and]

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . .

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2. Id.


5. Id.

Thus, from the early days of the United Nations, protection of basic human rights was regarded not only as a moral imperative, but also as an essential ingredient of a stable world order.

Gradually over the past fifty years, several of the Universal Declaration's articles, particularly those within the category of civil and political rights, have come to be regarded as statements of binding international law.\(^7\) For example, in 1968 at the International Conference on Human Rights, eighty-four governments adopted the Proclamation of Teheran, which says, *inter alia*, that the Universal Declaration "constitutes an obligation for the members of the international community."\(^8\) In the well-known *Filartiga v. Pena-Irala*\(^9\) case, the United States Court of Appeals for the Second Circuit said that the prohibition against torture "has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights."\(^10\) Hurst Hannum, a leading scholar in the field and a participant in the Washington and Lee Conference on The Future of International Human Rights, concludes after a thorough study of the matter: "Given the central importance of the Universal Declaration in the international human rights firmament, it is the first instrument that should be consulted when attempting to identify the contemporary content of international human rights law."\(^11\)

Despite the Universal Declaration's ascent up the ladder of international obligation, it obviously could not by itself provide an effective international system of human rights protection. Its principles needed to be elaborated with greater precision and needed to be extended specifically to newly-appreciated areas of concern such as those stemming from racial discrimination and from restraints on the legitimate aspirations and physical well-being of women. Moreover, processes had to be devised to determine the extent to which encroachments on elaborated rights have occurred, and to supply some form of deterrence or relief. Multilateral treaties (conventions) became the instruments for rule elaboration, and they established mechanisms designed to help assess official conduct and to impose pressures to comply with the relevant norms.

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\(^9\) 630 F.2d 876 (2d Cir. 1980).

\(^10\) Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980).

As is well known, two comprehensive treaties, global in reach, flesh out the Universal Declaration. Together with the Universal Declaration, these treaties—the International Covenant on Economic, Social and Cultural Rights\textsuperscript{12} and the International Covenant on Civil and Political Rights\textsuperscript{13}—form what is known as the international bill of rights. They have been complemented by similarly comprehensive regional treaties and by specialized global ones. The most prominent of the regional treaties are the American Convention on Human Rights\textsuperscript{14} and the European Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{15} The specialized global treaties include, \textit{inter alia}, the Convention on the Prevention and Punishment of the Crime of Genocide,\textsuperscript{16} the International Convention on the Elimination of All Forms of Racial Discrimination,\textsuperscript{17} the Convention on the Elimination of All Forms of Discrimination Against Women,\textsuperscript{18} and the Convention on the Rights of the Child.\textsuperscript{19} Some of the treaties include mechanisms by which persons may petition an impartial body for relief.\textsuperscript{20} Others rely primarily or exclusively on

\begin{itemize}
\item \textsuperscript{12} International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. The United States is not a party.
\item \textsuperscript{13} International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. The United States is a party, subject to several reservations, understandings, and declarations.
\item \textsuperscript{14} American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123. The United States is not a party.
\item \textsuperscript{16} Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. The United States is a party.
\item \textsuperscript{17} International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. The United States is a party.
\item \textsuperscript{18} Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. The United States is not a party.
self-generated reports by states parties and review by a treaty-monitoring body.\textsuperscript{21}

These treaties, like the Universal Declaration, have generated a considerable amount of practice interpreting, applying, and enforcing the principles and the rules they contain. A conference of human rights experts could usefully look back over the fifty years since the Universal Declaration was adopted and try to synthesize the very great strides in human rights law that have been taken in that time. Our aim was different. We thought it would be more useful to look to the future. Consequently, we decided to jump start the 150th anniversary year of the Washington and Lee School of Law (and the 250th anniversary year of the University) with a conference on The Future of International Human Rights. We assembled experts in several fields, some with vast overall knowledge of international human rights law and others with more specialized expertise, to come to the picturesque college town of Lexington for two days of public discussion and a half day of informal, private discussion to try to map out the primary directions human rights substance and procedure are likely to take in the foreseeable future. Of course, this required some consideration of what has gone before in order to examine what is likely to come next. But the focus was on the future, and the papers emanating from the conference — the papers published in the ensuing pages — reflect that forward-looking approach. We could not hope to cover all of the important issues, but we were able to deal with many of them on three levels — global, regional, and domestic.

We were extremely fortunate to be able to assemble a multinational cast that included not only generalists and specialists, but also presented a mix of academics, international officials, and private practitioners. Professor Dinah Shelton served as our generalist from academia, although she is anything but an ivory tower academic. She has impressive activist credentials to go with her more traditional academic \textit{curriculum vitae}. Professor Shelton displayed her versatility with presentations on the International Covenant on Civil and Political Rights and on the Inter-American human rights system. She noted particularly the current and future importance of the intersection between technology and human rights.

INTRODUCTION

Elsa Stamatopoulou and Andrew Drzemczewski shared with us their expertise as international officials vastly experienced in human rights systems – Ms. Stamatopoulou with the United Nations and Dr. Drzemczewski with the Council of Europe. Ms. Stamatopoulou noted that the United Nations is becoming increasingly objective in its efforts to bring about an increasing level of respect globally for human rights. Dr. Drzemczewski discussed the details of the newly-redesigned European human rights system.

Steven Schneebaum and Susan Karamanian presented the thoughtful, reflective practitioners’ approach to the protection of human rights in the domestic legal system of the United States. They explained several of the practical and ethical difficulties practitioners face in this country.

To complement all this, we were favored with presentations by three of the leading specialists in important human rights sub-fields – Professors Hurst Hannum on self-determination, Hilary Charlesworth on women’s rights, and William Schabas on capital punishment. They assessed the current and foreseeable issues in their fields. All the panelists joined in discussing each others’ papers.

The conference produced what might best be called cautious optimism for the future development of human rights protections. Regionally, the Inter-American system no longer needs to focus so much on heavy-handed governmental tactics to stifle dissent. Instead, it will increasingly focus on issues akin to those faced in the European human rights system – due process in the courts, freedom of expression, and the like. In Europe, there is great promise in the new procedures that entered into force on November 1, 1998. The reconstituted European Court of Human Rights, functioning without a separate Commission, gives individuals direct access to international judicial determination of their rights. In the United Nations, there is also promise for the future, as United Nations organs like the Commission on Human Rights become increasingly confident and effective. The conference produced rather less optimism regarding the role of international human rights in the courts of the United States, where judges (and their law clerks) often seem oblivious to the arguments of international lawyers unless a federal statute, such as the Alien Tort Claims Act or the Torture Victim Protection Act of 1991, specifically incorporates human rights norms.

22. It has proved impractical to transcribe and to publish the exchanges among the panelists and with the audience that followed each principal presentation. Videotapes of the conference proceedings, however, are on file with the Washington and Lee University School of Law Library.


Recent and future development of the international law of self-determination revolves significantly around the claims of ethnic, regional groups to have a right of secession to form new states. Hurst Hannum does not find any such right in international law, but neither does he find a prohibition against secession. This is an area in which the international law-creating process of claim, counterclaim, and acquiescence will be very much at work in the foreseeable future.

The future of women's rights may be seen as a continuing response to what Hilary Charlesworth calls the mid-life crisis of the male-oriented Universal Declaration of Human Rights. The task will be to take norms that are facially gender-neutral, yet often insensitive to women's needs, and to create a more gender-sensitive normative system.

The future development of international norms relating to capital punishment, in William Schabas's view, may well be passing the United States by. The international community is increasingly unwilling to accept capital punishment, yet he sees the United States as remaining resolute in its tolerance or approval of individual states' use of it.

A development in Virginia just after the conclusion of our conference raised a host of issues about capital punishment and respect for international legal systems in this country. During our conference, the clock was approaching midnight for Angel Francisco Breard, a Paraguayan national then being held on death row in Virginia under a conviction for a capital crime. Even though the important last-minute developments in his case occurred too late to be discussed at the conference, they are so relevant to the current and future development of international human rights in this country and respect for international processes in criminal cases—especially in capital cases—that it is appropriate to outline them here.

On April 3, 1998, Paraguay brought a proceeding in the International Court of Justice (ICJ) against the United States, challenging the Commonwealth of Virginia's failure to advise Breard of his right under the Vienna Convention on Consular Relations to consult Paraguayan consular officers before he was tried and convicted of capital murder in a Virginia court.25


If [a foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Breard was scheduled to be executed on April 14.26 Paraguay asked the ICJ to declare that the United States should restore the situation as it existed before the violation of the Vienna Convention occurred.27 Meanwhile, Breard sought a writ of habeas corpus in a United States district court, and Paraguay sued several Virginia officials alleging that its rights under the Vienna Convention had been violated.28 By early April, the United States Supreme Court had been asked, by various applications and petitions, to hear both Breard’s and Paraguay’s cases.29 On April 9, the ICJ ordered provisional measures of protection calling on the United States to prevent the execution pending final judgment in the international proceedings.30 On April 13, U.S. Secretary of State Madeleine Albright wrote a letter to the Governor of Virginia asking that he stay the execution in order to prevent what could be seen as a denial of the significance of international law by the United States.31 On April 14, the Supreme Court, relying on procedural grounds, declined to intervene.32 The Governor refused the stay, and the Commonwealth executed Breard on schedule.

Much could be said about the international law and the United States foreign relations law aspects of the Breard case, and much, no doubt, will be said in law reviews in the coming months. Suffice it to say here that there are issues relating not only to the death penalty as such, but also to the binding or nonbinding nature of ICJ provisional measures; the respect owed to them even if they are nonbinding; the appropriate remedy for the conceded violation of the Vienna Convention in a capital case; the propriety of the Supreme Court’s refusal on procedural grounds either to stay the execution (in order to give itself adequate time to deliberate) or to face squarely the international law and the foreign relations law issues; the effect of Secretary of State Albright’s letter as a statement of current American foreign policy; the accuracy or lack thereof in the Supreme Court’s dictum that "nothing in our existing case law allows us to make [the Governor of Virginia’s] choice for him;"33 the likeli-
hood that the Governor’s decision to go ahead with the execution would interfere with the exclusive federal role in the conduct of foreign relations; the propriety of the Governor’s denigrating statements about the role of the ICJ; the post-execution scenario in the ICJ, given Paraguay’s apparent determination to pursue the proceedings in that forum; and the implications of this case on other foreign nationals who are being held on death row despite having been denied their right to be seasonably informed of possible consular assistance.

I would hazard a guess that had the *Breard* case come to light before our conference, the answers of our panelists to these questions would have been less than flattering to the United States Supreme Court and to the Governor of Virginia. However that may be, the *Breard* case, for all its notoriety in international law circles, hardly exhausts the list of highly significant human rights issues facing the United States and the rest of the world. Our panelists’ presentations stand by themselves as important analyses of several of the most crucial areas of international human rights law as it now is and as it is likely to be in the foreseeable future. I am very pleased that the *Washington and Lee Law Review* is able to publish such an impressive compendium of scholarship by such an outstanding group of international human rights experts.

34. Governor Gilmore stated that a stay would "have the practical effect of transferring responsibility from the courts of the commonwealth and the United States to the international court," and that the U.S. Department of Justice and Virginia’s Attorney General made a compelling case that "the International Court of [J]ustice has no authority to interfere with our criminal justice system." Frank Green, *Paraguay to Pursue Complaint*, RICHMOND TIMES-DISPATCH, Apr. 16, 1998, at B1.

35. According to Amnesty International, "[t]he vast majority of the more than 60 foreign nationals under sentence of death in the USA were denied their rights under the Vienna Convention." AMNESTY INTERNATIONAL, *Will the USA Execute Angel Francisco Breard in Defiance of the International Court of Justice?*, AI Index: AMR 51/25/98, Apr. 9, 1998.
Challenges to the Future of Civil and Political Rights

Dinah Shelton*

I. Introduction

The Universal Declaration of Human Rights (Universal Declaration)\(^1\) and the American Declaration of the Rights and Duties of Man\(^2\) first articulated in 1948 the list of internationally recognized human rights and fundamental freedoms. Since that time, only a few new claims have emerged to add to the list of basic rights, although subsequent treaty and soft law texts have further defined and refined the stated rights.\(^3\) On the other hand, none of the rights contained in the declarations seems to have been "de-certified" and denied continuing normative value. As this century nears its end, it may be asked whether the relative stability of the human rights catalogue will remain with the existing guarantees deemed adequate to meet coming challenges to human dignity and development, or whether, instead, new rights and obligations will be claimed and recognized. A response to this question and any attempt to predict the future of civil and political rights require evaluating present and foreseeable threats to human dignity and well-being.

Law in general is responsive to emerging values, conflicts, fears, and social problems. The initial articulation of international human rights norms fifty years ago responded to the "barbarous acts" referred to in the Universal Declaration of Human Rights.\(^4\) The Universal Declaration sees human rights

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4. See Universal Declaration of Human Rights, supra note 1, preamble para. 2 ("Whereas disregard and contempt for human rights have resulted in barbarous acts which have
instrumentally, as "the foundation" and the means to achieve "freedom, justice and peace." Neither the barbarous acts nor the need for freedom, justice, and peace has disappeared. In this regard, the demand for civil and political rights, as part of the indivisible human rights canon, remains a fundamental objective.

The task of drafting the canon of human rights is largely complete, and international supervisory institutions are functioning more or less as intended, however limited that intent may have been. Although improvement of procedures and institutions is necessary, what currently demands attention is perhaps best expressed in a series of conjunctive phrases – human rights and democracy, human rights and technology, human rights and the environment, and human rights and trade. These phrases reflect the need to consider civil and political rights in the context of emerging social problems and values and the need to integrate human rights into all areas of human activity in the light of globalization, the increased interdependence of states, growth of transboundary civil society, and deregulation. In some instances, new rights may need to be articulated. In others, existing rights may be adequate to resolve the perceived problems if adapted to the new contexts. In fact, it may be in regard to obligations, not rights, that reformulation may be most needed in the future.

II. The Debate over New Rights

Not every social problem must result in the expression of a new human right. Even the existing catalogue is not always met with consensus; states and scholars occasionally challenge the concept and the content of rights from freedom of the press to the right to development. There are legitimate fears

5. See id. preamble para. 1 ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . .").

6. The most frequently utilized supervisory mechanism is state self-reporting on compliance with human rights norms. In general, any procedure that would allow victims to file complaints regarding human rights violations is optional for states parties to the treaties. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, supra note 3, arts. 9, 14.

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that expanding the list will not only create further dissension, but will under-
mine the very concept of fundamental and inalienable rights by devaluing or
trivializing core norms, taking time and energy away from the essential task
of implementing and enforcing those rights that are nonderogable and univer-
sally accepted.  

The concern is legitimate and must be taken seriously; at the same time,
the list can never be considered closed. It is impossible to predict future
threats to human dignity, the foundation of all human rights, although it may
be possible to identify current issues and developments that may require
reformulated or expanded rights. Some scholars attempt to establish criteria
that a claim must meet before it is included as a human right. Ramcharan
speaks of qualitative characteristics such as appurtenance to the human person
or group; universality; essentiality to human life, security, survival, dignity,
liberty, or equality; essentiality for international order; essentiality in the
conscience of mankind; and essentiality for the protection of vulnerable
groups. Jacobs argues that a human right must be fundamental, universal in
the sense that it is universally or very widely recognized and that it is guaran-
teed to everyone, and capable of sufficiently precise formulation as to give
rise to legal obligations on the part of the state. Another way to approach the
issue is to ask in each case whether existing norms, if fully implemented,
would provide the necessary protection against the threat posed. If the answer
is yes, no new right need be recognized. If the answer is no, consideration
must be given to expanding the list of rights or to altering the scope of duties.
The remainder of this paper discusses some trends, problems, and issues that
arise in the context of civil and political rights.

III. Human Rights and Democracy

Considerable human rights efforts have been expended in recent years to
establish free elections and to achieve political rights by instituting democratic
electoral processes. For the most part, insufficient attention has been paid

8. See Philip Alston, Conjuring up New Human Rights: A Proposal for Quality Control,

9. B.G. Ramcharan, The Concept of Human Rights in Contemporary International Law,
1983 CAN. HUM. RTS. Y.B. 267, 280.

10. See F.G. Jacobs, The Extension of the European Convention on Human Rights to

11. In the Inter-American system, efforts to establish democratic pluralism can be seen
to protecting human rights once a freely-elected government is in place. The breakdown of order in many of the emerging, so-called democratic states and the overreaching by democratic majorities demonstrate that the concept of human rights has yet to take hold to create a human rights culture in many regions of the world. A recent Newsweek article notes that most people now have the right to vote freely and adds "[b]ut that's not enough if governments then trample on basic rights."

Free elections that bring to power racists, separatists, religious fundamentalists, and others intent on instituting a uniform belief system pose distinct dangers to freedom, justice, and peace. Too often they lead to restraints on speech, assembly, religion, and other basic liberties. The result is that countries without a tradition of peaceful political disagreement have disintegrated into conflict and have divided along racial, religious, or ethnic lines. Democracy, like respect for human rights, is not an end in itself, but a means to individual and social development.

A major issue for the present and the near future will be to ensure that democracy, representing one set of political rights, is not elevated to the detriment or to the exclusion of other civil and political, or economic, social, or cultural rights. It is not an easy matter to deny a political party or an individual the right to compete in the political arena because of a political agenda. Events in Algeria demonstrate the dangers involved. No individual or group, however, is entitled to use the political process to achieve power in order to deprive others of basic liberties. As the last article of the Universal Declaration states: "Nothing in th[e] Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth [t]herein." The Inter-American Commission on Human Rights applied this principle in denying that the political rights of former Guatemalan dictator Jose Efrain Rios Montt were violated when national law prohibited him from being a candidate for president of the country. The Commission rightly


perceived that the difficulties inherent in limiting political rights to preserve political rights should not lead to a denial of efforts to preserve democratic institutions that respect human rights.

Human rights precede, are inherent in, and flow from democratic processes and institutions. Some preconditions for effective democracy are protected as human rights — freedom of expression, freedom of assembly and association, and freedom of speech. In turn, democratic processes should ensure meaningful participation of the governed in the establishment of rules and structures of society. It requires periodic legitimation or revalidation to demonstrate the continued consent of the people. Hence, the Universal Declaration requires that the will of the people "be expressed in periodic and genuine elections which shall be by universal and equal suffrage." It also requires, however, the establishment and maintenance of an independent and impartial judiciary, with all persons accountable for their actions and with respect for the rule of law, including the provision of remedies when rights are violated. As noted during the Conference on Security and Co-operation in Europe meeting in Copenhagen in June 1990, "democracy is an inherent element of the rule of law," but pluralism is also important with regard to political organizations.

Many of the measures needed to ensure civil and political rights in the context of emerging democracies and dysfunctional countries are positive measures similar to those required to achieve progress in economic, social, and cultural rights. Institution-building and technical assistance to create an independent and impartial judiciary and to build a competent and honest civil service, as well as the provision of resources for educating police and military forces, raise issues of capacity as well as willingness to achieve compliance with international obligations. The positive measures required result in a

actions against "subversives." *Id.* at 206. The Guatemalan Constitutional Convention in 1986 approved article 186, which banned from holding office the "leader and chiefs of any coup d'etat, armed revolution or similar movement that changes the constitutional order" as well as those who became head of the government as a result of such actions. *Id.* at 207. For a discussion of the Inter-American system and democratic rule, see THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS 494-559 (4th ed. 1995); Dinah Shelton, Representative Democracy and Human Rights in the Western Hemisphere, 12 HUM. RTS. L.J. 353 (1991).

16. Universal Declaration of Human Rights, *supra* note 1, art. 21(3).
17. *Id.* arts. 7, 10, 11.
18. *Id.* art. 8.
blurring of the oft-stated distinction between state abstention to achieve civil and political rights and state action to further economic, social, and cultural rights. In this regard, it is perhaps appropriate to reiterate the indivisibility of all rights rather than attempt to articulate any new rights. In terms of implementation, however, the issue of capacity means that the task of ensuring civil and political rights may require international aid rather than condemnation in respect to those countries that have the will, but lack the capacity without international assistance, to build democratic institutions that respect human rights. Thus, the obligation in article 2 of the International Covenant on Economic, Social and Cultural Rights "to take steps, individually and through international assistance and cooperation, especially economic and technical" to achieve the full realization of the guaranteed rights may need to be considered as applying to civil and political rights as well to economic, social, and cultural rights.

IV. Technology and Human Rights

In contrast to issues of democracy and human rights, the problems arising due to technological change may very well necessitate either further elaboration of existing norms or development of new rights. Most significant, perhaps, are the human rights concerns that are emerging from developments in biotechnology, including reproductive technology, treatment of death and dying, cloning, genetic transfers, and the emergence of new diseases and resistant strains of formerly treatable or curable ailments. Some of these scientific changes raise fundamental issues about the very concept of human identity and questions concerning whether there is or should be a right to genetic integrity, even to species integrity, that limits or prohibits manipulating the very code of human existence and personal identity, even with the informed consent of the individual.

The Human Genome Project, a global network of genetic researchers, has developed a systematic plan to coordinate the mapping of the human genome. Genes contain the code to produce a protein, the material of cellular structure that determines most chemical reactions in the body. With a

21. See generally HUMAN DNA: LAW AND POLICY (Bartha Maria Knoppers et al. eds., 1997) (presenting various articles concerning human genetics).
22. See Kara H. Ching, Note, Indigenous Self-Determination in an Age of Genetic Patenting: Recognizing an Emerging Human Rights Norm, 66 FORDHAM L. REV. 687, 691 (1997). The human genome consists of a sequence of nucleotide bases which contain approximately three billion pairs, some of which form the 50,000-100,000 genes found in human cells. Id. at 690.
23. Id.
map of the human genome, scientists may identify genetic markers and the location of disease-producing genes. Mapping could make it possible to diagnose a predisposition, cure, or preventative measure. In a related proposal, the controversial Human Genome Diversity Project seeks to collect and to analyze genetic samples from indigenous groups throughout the world in order to amass "a representative sample of human genetic variation." Researchers would have access to the resulting database. The Model Ethical Protocol for Collecting DNA Samples contains extensive guidelines that include measures on mandatory informed group and individual consent, benefits for participating communities, privacy, and patenting.

Genetic mapping and diagnostics raise the specter of eugenics. To take an extreme example, one may suppose that geneticists might discover that homosexuality is genetically determined and not only will become able to identify the genes, but to alter them as well. Do we eliminate the "different?" On the other hand, suppose one group has a natural defense to a disease that decimates another group. Can the state require genetic sharing? Should parents be permitted to choose the characteristics of their children? Or, do the human species and each individual have a right to the natural diversity produced by thousands of generations of genetic transmission? Do humans have a right to genetic privacy? Is it any more acceptable to manipulate the physical integrity of the individual than it is to manipulate the personality or the intellect?

Unfortunately, too often the debate has centered on procedure and on the requirement of free and informed consent. It may also be appropriate, and even necessary, to question the need for substantive limits on what can be done, even with the consent of the individual, because of the impact on society as a whole. Just as the right to be free from slavery is inalienable and no individual can choose to be a slave, it may be necessary to establish the limits to genetic manipulation, the line beyond which individuals may not give consent, however free and informed. Human dignity, and even human existence, may depend on it.

Commodification of human parts and genetic material is also an issue. The patenting of human genetic information has been permitted, based on a

24. Id. at 691.
25. Id.
27. Id.
28. The North American Regional Committee of the proposed Diversity Project published the Model Protocol. Id. at 693.
29. Id.
desire to provide incentives for scientific research and development in the genetics field. The United States has granted, and the Supreme Court has upheld, life patents, something that needs to be scrutinized carefully by human rights scholars and activists. On the other hand, the Supreme Court of California has rejected the notion that property principles could be utilized to protect the interests of an individual whose spleen was used for commercial purposes. As Justice Arabian questioned: "Does it uplift or degrade the 'unique human persona' to treat human tissue as a fungible article of commerce?"

A recent note describes one set of problems:

Genes and the information they contain are fundamental building blocks of a people's identity. Genetic research on groups of people occasionally results in lucrative biotechnology patents. Researchers have recently targeted indigenous peoples for genetic study because their heightened isolation may have resulted in unique genetic traits of increased resistance or susceptibility to disease.

Indigenous peoples have concerns about the procurement and use of their genetic materials. Many are worried about researchers obtaining genetic samples without the informed consent of their subjects. Some of these peoples' religious or philosophic beliefs do not permit the patenting of life. No avenues exist for these peoples to enjoin the patenting of their genetic material. No mechanisms beyond private contract currently ensure that the indigenous donors will be adequately compensated, or compensated at all, for their contribution. Moreover, many indigenous people may never have access to medical advances based on their own genetic material because they do not live near medical facilities.

The sum of all these considerations has led some to coin the term "molecular colonialism," a fear that the DNA of indigenous peoples will be harvested for genetic samples. The fear is based on experience.

30. See id. at 695.
33. Moore, 793 P.2d at 497-98 (Arabian, J., concurring).
34. Ching, supra note 22, at 687-88.
35. See id. at 697.
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As the note states:

In the early 1990s, the U.S. Department of Commerce submitted a patent application on the cell line of a Guaymi woman[, a member of an indigenous group inhabiting Panama]. The cell line was believed to have antiviral qualities. Rural Advancement Foundation International ("RAFI") found the application while going through a database of patent applications and contacted the Guaymi people. Neither the tribe nor the woman knew anything about the development of the cell line or the patent application. Rural Advancement and other groups supported the Guaymi in their demand for withdrawal of the patent application. The Guaymi tribal president explained, "[i]t's fundamentally immoral, contrary to the Guaymi view of nature, and our place in it. To patent human material . . . to take human DNA and patent its products . . . violates the integrity of life itself, and our deepest sense of morality." Later that year, due to international pressure, the Center for Disease Control withdrew the patent application.  

Another case involved the Hagahai, an isolated 260-member tribe from the Madang Province of Papua New Guinea. In 1984, some tribe members sought outside help for illness that plagued the group. During diagnostic efforts, researchers discovered that several members of the tribe were infected with the human T-cell leukemia virus (HTLV-I) that usually produces severe leukemia, but that is benign in the Hagahai. Scientists created an HTLV-infected cell line of Hagahai DNA, the cell line was patented in the United States, and the researchers were listed as the "inventors." The Papua New Guinea government questioned whether the patent claim violated that nation's sovereignty. After considerable controversy, on October 24, 1996, the National Institute of Health forfeited its rights to the U.S. patent. 

It is important to consider whether the existing human rights protections are adequate in the face of bio-prospecting, commodification of human genetic material and organs, and other biological developments. The International Covenant on Civil and Political Rights calls for free consent before medical or scientific "experimentation." It does not require "informed" consent, nor does

36. Id. at 700 (quoting Philip L. Bereano, Patent Pending: The Race to Own DNA, Seattle Times, Aug. 27, 1995, at B5).

37. Id. at 701.

38. Id.

39. Id.

40. Id.

41. Id.

42. Id. at 702.

43. International Covenant on Civil and Political Rights, supra note 3, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.").
it extend to treatment that is not experimental. Perhaps the notion of inhuman or degrading treatment would be adequate to cover certain techniques, especially prolonged life support of someone in a persistent vegetative state. For the indigenous, self-determination could be seen as encompassing "internal self-determination," referring to their ability to control all aspects of their lives. The right of indigenous peoples to decide whether, and to what extent, to participate in genetic research could be recognized as within the scope of self-determination. More broadly, the right to self-determination could secure for all persons the right to control access to and use of genetic material.

The Draft United Nations Declaration on the Rights of Indigenous Peoples acknowledges the urgent need to recognize the rights of indigenous peoples. It explicitly states that indigenous peoples' genetic resources are entitled to special protection. More broadly, the United Nations Educational, Scientific and Cultural Organization adopted on November 11, 1997 the Universal Declaration on the Human Genome and Human Rights (Declaration). The Declaration relies upon human rights, intellectual property, and environmental texts, including the Convention on Biological Diversity. In recognizing the genetic diversity of humanity, the Declaration quotes from the Universal Declaration's preamble to reaffirm "the inherent dignity, and . . . the equal and inalienable rights of all members of the human family." The Declaration is positive toward research on the human genome, foreseeing "vast prospects for progress in improving the health of individuals and of humankind as a whole." It calls for respect for human rights in regard to such research, and calls in particular for nondiscrimination on the basis of genetic characteristics.

44. Id.
49. Universal Declaration on the Human Genome and Human Rights, supra note 47, preamble para. 4 (quoting Universal Declaration, supra note 1, preamble para. 1).
50. Id. preamble para. 6.
51. Id.
The Declaration in general combines techniques and legal approaches from both human rights and environmental protection.\(^\text{52}\) It demands that all research, treatment, or diagnosis be preceded by rigorous assessment of the potential risks and benefits and be based on the prior, free, and informed consent of the person concerned.\(^\text{53}\) Rather than declare a right to genetic integrity, the Declaration places its focus on duties and provides in article 10 that "[n]o research or research its [sic] applications concerning the human genome, in particular in the fields of biology, genetics and medicine, should prevail over respect for the human rights, fundamental freedoms and human dignity of individuals or, where applicable, of groups of people."\(^\text{54}\) Article 11 specifically prohibits cloning and other "[p]ractices which are contrary to human dignity."\(^\text{55}\) However, at the same time, article 12 identifies freedom of research as part of freedom of thought.\(^\text{56}\) Because the group of experts involved in drafting the Declaration came from the scientific and research community, it is incumbent on those concerned with human rights to examine the Declaration carefully to determine whether its protections are adequate.

The Council of Europe Convention on Human Rights and Biomedicine (Convention), signed by twenty-two states on April 4, 1997,\(^\text{57}\) goes further in establishing that states parties shall protect the dignity and the identity of human beings, referring to the latter as a human right to be respected along with other rights and fundamental freedoms.\(^\text{58}\) This is reinforced by article 15, which provides that scientific research in the field of biology and medicine is subject to the provisions of the Convention and "the other legal provisions ensuring the protection of the human being."\(^\text{59}\) This suggests that all existing human rights norms govern research and treatment, whether undertaken by the state or by private actors. Article 2 explicitly states that "[t]he interests and welfare of the human being shall prevail over the sole interest of society or science."\(^\text{60}\) Free and informed consent is the subject of chapter two of the agreement, providing a basic principle for "intervention."\(^\text{61}\) Unfortunately, the

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\(^{52}\) See generally Universal Declaration on the Human Genome and Human Rights, supra note 47.

\(^{53}\) Id. art. 5.

\(^{54}\) Id. art. 10.

\(^{55}\) Id. art. 11.

\(^{56}\) Id. art. 12.


\(^{58}\) Id. art. 1.

\(^{59}\) Id. art. 15.

\(^{60}\) Id. art. 2.

\(^{61}\) Id. art. 5.
Convention contains no definitions of terms. One problematic provision is article 7, which concerns the mentally ill.\textsuperscript{62} It allows nonconsensual treatment, without substantive limits on the nature or the extent of the intervention, when "without such treatment, serious harm is likely to result to his or her health."\textsuperscript{63} It would have been preferable if the treaty had imposed a requirement that the least harmful or dangerous treatment be utilized and had excluded permanently disabling or personality-crippling "treatments" such as lobotomies and electroshock.

The provisions on the human genome are more progressive than those of the United Nations Educational, Scientific and Cultural Organization's text. Article 13 provides that "[a]n intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants."\textsuperscript{64} No tests or alterations are permitted for gender selection\textsuperscript{65} or for other preferences.\textsuperscript{66} "The creation of human embryos for research purposes is prohibited,"\textsuperscript{67} and the human body and its parts are not to be used for financial gain.\textsuperscript{68} The treaty foresees enforcement through injunctions, compensation, and punishment. There is no direct reference to the jurisprudence of the European Convention on Human Rights.

The Convention also contains no direct ban on human cloning.\textsuperscript{69} Because of concerns over this omission, the European states negotiated a protocol to this effect.\textsuperscript{70} The Committee of Ministers presented the draft, prepared at its request by the Steering Committee on Bioethics, to the Parliamentary Assembly, which prepared an opinion recommending adoption of the draft protocol.\textsuperscript{71} The preamble calls cloning "contrary to human dignity"\textsuperscript{72} and in article 1, its only substantive provision, the draft prohibits "[a]ny intervention

\begin{footnotes}

62. \textit{Id.} art. 7.
63. \textit{Id.}
64. \textit{Id.} art. 13.
66. \textit{Id.} art. 12.
67. \textit{Id.} art. 18(2).
68. \textit{Id.} art. 21.
69. \textit{See generally id.}
71. \textit{Id.} at 1415 n.*.
72. \textit{Id.} at 1417.
\end{footnotes}
seeking to create a human being genetically identical to another human being, whether living or dead."73

It seems clear that procedural and substantive human rights issues are emerging because of scientific developments in biology and medicine. These necessitate careful consideration of several questions, including the issue of whether there should be a right to genetic integrity and, if so, under what circumstances that right should be limited in light of the needs of society.

V. Environmental Protection

Technology and human activity in general have transformed our natural surroundings, making some areas uninhabitable and creating risks for the future survival of human life on the planet. Humans cannot be separated from the natural environment on which all life depends. The complex ecological web in all its diversity has intrinsic and instrumental value, comprising a vast number of elements only partly known and understood. It has become clear that serious environmental harm impacts human rights and that human rights violations can lead to environmental degradation. The complex interplay of the two has led to the widespread adoption of environmental rights and the articulation, primarily in constitutional law, of a right to a safe, healthy, and ecologically-balanced environment.

The environment has two characteristics that have broad implications for human rights—interdependence and irreversibility. Environmental science demonstrates that air and water know no boundaries, that climate change is a global issue, and that the reduction in biological diversity impacts across boundaries and regions.74 Furthermore, much environmental harm is irreversible—extinct species are gone and dead lakes and rivers cannot be brought back, at least in the short term.75 The problems can be demonstrated in regard to freshwater. Less than one percent of the water of the earth is accessible for human use.76 Any loss of water resources, especially pollution of underground aquifers, poses dangers for future generations. According to the World Health Organization, more than five million people die each year as a

73. Id. art. 1.
75. See ALEXANDRE KISS & DINAH SHELTON, MANUAL OF EUROPEAN ENVIRONMENTAL LAW 9 (2d ed. 1997).
result of polluted drinking water.\textsuperscript{77} Severe water shortages exist in twenty-six countries, and by 2025, two-thirds of the world’s population could face water shortages.\textsuperscript{78} Sixty percent of the world’s drinking water is located in just ten countries, and much of it is polluted. Freshwater shortages are already raising tensions and threaten to be a cause of future interstate conflicts. Similarly, virtually all the known commercial fish stocks are declining or are endangered.

Interdependence and irreversibility mean, in the first place, that environmental quality must be considered a common concern of humanity. Second, the common concern is a human rights concern, linked to, but broader than, life, health, political participation, culture, and standard of living. Civil and political rights can be adapted to enhance environmental protection, which, in turn, strengthens other rights. It has become common to speak of the right to environmental information, the right to public participation in environmental decision-making, and the right to a remedy for environmental harm. These procedural rights, however, are inadequate to protect the substance of the biosphere. As with medical experimentation, there are certain actions that should not be taken, regardless of the procedural regularity, because the impacts extend temporally and spatially beyond those involved in taking the action.

Existing human rights standards are not sufficient, even if fully implemented, to safeguard a healthy and ecologically-balanced environment. Such an environment can be seen as a necessary precondition to all other rights, ensuring the present and future well-being of humankind, or as inextricably intertwined with existing rights. In this light, states are increasingly incorporating a specific right to environmental quality in constitutional and regional human rights texts. Virtually every constitution written or revised since the 1972 Stockholm Conference on the Human Environment has included a right to environment in some form. The right is different in many regards from other human rights because environmental harm is largely due to private conduct, not state action. The articulation of the right seeks to ensure that the state places a high priority on environmental protection and will take effective action to prevent state and nonstate conduct that produces environmental harm or serious risk thereof.

\textsuperscript{77} Id. ¶63. The Convention on the Rights of the Child requires states to take appropriate measures to implement the child’s right to health, including efforts to combat disease through, \textit{inter alia}, the provision of clean drinking water, "taking into consideration the dangers and risks of environmental pollution." Convention on the Rights of the Child, supra note 3, art. 24.

\textsuperscript{78} Comprehensive Assessment of the Freshwater Resources of the World, supra note 76, ¶84.
Most frequently in the European system, environmental protection has been sought through the use of existing human rights norms.\textsuperscript{79} The primary right invoked is article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which involves privacy and family life.\textsuperscript{80} The European Court has accepted that environmental harm may interfere with privacy and family life and has balanced the competing interests of the individual and of the community as a whole. The result has been limited environmental protection. However, the scope of protection remains narrow because environmental degradation is not itself a cause for complaint, but must be linked to an existing right.

In contrast, the 1994 United Nations draft principles on human rights and the environment explicitly state that "[a]ll persons have the right to a secure, healthy and ecologically sound environment."\textsuperscript{81} Subsequent principles detail the contents of this right, including the right to freedom from pollution, environmental degradation, and activities that adversely affect the environment; the right to preservation of environmental components; and the rights of information, participation, and remedy. The United Nations Commission on Human Rights has had the draft declaration under consideration for the past three years and is divided over the text, with opposition coming primarily from the United States and some of the European Union countries. The latter position is not entirely consistent with a text of the Organization for Economic Cooperation and Development that states that the promotion of a "decent" environment is recognized by many of its member states as a fundamental human right.\textsuperscript{82}

In international human rights texts, the right to environment has been included only in recently adopted regional texts.\textsuperscript{83} The theoretical and practi-
cal problems involved in developing such a right have yet to be fully consid-
ered. In particular, both the temporal and spatial extent of environmental
harm raises problems about the scope of the right and remedy, in particular
whether there are duties owed to "future generations" and persons outside the
territory and the jurisdiction of the state. It seems likely that the jurisdictional
limit on human rights duties was included in treaties out of a belief that states
would be largely incapable of violating the rights of individuals in other
states. This is not the case with environmental harm, which is often trans-
boundary in scope. Thus, the appropriate extent of state obligations needs
careful consideration, as does the question of whether there is juridical con-
tent to the notion of rights of future generations.

VI. Trade, Globalization, and Human Rights

Globalization of civil society has led to the creation of powerful nonstate
organizations and entities, many of them capable of and engaged in violating
human rights. Globalization, coupled with trade liberalization and deregula-
tion, has produced high social costs, reflected in lawsuits against corporate
complicity in human rights violations in, inter alia, Burma,\textsuperscript{84} Ecuador,\textsuperscript{85} and
Nigeria.\textsuperscript{86} Economic globalization may undermine national and international
human rights protections as states make an effort to remain competitive and
to entice investment. The "race to the bottom" is a threat, as countries are
pressured to relax their standards for the treatment of workers, denying
collective bargaining, minimum wages, and, in some cases, the right to be free
from forced labor.

The growth of powerful nonstate actors poses a problem for human rights
law. International agreements were written to guarantee rights against the
state, and none of the instruments directly applies to nonstate actors. Corpo-
rate codes of conduct on worker rights and environmental protection are
inadequate because they use self-regulation and thus often aim at the lowest
common denominator and only after public pressure. State regulation is often
difficult or impossible, not for lack of will, but for lack of capacity. Interna-
tional human rights law in the future must address the problem of abuse of
power by nonstate actors.

\textsuperscript{85} See generally Aquinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996), vacated
\textsuperscript{86} See generally Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (S.D.N.Y.
1996) (demand for jury trial).
One approach that has been suggested, but that poses enormous dangers, is the notion of drafting a Universal Declaration of Human Responsibilities. A group of former heads of state, joined in the InterAction Council, has proposed such a text, to be adopted on the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights. The United Nations Educational, Scientific and Cultural Organization also has a text under consideration that was drafted at a meeting of philosophers held March 25-28, 1997. The responsibilities it discusses are little more than an extension of human rights obligations to individuals and other nonstate actors. Rather than limiting or "balancing" the Universal Declaration of Human Rights with a declaration of responsibilities, which could provide a pretext for the state to limit existing rights, it would perhaps be better to attempt to extend the possibility of claiming human rights against nonstate entities as well as against state actors.

It must be emphasized, however, that the role of the state remains crucial. Each state has an obligation not only to respect, but, to ensure human rights and fundamental freedoms. Given the challenge posed by interdependence and globalization and the resulting power shift from states to civil society, state intervention remains necessary to protect the basic freedoms. As Gordon Christenson states, "Neither human dignity nor voluntary transactions or investments can thrive in world civil society without credible and legitimate international and national legal systems in which participants may place at least some trust in return for protection." Legal systems, both national and international, must cooperate to protect society's fundamental values and to referee when there are competing values that require balancing and reconciliation. Market mechanisms alone will not provide the necessary protection and are incapable of balancing and reconciling competing values, especially when they themselves reflect one of the values in competition.

VII. Conclusion

The next century will bring new problems and new contexts for the protection of human rights. Some emerging issues can be seen in recent developments in governance, technology, and economics. They may require refining existing human rights norms or invoking human rights protections against new actors. In some instances, new rights may be necessary to respond to the most serious threats to human dignity and to well-being, when existing norms do not include the necessary guarantees.

None of the emerging issues should lead to ignoring the ongoing need to protect civil and political rights as they are currently formulated. From Afghanistan to Zaire, gross and systematic violations remain around the world. It is not necessary to formulate new rights to have enough to do well into the next millennium. Regional and global systems should be strengthened to monitor and to expose violations and to provide remedies to victims. Prevention of violations through institution-building and support for human rights nongovernmental organizations is also crucial to fulfilling the promise of the Universal Declaration of Human Rights.
The Development of United Nations Mechanisms for the Protection and Promotion of Human Rights

Elsa Stamatopoulou*

I. Introduction

The development of human rights protection mechanisms at the United Nations has been inextricably linked with the organization's efforts to promote human rights. The two approaches have been mutually reinforcing and have created strong human rights constituencies. In fact, this process itself has been gradually depoliticizing the international mechanisms in the area of human rights.

The concept of human rights has always been dynamic, as has the entire discipline of international law. Human rights concepts and mechanisms have developed historically along with interventions by civil society and by states. The right to self-determination is one of the most eloquent examples. The development of international human rights mechanisms over the past five decades since the adoption of the Universal Declaration of Human Rights has been linked as much with the rise of pro-democracy and pro-human rights movements around the world as with the end of the Cold War and the growing interdependence of states, markets, and peoples.

I therefore discuss the development of United Nations human rights protection mechanisms from this broader angle and try to explain the "whys" and "why nots" accordingly. For the purposes of this discussion, I concentrate on the human rights mechanisms of the United Nations proper without including the mechanisms of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organisation (ILO).

I first discuss the treaty-based human rights mechanisms and their significance in the protection and promotion of human rights. I then refer to the extra-conventional system of protection of human rights. Third, I discuss the contribution of the World Conference on Human Rights in 1993 to the protection and promotion of human rights. Fourth, I discuss the United Nations human rights field presences and their contribution. Fifth, I examine recent efforts to mainstream human rights in the areas of peace and security, humani-

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tarian issues, and development. Finally, I outline some of the main challenges ahead in protecting and promoting human rights.

II. A Treaty-Based System of Protection and Promotion of Human Rights

After the adoption of the Universal Declaration of Human Rights (Universal Declaration), the United Nations faced the challenge of preparing binding international human rights instruments. One day before the adoption of the Universal Declaration on December 9, 1948, however, the General Assembly had already adopted the first United Nations human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide. Initially, the ascending Cold War ideological rift between civil and political rights on the one hand and economic, social, and cultural rights on the other was bridged by the inclusion of both families of rights in one unified document, the Universal Declaration. This was due in part to the overwhelming momentum after the tragedies of World War II and in part to the leadership of Eleanor Roosevelt and her peers. Yet, this rift reemerged during the subsequent two decades when it became obvious that the polarized world around the table was not ready to allow the same fusion when preparing binding legal instruments. Thus in 1966, the United Nations separately adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its (First) Optional Protocol. The year before, the United Nations had adopted the International Convention on the Elimination of All Forms of Racial Discrimination.

These three treaties corrected an omission of the earlier antigenocide convention by establishing the first three human rights monitoring mechanisms in the form of "treaty bodies," as this type of mechanism is now called. The first treaty bodies were later joined by three others under the following subsequent human rights treaties: the Convention on the Elimination of All

Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. The International Convention on the Suppression and Punishment of the Crime of Apartheid had also established a treaty body, the Group of Three on Apartheid, which stopped meeting after the change of regime in South Africa. The treaty bodies are composed of independent experts elected in their individual capacities, although proposed by governments. Their main mandate is to examine periodic reports of states parties to the treaties on the measures taken by those states to implement their treaty obligations. Moreover, the Human Rights Committee, which is the treaty body under the Covenant on Civil and Political Rights, the Committee on the Elimination of Racial Discrimination (CERD), and the Committee Against Torture (CAT) also examine individual complaints submitted, respectively, under the Optional Protocol to the Covenant, optional article 14 of the antiracism Convention, and article 22 of the antitorture Convention.

Under the above-mentioned treaties, the treaty bodies are expected to make "general comments" as well, a task that during the Cold War era precluded any formal value judgments or conclusions by the treaty bodies regarding the performance of specific governments after the examination of their reports. The general comments thus consisted of authoritative interpretations by the treaty bodies of the articles of the human rights treaties. This, however, changed in the early 1990s, and the treaty bodies, one after the other (the Committee on the Elimination of Discrimination Against Women (CEDAW) was the last), started adopting conclusions and recommendations after examining the specific country reports in addition to adopting interpretative statements to the articles of the conventions. This practice, along with the increasing acceptance of the role of Non-Governmental Organizations (NGOs) as information-providers to the treaty bodies, has resulted in an objective system of treaty monitoring. The system has been further strengthened by the adoption of some innovative working methods, including requests for extraordinary or supplementary reports from governments when necessary and especially including linking technical assistance to the areas of weakness

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identified in each country by the treaty bodies. The latter approach, initiated by the Committee on the Rights of the Child, is a fundamental step in the operationalization of human rights. Not only is the United Nations’s Programme of Technical Cooperation in the Field of Human Rights expected to respond to areas identified by the treaty bodies, but other parts of the United Nations also are gradually expected to do so.

III. Extra-Conventional System for the Protection of Human Rights

For two and a half decades, the Commission on Human Rights restrictively interpreted the original words in article 1 of the United Nations Charter that identify the promotion of human rights as one of the United Nations’s aims. The Commission definitely viewed "promotion" as softer than "protection," and, in a polarized ideological environment, the United Nations Commission on Human Rights had no power to establish any monitoring mechanisms protective of human rights.

The breakthrough came in the late 1960s when the situation in southern Africa allowed the Commission to create the Ad Hoc Working Group on Southern Africa, a group in charge of monitoring the situation in that part of the world. At the same time, the Commission was able to gather adequate political will to establish a procedure for considering, on a confidential basis, gross and systematic violations of human rights. The procedure, which became known as the "1503 procedure" from the number of the resolution of the Economic and Social Council which established it, received information about human rights violations from victims, NGOs, and others in specific countries. Since then, nongovernmental actors have received official standing at the Commission on Human Rights as recognized information-providers about human rights violations. Significantly for the United Nations, virtually during the same period in the late 1960s, the Economic and Social Council officially adopted a procedure for granting consultative status to NGOs that was valid in the whole economic and social area, not only in the area of human rights. This procedure, which has been significantly expanded since the global United Nations conferences of the 1990s, has allowed a significant input of civil society in the development of international human rights norms and

13. U.N. CHARTER art. I ("The Purposes of the United Nations are: ... 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all . . . ").


mechanisms and, consequently, the relative defusion of governmental politics in the United Nations human rights bodies. I also believe that the very recognition of such consultative status for NGOs was obviously a result of the rising strength and significance of the nongovernmental part of society and of powerful movements against colonialism and for democracy and human rights.

These first mechanisms of human rights monitoring and protection were soon followed by the Working Group on Chile in 1974, after the coup against President Salvador Alliente, and, in the late 1970s, by the Working Group on Enforced or Involuntary Disappearances. The 1980s and 1990s were characterized by the establishment of a series of protection mechanisms, both country-specific and thematic. Currently, there are seventeen thematic mandates (enforced or involuntary disappearances; arbitrary detention; summary or arbitrary executions; independence of judges and lawyers; torture and cruel, inhuman, or degrading treatment or punishment; internally displaced persons; religious intolerance; use of mercenaries as a means of impeding the right to self-determination; freedom of opinion and expression; racism, racial discrimination, and xenophobia; sale of children, child prostitution, and child pornography; violence against women; effects of toxic and dangerous products on the enjoyment of human rights; protection of children affected by armed conflict; impact of external debt on human rights; the right to education; and the right to development) and sixteen country-specific mandates (Israeli practices in the occupied territories, Afghanistan, Cuba, Equatorial Guinea, Iran, Iraq, Myanmar, Sudan, former Yugoslavia, Zaire, Rwanda, Burundi, Cambodia, Haiti, Somalia, and Nigeria). Additional country-specific or thematic mandates are occasionally given to the Secretary-General and to the High Commissioner for Human Rights.

The methods of work of the Commission's Special Rapporteurs/Representatives and Working Groups consist of collecting and analyzing information received by individuals, NGOs, church groups, opposition groups, and others; conducting country visits; sending urgent action appeals to governments on individual cases; and presenting annual public reports with specific conclusions and recommendations to the Commission on Human Rights as well as, in many cases, to the General Assembly. This methodology of the United Nations's extra-conventional human rights procedures allows for a considerable depolitization of human rights mechanisms. The development of specific technical and procedural tools places these procedures beyond the political whim of specific governments. Thus, it is not necessary for the Commission on Human Rights to adopt a specific resolution on a country for that


17. Id.
country to appear in the reports of the thematic mechanisms of the Commis-
sion on the basis of information received from NGOs and others.

IV. The Contribution of the World Conference on Human Rights

Following are the main points of consensus at the World Conference on
Human Rights in 1993 that have added significantly to the international
protection and promotion mechanisms of human rights:

1. Human rights are universal. Human rights are a legitimate concern
of the international community; all human rights – civil, cultural, economic,
political, social – must be respected; human rights are interrelated and interde-
pendent (forty-five years after the adoption of the Universal Declaration, the
world again came to view human rights holistically); all states, irrespective of
their regional, cultural, or political particularities, must respect internationally
recognized human rights; all states should ratify human rights treaties (the
Child Convention by 1995, the Women’s Convention by the year 2000).19

2. The right to development is part of fundamental human rights, and
the High Commissioner for Human Rights, established at the end of 1993 at
the behest of the World Conference, is to promote the right to development.20

3. Women’s rights are human rights and must be fully integrated in
human rights protection procedures. Violence against women, whether in the
public or private sphere, is a human rights issue, and states must eliminate
cultural or religious practices that violate the human rights of women.21

4. Human rights are linked with peace and, thus, must be integrated as
appropriate in United Nations peace-keeping operations.22

5. Development, democracy, and human rights are inextricably linked.23

6. Human rights institutions must be strengthened, and the United
Nations should provide comprehensive assistance in this respect. Human
rights education is crucial and the United Nations should proclaim a Decade
for Human Rights Education (the General Assembly did so in 1993).24

7. The General Assembly was called upon to consider the establish-
ment of a High Commissioner for Human Rights and did so in 1993, thus
adding to the system of protection and promotion of human rights.25

18. WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA DECLARATION AND PROGRAMME

19. Id. at 28-30, 35, 55.

20. Id. at 31-33, 49.

21. Id. at 33-34, 53-57.

22. Id. at 70.

23. Id. at 30-31.

24. Id. at 66-67.

25. Id. at 49.
8. The international community was called upon to expedite the establishment of an international criminal court. (The ICC mandate was adopted in June 1998.)

9. The United Nations should substantively increase its resources for human rights.

V. Human Rights Field Presence

The peace and human rights areas of United Nations organizations have had an uneasy relation over the years. Members of the Security Council generally have been hesitant to formally recognize any role for the Council to intervene and protect human rights. This, however, has not been absolute, and in the last few years the Council was able to recognize such a role, for example, in Iraq (regarding the Kurds in the north), El Salvador (establishment of ONUSAL, the United Nations mission in El Salvador, a human rights field presence), the former Yugoslavia, Rwanda, and Georgia.

This tension regarding human rights issues in the Security Council has been counterbalanced by other avenues for the United Nations to establish human rights field presences through the General Assembly in Haiti and Guatemala, through the Commission on Human Rights in Cambodia, former Yugoslavia, and the Democratic Republic of Congo, or through initiatives of the High Commissioner for Human Rights in agreement with the governments in, for example, Rwanda, Burundi, Malawi, and Colombia. Currently, apart from the human rights operations in Guatemala and Haiti, which do not fall under the aegis of the High Commissioner for Human Rights, there are twenty-two field presences of the High Commissioner in Rwanda, Burundi, former Yugoslavia, Abhazia, Georgia, Cambodia, Colombia, Gaza, Malawi, Mongolia, and the Democratic Republic of Congo. Additionally, there is a recent trend to attach human rights advisors or units to the Special Representatives of the Secretary-General in charge of political missions in affected areas or in peace-keeping operations.

Until now, the work of the peace and security mechanisms of the United Nations undoubtedly has not adequately included human rights elements. Funding has been a major challenge for the human rights field presences. With the exception of Cambodia, where the regular United Nations budget funds some ten posts, voluntary contributions fund the rest of the field operations. Consequently, they suffer from financial precariousness. Moreover, the United Nations has been unable to adequately protect the human rights of populations in extreme situations, although United Nations human rights presences sometimes have a dissuasive effect. The High Commissioner has

26. Id. at 16, 69.

27. Id. at 42, 46-47.
recently conducted an evaluation of human rights field presences in order to improve their approaches.

The United Nations increasingly has been combining both protection and promotion of human rights in almost all these human rights operations. The United Nations has become aware that human rights institution-building, human rights education and training, the creation of a civil society aware of human rights, assistance to local human rights NGOs, and the creation of human rights infrastructures must be addressed as early as possible.

VI. Mainstreaming of Human Rights

Gender and human rights are now the two cross-cutting themes in the four Executive Committees established by the Secretary-General. These four committees, the Executive Committee on Peace and Security (ECPS), the Executive Committee of the United Nations Development Group (EC-UNDG), the Executive Committee on Humanitarian Affairs (ECHA), and the Executive Committee on Economic and Social Affairs (ECESA), have been functioning since April 1997. The ECPS, the ECHA, and the EC-UNDG are the most challenging for human rights. The High Commissioner's position is that in the area of peace, human rights should be part of the thinking from the phase of prevention of crises to the phase of conceptualization of an operation, whether in fact a peace-keeping presence will be decided or not. Also, human rights should be an integral part of postconflict peace-building. Furthermore, the potential of women in peace-building initiatives should be fully explored.

Moreover, there now is a push to incorporate human rights advisors in the teams of Special Representatives of the Secretary-General, and this is happening increasingly. Human rights advisors could be covered by a budget provided by the Security Council in the same way that military advisors can be so funded. Another interesting issue in connection with the presence of human rights observers and advisors within peace-keeping or political missions is the line of reporting, for example, whether the human rights observers should report to the High Commissioner, the Special Representatives of the Secretary-General, or in some other way. This is not yet clarified in the system, but the desired solution would be for the human rights staff to report to the High Commissioner through the Special Representatives of the Secretary-General. This issue touches upon a core question: To what extent is the full integration of human rights in peace or political negotiations possible or even desirable? I would like to leave the question open for discussion. For now, I contend that there definitely is merit in the United Nations having

different angles. The human rights angle, with its inherent, although relative, independence, should continue to have an independent voice. Furthermore, I believe at the same time that this may be quite useful not only for the cause of human rights but for political reasons as well.

The human rights debate is of course entering the debates of the Security Council in several areas, one of which is the area of sanctions. Currently, discussions are taking place as to the limitation of sanctions so that they do not infringe upon fundamental nonderogable rights. Of course, the area of economic and social rights has been neglected over the decades, and the Vienna Declaration and Programme of Action clearly stated that more work needs to be done in this area. Protection mechanisms for economic and social rights are little developed; however, this is not to criticize the Committee on Economic and Social Rights which has been doing excellent work in the last few years. At its 1998 session, the Commission on Human Rights focused on the matter. It decided to establish a Special Rapporteur on the right to education as well as new mechanisms on the right to development, on extreme poverty, and on the impact of structural adjustment on human rights.

The right to development is a high priority of the High Commissioner, and recently the EC-UNDG decided to establish an Ad Hoc Group on the Right to Development mainly in order to incorporate this right in the United Nations Development Assistance Framework (UNDAF). Our hope is that the political debates over structural adjustment and social cost, which have blocked agreement at the Commission on Human Rights Working Group on this subject, will be, in a certain sense, mooted by the United Nations itself adopting a very practical approach to give meaning to the right to development in its operations. The United Nations Development Programme (UNDP) issued a very important policy paper at the beginning of 1998 on the integration of human rights in development. In the introduction, the paper states that one-third of the United Nations’s resources are devoted to governance programs. The United Nations Children’s Fund, UNICEF, on the other hand, already is a human rights operational agency, conceptually restructured around the Convention on the Rights of the Child.

29. See Vienna Declaration and Programme of Action, supra note 18.


32. Id.
Obviously, the promotion and protection efforts of the United Nations are intertwined. The High Commissioner has an important program of human rights advisory services and technical assistance in place, precisely for institution-building.\textsuperscript{33} The program of advisory services, although present on paper for decades, saw a true increase in quality and quantity since 1987 and has now become a major part of the activities of the Office of the High Commissioner for Human Rights (OHCHR).

\textit{VII. Some of the Main Challenges in the Promotion and Protection of Human Rights}

Below are six major challenges to the promotion and protection of human rights, some of which I have already mentioned above:

1. The core challenge of the implementation of international human rights norms;
2. The full integration of economic and social rights in the United Nations's human rights mechanisms and in all countries' approach to human rights;
3. The full integration of the human rights of women in the human rights mechanisms;
4. The integration of human rights in the peace and security areas of the United Nations, as well as regionally and nationally;
5. The extremely serious challenge of making private economic actors in our global economy accountable for the violation of human rights. It is hard, for example, to understand why it took human rights NGOs so long to realize the importance of the draft Multilateral Agreement on Investments (MAI) to the human rights of millions.
6. Finally, the civil society must continue to be mobilized.

\textit{VIII. Conclusion}

Human rights movements around the world have led to the development of international human rights mechanisms that now stand on their own, and this trend must continue throughout civil society. Without solid constituencies, even strong institutions fall into disarray and wither away. Human rights education, in the largest sense of the term, must systematically penetrate each society, whether at school, in the community, in professional settings, or otherwise. The creation of a human rights culture beyond divisive ideologies is the ultimate guarantor of human rights.

The European Human Rights Convention:
A New Court of Human Rights in Strasbourg
as of November 1, 1998

Andrew Drzemczewski*

I. Introduction

Protocol No. 11 to the European Convention on Human Rights (ECHR), ratified by all Council of Europe member states — in other words, ratified by all of the forty contracting states parties to the ECHR (Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia," Turkey, Ukraine and United Kingdom)—establishes a full-time, single court to replace the Convention’s prior monitoring machinery. It entered into force on November 1, 1998.¹

This text, opened for signature on May 11, 1994, is one of the concrete results of decisions taken by the Council of Europe’s Heads of State and Government at their first summit meeting in Vienna on October 8-9, 1993.

II. Main Aspects of the Reform

A. The prior part-time monitoring institutions, namely the European Commission of Human Rights and the European Court of Human Rights, ceased to exist. A new European Court of Human Rights, operating full-time, was set up in Strasbourg, France.

B. The system has been streamlined and, above all, all applicants now have direct access to the new court.

Any cases that are clearly unfounded will be sifted out of the system at an early stage by a unanimous decision of the court sitting as a three-judge

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¹. All of the 16 new member states from central and eastern Europe have now ratified the ECHR (including Protocol No. 11). The last one to do so, the Russian Federation, deposited instruments of ratification on May 5, 1998. See infra Appendix II (containing detailed list).
committee (the cases will therefore be declared inadmissible). In the large majority of cases, the court will sit as a seven-judge chamber. Only in exceptional cases will the court, sitting as a Grand Chamber of seventeen judges, decide on the most important issues. The President of the court and the presidents of chambers will always be able to sit in the Grand Chamber so as to ensure consistency and uniformity of the main caselaw. A judge elected in respect of the state party involved in a case will also sit in the Grand Chamber in order to ensure a proper understanding of the legal system under consideration.

C. All allegations of violations of individuals' rights will be referred to the court. The Committee of Ministers (the Council of Europe's executive organ) will no longer have jurisdiction to decide on the merits of these cases. It will, however, retain its important role of monitoring the enforcement of the court's judgments.

D. The right of individual application will be mandatory, and the court will have jurisdiction with respect to all inter-state cases.

III. Operation of the New Procedure as of November 1, 1998

As under the past system, individual applications and inter-state applications will exist side by side. As the secretariat of the Commission did in the past, the registry of the court will establish all necessary contacts with the applicants and, if necessary, request further information.

Then, a chamber of the court will register the application, and the application will be assigned to a judge-rapporteur. The judge-rapporteur may refer the application to a three-judge committee, which may include the judge-rapporteur. The committee may, by a unanimous decision, declare the application inadmissible; this decision will then be final.

When the judge-rapporteur considers that the application raises a question of principle and is not inadmissible or when the committee is not unanimous in rejecting the complaint, a chamber will examine the application. (This procedure matches the prior system that was in force before the Commission.)

A chamber, composed of seven judges, will decide on the merits of an application and, if necessary, its competence to adjudicate the case. The judge-rapporteur will prepare the casework and establish contact with the parties. The parties will then submit their observations in writing. A hearing may take place before the chamber. The chamber will also place itself at the parties' disposal with a view towards a friendly settlement. If no friendly settlement can be reached, the chamber will deliver its judgment.
The chamber may decide *proprio motu* to refer a case to the Grand Chamber when it intends not to follow the court's previous caselaw or when a question of principle is involved. This procedure may be adopted on the condition that none of the parties object to it.\(^2\)

Once the judgment has been delivered, the parties will have three months to request that the case be referred to the Grand Chamber. However, this procedure will be restricted to exceptional instances, that is, when a case raises a serious question concerning the interpretation or application of the Convention and its protocols or a matter of general interest. A panel of five judges of the Grand Chamber will determine whether the request for a rehearing is admissible.\(^3\)

The chamber's judgment will become final when there is no further possibility of a referral to the Grand Chamber. The Grand Chamber's judgment will be final and, as previously, binding in international law. As under the former system, the Committee of Ministers will supervise the execution of the court's judgment.

* * *

Although the new system is less complicated than the one it has replaced, one cannot honestly say that it is simple to understand by an "outsider."\(^4\) For a comparative schema of both control mechanisms, consult Appendix I.

### IV. Transitional Arrangements

The Protocol, in Articles 4 and 5, regulates the transition from the prior system to the new system. As Protocol No. 11 is an amending protocol, all parties to the Convention have had to express their consent for the text to become mandatory.

#### A. Article 4 of Protocol No. 11

Article 4 specifies that the Protocol enters into force on the first day of the month one year after the last state party to the Convention has ratified Protocol No. 11.\(^5\) In other words, it entered into force on November 1, 1998. Protocol No. 11 provides that prior to the date of entry into force, the "election of new judges may take place, and any further necessary steps may


\(^3\) *Id.* art. 43.

\(^4\) *See infra* Appendix I (providing comparative schema of both control mechanisms).

\(^5\) Protocol No. 11, *supra* note 2, art. 4.
be taken to establish the new Court."\(^6\) Here, top priority has been given to the election of judges (which took place in January and April of 1998), who have already had their first meeting between April 28 and May 2, 1998, and a second meeting on July 23-25, 1998. The competent bodies of the Council of Europe have also undertaken a number of other preparatory measures to which later reference will be made.\(^7\)

B. Article 5 of Protocol No. 11

Article 5 provides the necessary transitional provisions for applications that have been lodged in Strasbourg and that will need to be processed, both pending and subsequent to the Protocol’s entry into force. The provision was quite difficult to draft because no appropriate solution could initially be found that satisfied all parties in the negotiations; discussions on this subject were lengthy and continued well into 1994.

The terms of office of the members of the prior court and Commission, as well as the Registrar and the Deputy Registrar of the court, terminated with the entry into force of this Protocol on November 1, 1998. This prevented two courts from operating at the same time. However, the Commission will continue to exist for the additional period of one year so as to settle any pending applications.\(^8\)

Paragraphs 2 through 4 of Article 5 explain what will happen with applications pending before the Commission.\(^9\) If, at the time of the Protocol’s entry into force, the Commission had not declared them admissible, the new court will automatically deal with these applications.\(^10\) On the other hand, applications already declared admissible will be finalized by the Commission under the prior system.\(^11\) Because the drafters of the text considered it inappropriate for the Commission to continue its work many years after this Protocol’s entry into force, paragraph 3 of Article 5 provides for a time limit of one year within which the Commission will, hopefully, be able to complete work on most applications that it has declared admissible. Applications not finalized during this time limit (by November 1, 1999) will go before the new court for determination under the new system. Obviously, as the Commission will already have declared these applications admissible, no need will exist for a committee of the new court to examine them.

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6. Id.
8. Protocol No. 11, supra note 2, art. 5, para. 3.
9. Id. art. 5, paras. 2-4.
10. Id.
11. Id. art. 5, para. 3.
It should be noted that the first sentence of paragraph 3 stipulates that members of the Commission may continue their work for one year after the entry into force of this Protocol, even if their term in office expired before that date. This will allow them to complete work on cases declared admissible during that additional one year period. But, because the office of members of the Commission expired at the entry into force of the Protocol, those Commissioners elected as judges to the new court will be able to continue, at the same time, their Commission functions as provided in paragraph 3 of Article 5. (Any vacancy that may occur in the Commission during this additional one year period may be filled in accordance with the relevant provisions of the formerly applicable text of the Convention so that no contracting party need be without a Commissioner during the said period.) Here, it can be assumed that the workload of persons that may find themselves both on the new court and completing work as Commissioners will be substantial. The President of the new court probably will need to make special arrangements for them, so as to ensure an equitable distribution of work among the newly appointed judges.

Paragraph 4 of Article 5 relates to cases in which the Commission has adopted an Article 31 Report—a legal opinion as to whether the ECHR has been breached—within the period of twelve months following the entry into force of Protocol No. 11. In such instances, the procedure for bringing cases before the court in the former Article 48 of the Convention (and Protocol No. 9, where applicable) will apply. In other words, the Commission or a state party, as well as the applicant if Protocol No. 9 is applicable, will have the right to refer the case to the new court.

However, in order to avoid cases that have already been examined from being dealt with at three levels, the panel of five judges of the new court will be given the power to decide whether the Grand Chamber or a chamber should decide the case. Cases not referred to the new court under this Article will be decided by the Committee of Ministers in accordance with the present Article 32 of the Convention.

The prior court ceased to function on November 1, 1998, and all cases pending before it were transmitted to the Grand Chamber of the new court. Again, for the Grand Chamber not to be inundated with "less important" cases, the prior court had to resort to some fine-tuning in the months leading up to the Protocol’s entry into force. It is understood that, although this matter was on the prior court’s agenda, the Grand Chamber of the new court in effect has many more cases to deal with in this context than had originally been anticipated.

12. Id.
13. Id. art. 5, para. 4.
14. Id. art. 32.
Lastly, paragraph 6 of Article 5 specifies that the Committee of Ministers will be able to continue to deal with cases not transmitted to the court under the present Article 48 of the Convention, even after Protocol No. 11 entered into effect, until such time as these cases are completed. Although this will, in all probability, prolong consideration of cases before the Committee of Ministers for (potentially) several years after the Protocol's entry into force, the drafters considered it inappropriate, by means of such an instrument, to try to tie the hands of an organ whose existence predates the ECHR and, as the Council of Europe's executive, works independently of the Convention mechanism.

V. Election of Judges to the New Permanent Court

In a circular letter addressed to all Foreign Ministers of contracting states parties back in October 1997, the Secretary General of the Council of Europe reminded them all of the procedure agreed upon, indicating to them the importance of a list of candidates reaching him by mid-November 1997, at the very latest. Unfortunately, for a variety of reasons, the initially agreed upon timetable could not be maintained with respect to all states.

The Parliamentary Assembly's interviews with most candidates took place within a special subcommittee of the Assembly's Committee on Legal Affairs and Human Rights at the Council of Europe's offices in Paris during two periods from December 17-19, 1997 and from January 17-19, 1998. A second set of interviews, with respect to an additional eight states, took place on April 6, 1998.

The basic criteria laid down for the election procedure were as follows: States had to provide a list of three candidates accompanied by a detailed biographical note on each of them in English or French, structured in accordance with a model curriculum vitae established by the Parliamentary Assembly, as provided in Appendix IV.

Unfortunately, in a number of instances, this proposal was not always scrupulously followed.

15. See id. art. 5, para. 6 (stating that cases shall be completed by Committee of Ministers).
16. See infra Appendix III (providing indicative timetable concerning election procedure).

It is interesting to note, in this connection, the fact that certain states openly invited applications from candidates possessing the necessary qualifications and experience for this position. See Judge of the European Court of Human Rights, Strasbourg, TIMES (London), Sept. 16, 1997; Selection of Judges for the European Court of Human Rights in Strasbourg, RZECZPOSPOLITA (Warsaw), Oct. 6, 1997; Cour Européenne des Droits de l'Homme, MONITEUR
Of interest to note, in this connection, was the rather unusual decision taken by the Committee of Ministers on May 28, 1997 to establish an informal procedure for the examination of prospective candidacies for election as judges. In accordance with this decision, the Committee of Ministers' Deputies undertook an examination of such candidacies before formally submitting the list of candidates to the Parliamentary Assembly.

The main elements of the new election procedure may be summarized as follows: "The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party." The former requirement that no two judges may have the same nationality no longer applies under Protocol No. 11.

"The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence." They shall sit on the court in their individual capacity. During their term of office they shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office."

"The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years."

"The judges whose terms of office are to expire at the end of the initial period of three years [were] chosen by lot by the Secretary General of the Council of Europe immediately after their election" on April 29, 1998. Twenty of the judges were given a six year mandate, and nineteen were given a three year mandate; the fortieth judge, when elected, will automatically be put into the latter category. The terms of office of judges shall expire when they reach the age of seventy. Further details regarding the status and conditions of service of the judges have been enumerated in a resolution adopted by the Committee of Ministers on September 10, 1997.

BELGE (Brussels), Oct. 10, 1997; see also Human Rights Bill No. 38, House of Lords, Oct. 1997, cl. 18 (stipulating that holder of judicial office to which clause applies may become judge of European Court of Human Rights without being required to relinquish his office and that he is not required to perform duties of his judicial office while he is judge of Strasbourg Court). The purpose of this Bill is to incorporate the ECHR into U.K. law.

18. See infra Appendix V (providing copy of text adopted).
19. Protocol No. 11, supra note 2, art. 22, para. 1.
20. Id. art. 21, para. 2.
21. Id. art. 21, para. 3.
22. Id. art. 23, para. 1.
23. Id. art. 23, para. 2.
24. See infra Appendix VI (showing copy of resolution).
Finally, mention should also be made of the fact that in his letter in October 1997, the Secretary General made specific reference to the Ministers' Deputies invitation for states to try to achieve a more balanced representation of men and women on the new court.25

**VI. Work Carried Out by an Informal Working Party Between February 1995 and May 1997**

At the Vienna Summit of October 1993, the Heads of State and Government of the Council of Europe made the solemn commitment that they "will ensure that this Protocol is submitted for ratification at the earliest possible date." With this in mind, and in particular the obvious need to facilitate the entry into force of Protocol No.11, Mr. Peter Leuprecht, the then Deputy Secretary General of the Organization, had a discussion on this subject with the court's President, the late Mr. R. Ryssdal, in the autumn of 1994. During this discussion they agreed that it would be useful to set up an informal working party to discuss preparatory measures that will need to be taken prior to and upon the (possible rapid) entry into force of Protocol No.11.

The informal working party came into being in February 1995. In addition to its Chairman, Mr. Peter Leuprecht, Mr. R. Ryssdal, President of the court, and Mr. Carl Aage Nørgaard, former President of the Commission (with the agreement of Mr. S. Trechsel, the present President of the Commission), members of the informal working party included Mr. Pierre-Henri Imbert, Director of Human Rights, Mr. Hans Christian Krüger, Secretary to the Commission (who has recently been elected as Deputy Secretary General), and Mr. H. Petzold, Registrar of the court. I provided secretariat backup to the working party.

This informal working party had a total of ten meetings. During these meetings it discussed a variety of issues such as the provision of adequate working conditions for judges when the new court is established, the "merger" of the Commission's and the court's secretariats, and the need to refurbish the Commission's "hearing room," which at present only has facilities for in

25. See *infra* Appendix VII (providing copy of text adopted in May 1997). The origins of this proposal can probably be traced to an initiative taken by Ms. Err. See *EUR. PARL. ASS.*, Order No. 519 (1996) <http://stars.coe.fr/ta/ta96/edir519.htm> (providing procedure for examining candidacies for election of judges to European Court of Human Rights); *see also* Eur. Parl. Ass., Doc. No. 7530 (motioning for order by Ms. Err). Here again, it would appear that "the result product" is less than satisfactory; 8 out of the 39 new judges are women.

camera meetings. From among the numerous matters discussed, often of a technical, administrative, and managerial nature, the following seven subjects can be mentioned.

A. Privileges and Immunities of Judges

The privileges and immunities of judges was a matter to which members of the working party attached considerable importance, stressing the urgency of drafting a new text on this subject. Now that Protocol No. 6 to the General Agreement on Privileges and Immunities, as well as the European Agreement on persons participating before the new court, has been opened for signature and ratification, the onus is firmly on member states of the Council of Europe to ensure that this instrument is ratified by all contracting states parties as soon as possible.\(^{27}\) Here, it should be appreciated that although this Protocol on Privileges and Immunities entered into force at the same time as Protocol No. 11 to the ECHR, that is, November 1, 1998, it is important for it to be ratified in particular by France, the Organization's host state. Were this not to occur, a number of ad hoc arrangements may even at this late stage need to be made to ensure that matters dealt with therein are appropriately handled in the meantime.\(^{28}\)

Entry into force of the 6th Protocol was contingent on (i) ratification by three parties to the General Agreement on Privileges and Immunities of the Council of Europe (General Agreement) that have expressed their consent to be bound by the Protocol, and (ii) entry into force of Protocol No. 11, ECHR. Presently, only ten parties (Albania, Austria, Croatia, the Czech Republic, Finland, Hungary, Italy, Latvia, the Netherlands, and Sweden) to the General Agreement have ratified the 6th Protocol; it has been signed by thirteen other states (including France), all of which are parties to the General Agreement.

This matter is more important than initially meets the eye, as nonratification by France, among others, might cause a number of practical difficulties. Although the Statute of the Council of Europe and the General Agreement remain possible legal bases to ensure appropriate privileges and immunities for the new judges, legal problems could exist. Here, reference can be made to Article 18 of the General Agreement, which grants certain privileges and immunities to "[o]fficials of the Council of Europe." However, when the 6th

\(^{27}\) European Agreement relating to persons participating in proceedings of the European Court of Human Rights and the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, 17 HUM. RTS. L.J. 472, 472 n.* (1996) [hereinafter European Agreement].

\(^{28}\) See Andrew Drzemczewski, Protocole n° 11 à la CEDH: préparation à l'entrée en vigueur, 8 EUR. J. Int'l L. 59, 68-72 (1997). See generally European Agreement, supra note 27, at 472-76 (publishing texts of these legal instruments including their explanatory reports). It is understood that France intends to ratify the 6th Protocol.
Protocol to the General Agreement was being drafted, it was considered inappropriate to qualify judges as "officials" of the Council of Europe. Article 51 of the ECHR, as amended by Protocol No. 11 (Article 59 of the Convention currently in force) refers to "privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder." However, as concerns Article 40 of the Statute, this provision cannot apply directly to judges because it refers to "representatives of members" and to the "Secretariat." Also, not all states parties to the ECHR are parties to either or both the 4th and the 5th Protocols to the General Agreement.

Consequently, one may have to anticipate a situation in which the 6th Protocol to the General Agreement may not be considered as applicable to all states parties to the ECHR despite its simultaneous entry into force with Protocol No. 11. In this circumstance, the Committee of Ministers may well need to consider or anticipate the adoption of a specific resolution on this subject. Such a resolution could solemnly confirm that the new judges enjoy all the privileges and immunities necessary for the fulfilment of their functions and specify what this actually means.

Additionally, the position of France as the host country of the new court may need clarification, especially with regard to the new judges' fiscal situation. It should be recalled, in this connection, that in so far as the prior members of the court and Commission elected in respect of France are concerned, France has not signed or ratified the 5th Protocol to the General Agreement. Here, it is difficult to know to what extent, if at all, the French delegation's statement attached to Appendix I of Resolution (97)9 clarifies matters in this respect. The French signature of Protocol No. 6 to the General Agreement on March 31, 1998 is certainly helpful in this respect, bearing in mind the significance of Article 18 of the Vienna Convention on the Law of Treaties, which stipulates that a state that has signed a treaty should refrain from acting in a way that would be contrary to its "object and purpose."

B. Library and Research Facilities

The Council of Europe's Human Rights Library, which is part of the Directorate of Human Rights Information Centre, is at present a public reference library that also services the human rights sector of the Organization, including the control organs and staff of the European Social Charter and the European Committee for the Prevention of Torture. This library is in need of expansion or restructuring, or both, bearing in mind its size and limited

29. Protocol No. 11, supra note 2, art. 51.
30. See infra Appendix VI (providing copy of statement).
32. Id. art. 18.
facilities available for readers. Currently, this library, situated in the new Palais des Droits de l'Homme, is not in a position to provide the various human rights bodies or their staff with modern efficient services. Hence, appropriate facilities to users, for example, extended operating hours, provisions of legal search and photocopying services, and separate research facilities for judges of the new court, must be envisaged.

A decision will also need to be made on an important matter: the extent to which, if at all, the Human Rights Library should be maintained as a public reference library. The way in which the libraries of the European Court of Justice in Luxembourg, the International Court of Justice in the Hague, and those of the highest judicial organs in member states are run are presently being considered on the hypothesis that the library should, if at all possible, continue to be accessible to bona fide postgraduate students, academics, and researchers rather than being limited for internal Council of Europe use only.

C. Legal Secretaries

The desirability of providing the new court with a number of highly qualified legal secretaries had been discussed. The informal working party was of the view that legal secretaries should be chosen from a pool of lawyers from within the new registry of the court. In other words, they should be chosen principally from the Council of Europe staff members already working in the Commission’s secretariat and in the court’s registry. This view was based not only on financial considerations (important though they be), but rather for more self-evident reasons: Present staff members of the two supervisory organs possess the required legal and linguistic qualifications as well as the "institutional memory" and practical experience in the processing of cases. They would be immediately operational and would be able to carry out duties assigned to them by judges. (It should not be forgotten, in this connection, that not all the judges on the new court will have had prior experience with the Strasbourg system and the multifaceted nature of the work that this entails.) This being said, it is not at all certain as to how this matter will be dealt with by the new court.

D. Composition of Chambers

The composition of chambers was discussed in considerable detail by the informal working party. A proposal, put forward by Carl Aage Nørgaard, was

noted with interest. The accepted hypothesis was that chambers should be composed in such a way as to ensure that different legal families are represented in each chamber and are regionally balanced, that the workload of each chamber should (to the extent possible) be equal, and that the presence of the "national judge" be possible when "his or her state" is being considered without too many practical difficulties. Similarly, note was taken of Rule 21 of the court's rules, as adopted on April 27, 1995.34 Bearing the above considerations in mind, Nørgaard proposed that chambers could be composed in such a way as to reflect, respectively, the actual number of cases registered against different states at a given time together with an equitable rearrangement of the subdivision adopted by the prior court in its Rule 21. (In situations in which no cases have been registered, for example, with respect to some new contracting states parties, these states would be placed according to the size of their population.) After having established the above order, the judge from the state with the highest number of registered cases could be placed in the first chamber, the judge with the second highest number of registered cases in the second chamber, and so forth. At the same time, cross reference would need to be made to the subdivision of states effectuated in Rule 21 to ensure that an appropriate "mix" is effectuated. With a few adjustments (as explained by Nørgaard) the resultant product would be an equal distribution of work among chambers, with due regard taken to "regional balance." This proposal, although slightly complicated, appeared to be a well-balanced, equitable, and practical solution worthy to be reflected upon by the new court.

34. Rule 21 states:

Composition of the Court when constituted in a Chamber
1. When a case is brought before the Court . . .
2. For the purposes of the drawing of lots provided for in Article 43 of the Convention and Rule 51 of these Rules, the members of the Court shall be divided into three groups.
   (a) The first group shall contain the judges elected in respect of Belgium, Denmark, Estonia, Finland, Iceland, Ireland, Latvia, Luxembourg, the Netherlands, Norway, Russia, Sweden and the United Kingdom.
   (b) The second group shall contain the judges elected in respect of Austria, the Czech Republic, France, Germany, Hungary, Liechtenstein, Lithuania, Moldova, Poland, Slovakia, Slovenia, Switzerland and Ukraine.
   (c) The third group shall contain the judges elected in respect of Albania, Andorra, Bulgaria, Cyprus, Greece, Italy, Malta, Portugal, Romania, San Marino, Spain, The Former Yugoslav Republic of Macedonia and Turkey . . .
4. There shall sit as ex officio members of the Chamber:
   (a) in accordance with Article 43 of the Convention, every judge who has the nationality of a Party;
   (b) on an alternate basis, the President or the Vice-President of the Court, provided that they do not sit by virtue of the preceding sub-paragraph.

European Court of Human Rights (Rules of Court A) (as amended April 27, 1995).
In a "model" set of rules of procedure of the new court (prepared by the working party and discussed under subsection E), the working party was unable to find an appropriate solution with respect to the way in which chambers of the court were to be composed. It considered that this matter needs further study in the light of the above proposal put forward by Nørgaard, with the President of the new court probably needing to decide in each case which seven judges are to constitute a chamber and which judge (or judges) is (are) to sit as (a) substitute judge(s) so as to ensure an appropriate "rotation" of judges in each chamber.

Finally, all members of the informal working party were also of the view that chambers should be constituted for three year periods and should always be composed of at least eight judges. Jochen A. Frowein's idea of creating "specialist chambers" was considered inappropriate by the working party.

E. Draft Rules of Court

The informal working party carefully looked into drafting new rules and has prepared a draft set of "model" rules for the new court. Although it will obviously be for the new court to adopt its own rules, it is probably desirable to ensure that it is able, to the extent it so desires, to take into account the experience of both the prior court and Commission, as well as the views of those familiar with the work of the Strasbourg organs, in particular government agents and practicing lawyers. What is important in this respect, in my view, is to tap the combined experience of Messrs. Nørgaard, the late Ryssdal, and Trechsel, coupled with that of Messrs. Krüger and Petzold (who have many years of precious in-house experience within the Convention control bodies' secretariats), as well as others whose practical experience in the operation of the prior control mechanism could be put into good use by the new court. This type of preparatory work (including the "brainstorming" organized on this subject by the DH-PR in September 1997 with lawyers who have had practical experience of pleading cases in Strasbourg, as well as certain or outside academic and research institutions, as was the case in Potsdam on September 19-20, 1997) will almost certainly be of the utmost utility if one takes into account that members of the new court had less than seven months to draft the new rules of court and to take all other necessary steps as required under new Article 26 of the Convention prior to the entry into force of Protocol No. 11 on November 1, 1998.

36. The text of these "model" rules, issued in May 1997, will soon be published in the Human Rights Law Journal.
37. See Protocol No. 11, supra note 2, art. 4. As can be seen from the timetable in
The drafting of the new rules of court has undoubtedly been one of the priority tasks of the judges elect. Two working parties were created in May 1998, one to prepare the rules of court and the other to deal with administrative questions. In this connection, I should perhaps add that in so far as intergovernmental "work" on this subject is concerned, the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights, known as the DH-PR Committee (a subordinate committee of the Steering Committee for Human Rights, CDDH), made a number of useful comments pertaining to the informal working party's "model" rules during its meetings in 1997 and early 1998. Subsequently, the CDDH, at its meetings in October 1997 and June 1998, requested the Secretary General of the Organization to have these comments transmitted to the judges of the new court (as well as, for information, to the Committee of Ministers and the Parliamentary Assembly).

In addition to the need of establishing a viable internal working mechanism (which will, presumably, initially at least, be an amalgam of the practice of the Commission and the prior court so as to integrate such concepts as "judge rapporteur" and "friendly settlement proceedings"), issues of fundamental importance will need to be confronted. The way in which chambers are to be constituted is one such subject; the use of languages is another. As concerns the latter, financial considerations will need to be borne in mind: Whereas the prior court worked on the premise that all documents submitted for its consideration must be provided in both Council of Europe official languages, in the Commission such a procedure would be impracticable. Members of the Commission receive documents either in English or in French; a passive knowledge of the second official language is required. Indeed, in this connection, the working party has probably rightly underlined the need for the Council of Europe to provide new judges with language training (and, if need be, training in the use of electronic office equipment).

F. Staffing Issues

Much progress was made on staffing issues within the informal working party. This was due principally to the close co-operation (at that time) of the heads of the two secretariats of the Convention control organs, supplemented by a handful of their respective staff members possessing an acquired management experience.

Appendix III, the choice of candidates by contracting states parties, the subsequent transmission of a list to the Parliamentary Assembly, hearings organized by the Assembly, formal voting by the Assembly, and convocation to a first meeting in Strasbourg of the newly elected judges all together took about seven months. The first meeting of the new court took place from April 28 to May 2, 1998.
The structure to be proposed must involve a viable registry capable of serving the new court properly as from the first day of its existence and must, at the same time, be sufficiently flexible to enable smooth changes that will subsequently follow from decisions taken by the court itself once it has become operational. Although it is impossible to foresee how the new court will ultimately choose to organize its activities, certain hypotheses can reasonably be made in light of the text of Protocol No. 11 and of the experience of the Convention organs.

It is therefore obvious that a "merger" of the secretariat of the Commission and the registry of the court needed to be well-prepared ahead of time. Appendix VIII reproduces the "organizational chart" of the new court's registry as was suggested by the informal working party. The working party's basic premise (an idea that was, in effect, subsequently accepted by the Committee of Ministers) was that all the staff members of the prior court's registry and Commission's secretariat should be "transferred" into the new court's registry from the very first day of the entry into force of Protocol No. 11; staff working for the "old" Commission for up to one year after Protocol No. 11's entry into force would be "lent" from the new court's registry. This transfer of posts necessitated a formal decision by the Committee of Ministers, which took place on February 18, 1998.38 Also, and this was stressed by the informal working party, it was essential that staff posts (probably in the region of at least twenty in the first year) be created for the new court and that such appointments be made ahead of time so that the new court (including, for example, judges' secretaries and the chambers' structure) could function as of the very first day of Protocol No. 11's entry into force, namely November 1, 1998.

G. Transitional Provisions

There are many complex issues that were in need of substantial advance planning in order to ensure, to the extent possible, that the permutation, in organizational terms, from a well-established and efficiently functioning system into a completely new regime occurred as smoothly as possible.39 As of April 1998, a number of matters were under active consideration. In addition to structural changes within the Convention control mechanisms as provided in Articles 4 and 5 of Protocol No. 11, practical, down-to-earth matters such as appropriate provisions for working facilities, office space within the new Palais des Droits de l'Homme, and the installation of modern computer workstations for judges were being actively studied. Some of the

38. See infra Appendix IX.
39. Other related matters, such as staffing issues, budgetary appropriations, and the need for specialized translators and interpreters, need to be considered carefully.
above-mentioned required forward planning; indeed, adequate budgetary appropriations needed to be set aside in anticipation of these changes.

Following is, for illustrative purposes, a nonexhaustive list of matters that need to be settled at the very outset by the newly elected court:

1. drafting and adoption of the new court's rules,
2. election of President and Vice-President(s) of the court,
3. election of Registrar and Deputy Registrar(s),
4. election of Presidents, and setting up, of chambers (and committees thereunder),
5. putting into place a new administrative/secretariat structure (new Article 25),
6. setting up of the Grand Chamber and its panel of five judges, and
7. allocation, to the extent possible, of tasks with other sectors of the Organization (for example, privileges and immunities of other staff of the registry, relations with the media, publication of documents, library and computer facilities, and personnel and budgetary matters).

The preparation and putting into effect of Protocol No. 11's Article 5 "transitional arrangements" within the new court's registry structure also needs to be ensured, especially as concerns procedures under paragraphs 3 and 4.

Also, every effort had been made by the "outgoing" court to ensure, to the extent possible, that recourse not be made to the procedure envisaged in paragraph 5 of Protocol No. 11, namely the transmission of cases pending before the prior court at the date of entry into force of this Protocol to the new court's Grand Chamber.

Obviously, appropriate arrangements also had to be made (budgetary and logistic) for the Commission members who continue work for up to one extra year after the entry into force of Protocol No. 11.41

VII. We Are Going into Uncharted Waters . . .

The implementation of the machinery laid out in Protocol No. 11 inevitably involves some uncertainties, and a difficult period can be envisaged in the

40. Who should chair meetings prior to the election of the new court's President? Probably the "doyen" of the new court, that is, the oldest, in age, of the newly elected judges. The court might, as an alternative, envisage the election of an Acting President, and Acting Registrar, for the "transitional" period or until the formal adoption of the new court's Rules of Procedure. The judges-elect agreed that Benedetto Conforti, age 68, the "doyen" of the new court, should be the Acting President of the new court, pending the election of the court's President.

41. See Protocol No. 11, supra note 2, art. 5, para. 3; Explanatory report to Protocol No. 11 to the European Convention on Human Rights, 15 HUM. RTS. L.J. 91, 100 para. 119 (1994).
run up, and in particular, in the transitional period leading to the entry into force of Protocol No. 11 and for a few years thereafter. States have to face additional costs during the transitional period; the setting-up of the new system also calls for supplementary budgetary resources.

Also, tied to implementing the new system is the need to readjust and "accommodate" the prior substantial caseload. As of November 1, 1998, the new court was faced with the following caseload: some 35,000 provisional files from the Commission and about 6800 registered applications. There were about 400 admissible cases pending before the Commission as of November 1, 1998, with some 1300 cases pending before the Committee of Ministers for just satisfaction issues. By the end of April 1998, there were 102 cases pending before the court, and it had been estimated that some 50 to 60 of these cases would not have been dealt with by the prior court by October 31, 1998. In addition, it had been calculated that as of November 1, 1998, the remaining Commission members would have some 450 admissible cases to deal with, with some 1300 cases pending before the Committee of Ministers.

Be that as it may, a more fundamental issue will need to be broached so as to ensure the success of the new system. As the late Marc-André Eissen, former Registrar of the European Court of Human Rights, had rightly pointed out, the real problem for the credibility of the reformed system is likely to reside in identifying the best ways to deal with the six to eight percent of complaints declared admissible. With this in mind, three interrelated factors can be emphasized when speculating as to how the new system will work in the future.

The first, decisive factor, is the political context. As P. Van Dijk and G.J.H. Van Hoof have rightly observed in their book *Theory and Practice of the European Convention on Human Rights*:

The success or failure of international instruments, including those like the European Convention, in the end depends on the political will of the States involved. Legal arguments, however cogent they may be, in the final analysis seldom override political considerations when States feel that their vital interests are at stake.

The second element is, of course, the difficult issue of the so-called "political compromise" that must somehow be made to work appropriately, not to mention other important changes made to the prior control mechanism.

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Here again, it is perhaps worth citing yet another passage, this time from a remarkable, though highly critical, analysis of Protocol No. 11 by Frédéric Sudre. His conclusion is rather surprising. Sudre writes:

49. - Le Protocole 11, malgré les réserves que le caractère biscomum de certaines de ces dispositions appelle, nous semble - pour paradoxal que cela soit - atteindre un résultat positif. Le protocole contient indiscutablement de bonnes choses - compétence obligatoire de la cour, droit de saisine individuelle, suppression du Comité des ministres comme organe de décision -, bien que celles-ci ne soient pas vraiment nouvelles, puisque déjà réalisées en pratique ou en droit (le Protocole 9), ou ne font qu’achever un processus largement engagé. Il n’en reste pas moins que le Protocole 11, en «constitutionnalising» les progrès antérieurs, fait accomplir au mécanisme européen de garantie des droits de l’homme un saut qualitatif, qu’il faut saluer : la protection des droits de l’homme en Europe s’inscrit désormais dans une procédure judiciaire, publique et contradictoire, sous l’autorité d’un organe indépendant et impartial. Comme l’a relevé très justement le Doyen Cohen-Jonathan, le Protocole 11 lie l’ordre public européen des droits de l’homme à un juge européen ayant une compétence obligatoire. Ce faisant, la Convention européenne des droits de l’homme offre le modèle de protection des droits individuels le plus perfectionné dans l’ordre international. Il faut néanmoins souhaiter que la nouvelle cour sache préserver le remarquable acquis jurisprudentiel de l’actuelle cour et de la Commission européenne des droits de l’homme, qui, par une interprétation évolutive et dynamique du texte conventionnel, ont largement contribué non seulement à la sauvegarde des droits de l’homme mais aussi à leur développement.

50. - Plus discutables sont les innovations - la Grande chambre et ses compétences -, qui viennent altérer la juridiction unique, générant des distorsions procédurales et une incohérence globale (mais il est vrai que le système actuel ne brille pas non plus par son homogénéité et peut également être qualifié d’hybride).

Ce n’est pas dire, pour autant, que le compromis qui fonde le Protocole 11 (en bref, le réexamen par la Grande chambre) est mauvais: il a l’immense mérite non seulement, en existant, de permettre la réforme, mais aussi de ne pas figer le système. Les États ont voulu un mécanisme de contrôle bâtarde, à la fois juridiction unique et double degré de juridiction, mais cela pourrait bien être un marché de dupes. En effet, la nouvelle architecture repose entièrement sur le collège de cinq juges, qui, <<tenant>> la procédure de réexamen, donnera vie à la Grande chambre ou la maintiendra (ce que l’on espère) en état de léthargie. C’est donc l’institution judiciaire elle-même, et non les États, qui maîtrisera l’évolution du nouveau mécanisme de garantie.44

44. Frédéric Sudre, La réforme du mécanisme de contrôle de la Convention européenne des droits de l’homme : le Protocole 11 additionnel à la convention, 69 LA SEMAINE JURIDIQUE 231, 240 (1995). He then concludes:
Is Sudre not right? Is it not, in the final analysis, better to leave the system’s potential evolution in the hands of judges rather than in those of the states themselves?

Directly linked, at least in part, with the above observations of Sudre (as well as those of Gérard Cohen-Jonathan cited therein) is another matter worth stressing, namely the fact that the Convention has become a constitutional instrument of European public order (“instrument constitutionnel de l’ordre public européen”). This has recently been reiterated in no uncertain terms by both the Commission and the court. 45 This statement, important as it certainly is, needs to be kept in perspective. The prior role of the Strasbourg control organs was, and that of the new single court will continue to be, subsidiary; it is principally for the domestic courts and internal state organs to adequately protect human rights at the national level. This point must always continue to be emphasized. 46

La pratique prétoorienne antérieure a montré combien la cour (mais aussi la commission) savait exploiter toutes les ressources que lui offrait la procédure européenne pour mieux garantir les droits individuels (ont songe, particulièrement, à la place fait à l’individu dans la procédure) et assoir son autorité. Il nous semble que l’on peut alors être confiant : les vices du Protocole 11 sont tels qu’ils devraient avoir une fonction dissuasive. L’intérêt même de la nouvelle cour, afin de préserver la crédibilité de sa jurisprudence, d’assurer l’efficacité de son contrôle (rapidité de la procédure) et de rendre <ilisible> la procédure européenne, est de ne faire intervenir la Grande chambre qu’à titre tout à fait exceptionnel pour des affaires hors du commun, qui revêtiront un aspect exemplaire. Gageons alors que la procédure de droit commun sera simple et efficace : l’individu saisit la cour qui, en chambre, rend une décision définitive par laquelle elle statue sur la violation ou la non-violation de la convention. La pratique dévoilerait alors le vrai visage du Protocole 11, la juridiction unique pure et simple.

En bref, la réforme réalisée par le Protocole 11 sera d’autant mieux appliquée qu’elle sera appliquée... à demi.

Id.


46. See Articles 13, 26, and 60 of the present text of the Convention, which will resurface as Articles 13, 35, and 53 in the revised text of the ECHR when Protocol No. 11 comes into force. See Emmanuel Decaux, Article 60, in LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME 897 (Emmanuel Decaux & Pierre-Henry Imbert eds., 1995) (analyzing Article 60); Andrew Drzemczewski & Christos Giakoumopoulos, Article 13, in LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME supra, at 455 (analyzing Article 13); Etienne Picard,
In short, the revision of the Convention was necessitated by the increase in the number of applications, their growing complexity, and the widening of the Council of Europe’s membership. The Convention was designed for ten or twelve member states, and it is quite simply impossible for the prior monitoring arrangements to work effectively with the expected forty or more states parties. Revision of the Convention control mechanism was therefore essential to strengthen its efficiency. The new system should, in particular, make the machinery more accessible to individuals, speed up the procedure, and make for greater efficiency. The credibility of the ECHR is at stake here.

Article 26, in LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME, supra, at 591 (analyzing Article 26).
Appendix I

European Convention on Human Rights (ECHR)

Detailed overview

New control mechanism

Full-time Court

Inter-state applications: Article 33

Individual applications: Article 34

Court: committee of 3 judges

Inadmissible: unanimous decision: end of case

Examined: examination of admissibility: Articles 29 and 35

Admissible:

Establishment of facts and friendly settlement proceedings

No friendly settlement

Court judgment: Articles 38 and 41 (and just satisfaction: if necessary: Article 41)

Request accepted in exceptional cases by panel of 5 judges: Article 43

Rejection: Court judgment stands

Committee of Ministers supervises execution of judgment: Article 49 (2)

Commission: committee of 3 members

Former control mechanism

Two distinct procedural stages before part-time Commission

and then before part-time Court or Committee of Ministers

Inter-state applications: Article 24

Individual applications: Article 25

Commission: committee of 3 members

Commission: examination of admissibility: Articles 26 and 27

Inter-state applications:

Article 34

Individual applications:

Article 25

Court:

committee of 3 judges

Commission:

chamber or plenary

Establishment of facts and friendly settlement negotiations

No friendly settlement

Commission report:

Article 41

Court: seizure of Court by Commission or State concerned within 3 months: Articles 46 and 49

Commission of Ministers: Article 32 (1)

Committee of Ministers supervises execution of its decision: Article 54

Committee of Ministers supervises execution of judgment: Article 49 (2)

Concept and design: P. Stronsawski

Graphic: Publications unit, Directorate of Human Rights
European Convention on Human Rights (ECHR) Summary overview

New control mechanism
- Reports from the Contracting Parties: Article 62
- Secretary General of the Council of Europe
- Parliamentary Assembly of the Council of Europe
- ECHR Strasbourg 1994
  - State v. State: Article 33 (compulsory jurisdiction)
  - Individual v. State: Article 34 (compulsory jurisdiction)
- European Court of Human Rights
  - Admissibility: Articles 29 and 35
- Establishment of facts, attempt to reach friendly settlement on the basis of respect for human rights: Articles 36 and 39
- Judgment of the European Court of Human Rights
  - Committee of Ministers supervises the execution of the Court's judgment: Article 46 (2)
- Secretary General of the Council of Europe
- Consultative Assembly of the Council of Europe

Former control mechanism
- Reports from the Contracting Parties: Article 57
- Individual v. State: Article 57 (optional jurisdiction)
- ECHR Rome 1950
  - State v. State: Article 24 (compulsory jurisdiction)
  - Individual v. State: Article 25 (optional jurisdiction)
- European Commission of Human Rights
  - Admissibility: Articles 26 and 27
  - Establishment of facts, attempt to reach friendly settlement on the basis of respect for human rights: Article 28
- Optional jurisdiction: Article 46: State concerned or Commission
- Commission report: legal opinion as to breach
- European Court of Human Rights: Judgment
  - Committee of Ministers supervises the execution of the Court's judgment: Article 54
- Committee of Ministers of the Council of Europe
  - If necessary, the Committee of Ministers supervises the execution of its own decision: Article 32 (3)

Concept and design: P. Durczynowski
Graphic: Publications unit, Directorate of Human Rights
Appendix II

The Council of Europe and Central and Eastern Europe
(as of May 6, 1998)

I. Membership of Organization: 40 countries (all of which have ratified the ECHR)

16 new member States from Central and Eastern Europe: \(^{47}\)

- Hungary (Nov. 6, 1990)
- Poland (Nov. 26, 1991)
- Bulgaria (May 7, 1992)
- Estonia (May 14, 1993)
- Lithuania (May 14, 1993)
- Slovenia (May 14, 1993)
- Slovak Rep. (June 30, 1993)
- Slovenia (June 30, 1993)
- Romania (Oct. 7, 1993)

6 applications for membership:

- Armenia (Mar. 7, 1996)
- Azerbaijan (July 13, 1996)
- Belarus (Mar. 12, 1996; but see III below)
- Albania (July 13, 1995)
- Moldova (July 13, 1995)
- Ukraine (Nov. 9, 1995)
- Latvia (Feb. 10, 1995)
- "the former Yugoslav Republic of Macedonia" (Nov. 9, 1995)
- Russian Federation (Feb. 28, 1996)
- Croatia (Nov. 6, 1996)

II. European Convention on Human Rights (ECHR)

16 ratifications:

- Bulgaria (Sept. 7, 1992)
- Hungary (Nov. 5, 1992)
- Czech Rep. (Jan. 1, 1993) \(^{48}\)
- Slovakia (Jan. 1, 1993) \(^{48}\)
- Poland (Jan. 19, 1993)
- Romania (June 20, 1994)
- Slovenia (June 28, 1994)
- Lithuania (June 20, 1995)
- Estonia (Apr. 16, 1996)
- Albania (Oct. 2, 1996)
- "the former Yugoslav Republic of Macedonia" (Apr. 10, 1997)
- Latvia (June 27, 1997)
- Ukraine (Sept. 11, 1997)
- Moldova (Sept. 12, 1997)
- Croatia (Nov. 5, 1997)
- Russian Federation (May 5, 1998)

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47. The Czech and Slovak Federal Republic was a member from February 21, 1991 to December 31, 1992.

48. The Czech and Slovak Federal Republic was a Contracting Party from March 18, 1992 to December 31, 1992. Following declarations made by the Czech Republic and by Slovakia of their intention to succeed the Czech and Slovak Federal Republic and to consider themselves bound by the ECHR as of January 1, 1993, the Committee of Ministers decided on June 30, 1993 that these states are to be regarded as Parties to the Convention effective January 1, 1993. Similarly, these states are bound as of January 1, 1993 by the declarations made by the Czech and Slovak Federal Republic (Mar. 18, 1992) with respect to Articles 25 and 46 of the Convention.
All of the above countries accepted the right of individual petition (Article 25) and compulsory jurisdiction of the European Court of Human Rights (Article 46), pending entry into force of Protocol No. 11, ECHR on November 1, 1998.

III. Special Guest Status with the Parliamentary Assembly of the Council of Europe

Armenia (Jan. 26, 1996); Azerbaijan (June 28, 1996); Bosnia-Herzegovina (Jan. 28, 1994); and Georgia (May 28, 1996) have Special Guest Status. Special Guest Status, given to Belarus on September 16, 1992, was suspended on January 13, 1997.

Special Guest Status was introduced by the Parliamentary Assembly in 1989 to forge closer links with the Parliaments of Central and Eastern European countries. Guest Status Parliaments send delegations reflecting different currents of opinion to plenary sessions in Strasbourg and to committee meetings.

IV. Co-operation programs:49

The Council of Europe’s co-operation programs were set up with two aims: reinforcing, consolidating and expediting the democratic reform process in the beneficiary countries and facilitating the gradual and harmonious integration of these countries into the structures of European co-operation, primarily the Council of Europe. In the human rights field, co-operation focuses on promoting conformity and implementation of the major human rights treaties, especially the ECHR. This co-operation includes expert consultations, training workshops, study visits, and providing documentation. It is conducted with both governmental and nongovernmental partners.

All countries that are either member states of the Council of Europe or have applied for membership may take part in co-operation activities (see Section I, above), although some, having reached a certain level of development, are gradually withdrawing from the program. (A limited number of co-operation activities have also been implemented with Kyrgyzstan in 1996-1997.)

The programs are all funded from a specific article in the Council of Europe budget (Vote IX), totaling some eighty million French francs in 1998. This is supplemented by voluntary contributions from a number of member

states, which make it possible to implement certain additional or expanded activities. Moreover, a number of Joint Programs with the European Commission (Brussels) have been initiated in favor of Albania, the Baltic States (currently covering Estonia and Latvia), the Russian Federation, and Ukraine as well as in the field of minorities and the fight against organized crime and corruption.
Appendix III

Timetable for the Election of Judges and Entry into Force of Protocol No. 11, ECHR

<table>
<thead>
<tr>
<th>I.</th>
<th>November 1997</th>
<th>Submission of the list of candidates by States Parties to the Committee of Ministers and transmission of candidate lists to the Parliamentary Assembly of the Council of Europe</th>
</tr>
</thead>
<tbody>
<tr>
<td>II.</td>
<td>December 17-19, 1997 and January 7-9, 1998</td>
<td>First set of personal interviews of candidates by an Ad Hoc Sub-Committee to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly</td>
</tr>
<tr>
<td></td>
<td>January 27-28, 1998</td>
<td>Election of thirty-one judges by the Parliamentary Assembly</td>
</tr>
<tr>
<td>III.</td>
<td>April 6, 1998</td>
<td>Second set of personal interviews of candidates by an Ad Hoc Sub-Committee to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly</td>
</tr>
<tr>
<td></td>
<td>April 20-24, 1998</td>
<td>Election of remaining (eight) judges by the Parliamentary Assembly</td>
</tr>
<tr>
<td>IV.</td>
<td>May-October 1998</td>
<td>New court elected President and Vice-President(s); started work on Rules of court, setting up of chambers, settling staffing arrangements, etc.</td>
</tr>
<tr>
<td>V.</td>
<td>November 1, 1998</td>
<td>Protocol No. 11 entered into force; inauguration ceremony on November 3, 1998</td>
</tr>
</tbody>
</table>
Appendix IV

Model Curriculum Vitae for Candidates Seeking Election to the European Court of Human Rights

I. Personal details
   Name, forename
   Sex
   Date and place of birth
   Nationality/ies

II. Education and academic and other qualifications

III. Professional activities
   a. Details of judicial activities
   b. Details of non-judicial legal activities
   c. Details of all non-legal professional activities

IV. Activities and experience in the field of human rights

V. Public activities

VI. Other Activities
   - Field
   - Duration
   - Functions

VII. Publications and other works
   (Indicate the total number of books and articles published but select only the most important ones (maximum twelve))

VIII. Languages
   (Indicate degree of fluency: speaking, reading, writing)
   a. Mother tongue
   b. Official languages
      - English
      - French
   c. Other languages

IX. Other relevant information

50. See generally EUR. PARL. ASS. RES. 1082, supra note 17.
Appendix V

EUROPEAN COURT OF HUMAN RIGHTS

Informal procedure for the examination of candidature for the election of judges

[Decision adopted by the Committee of Ministers on May 28, 1997]

The [Ministers’] Deputies agreed on the following informal procedure for the examination of prospective candidatures for the election of Judges of the European Court of Human Rights:

i. States Parties to the European Convention on Human Rights are invited to provide informally copies of the curriculum vitae of prospective candidates for election as members of the European Court of Human Rights to the Deputies;

ii. An Ad Hoc group of the Deputies established for this purpose will hold, in camera, an informal exchange of views on such candidates before the lists are formally submitted to the Committee of Ministers for transmission to the Parliamentary Assembly;

iii. It is understood that the results of this exchange of views would neither bind governments, who would retain the right to present candidates of their choosing, nor interfere with the Parliamentary Assembly’s function of electing judges from the lists provided.
Appendix VI

RESOLUTION (97)951

ON THE STATUS AND CONDITIONS OF SERVICE OF JUDGES OF THE EUROPEAN COURT OF HUMAN RIGHTS TO BE SET UP UNDER PROTOCOL No. 11 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

(Adopted by the Committee of Ministers on September 10, 1997 at the 600th meeting of the Ministers' Deputies)

The Committee of Ministers, acting pursuant to Article 16 of the Statute of the Council of Europe,

Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on November 4, 1950 ("the Convention");

Having regard to Protocol No. 11 to the Convention, restructuring the control machinery established thereby, signed at Strasbourg on May 11, 1994 ("Protocol No. 11"), which establishes a permanent European Court of Human Rights ("the Court") to replace the European Commission and Court of Human Rights;

Having regard to the General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on September 2, 1949,

Resolves as follows:

Article 1

Elected members of the Court to be set up under Protocol No. 11 shall enjoy the special status of "judges of the European Court of Human Rights" ("judges").

Article 2

In accordance with Article 51 of the Convention as amended by Protocol No. 11, judges and ad hoc judges appointed pursuant to Article 27 § 2 of the Convention shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 3

The conditions of service of judges and ad hoc judges shall be governed by the provisional Regulations set out in appendices I and II respectively to this Resolution. These provisional Regulations shall be reviewed by the Committee of Ministers within the twelve months following the entry into force of Protocol No. 11, on the proposal of the Secretary General of the Council of Europe and in consultation with the President of the Court.

The provisional Regulations shall be implemented by the Secretary General of the Council of Europe, who, for this purpose, shall act in consultation with the President of the Court and may have regard to the rules applied concerning staff members of the Council of Europe.

Article 4

This Resolution shall enter into force on the same day as Protocol No. 11.

APPENDIX I TO RESOLUTION (97)9
PROVISIONAL REGULATIONS GOVERNING THE CONDITIONS OF SERVICE OF JUDGES

Article 1 – Annual salary

1. The all-inclusive annual salary of judges, as holders of a full-time office, shall be 1,100,000 French francs, payable in equal monthly instalments in advance.

2. Additional remuneration at the following annual rates shall be paid, on a pro rata temporis basis, to the following office-holders:
   - the President of the Court: 75,000 French francs;
   - the Vice-President of the Court and the Presidents of Chambers: 37,500 French francs.

3. The Committee of Ministers shall consider each year whether the foregoing amounts should be adjusted having regard to the evolution of the cost-of-living in France.

4. The above salaries and remuneration shall be free of all taxation.52

52. At the 600th meeting of the Ministers' Deputies (September 10, 1997), the French delegation stated that the exemption of Judges' salaries and remuneration from taxation had been agreed to by all ministerial departments concerned by this question.

The French delegation also recalled that the requirements laid down in Article 53 of the
Article 2 – Place of residence

Judges shall reside at or near the seat of the Court.

Article 3 – Leave

i. Holiday leave

Judges shall be entitled to annual holiday leave of two-and-a-half working days per month of service.

For the purpose of calculating annual leave entitlement, periods of sick leave during which judges are paid their salary, in full or in part, by the Council of Europe in accordance with the general provisions contained in paragraph ii of this Article, shall be considered as service. In the case of sick leave occasioned by occupational injury, absences for health reasons lasting a continuous period of up to one year shall be considered as service.

ii. Sick leave

The Administration of the Council of Europe shall be notified immediately, through the Registry of the Court, whenever judges are absent and unable to perform their duties for health reasons and be supplied with appropriate medical certificates.

Judges who are absent on account of illness shall receive from the Council of Europe:
- for the first three days: their full salary;
- thereafter and for a period of eighty-seven days: 90% of their salary;
- thereafter and for a period of ninety days: one-half of their salary.

At the end of the said period of ninety days, judges shall no longer be remunerated by the Council of Europe.

Article 4 – Payment of expenses by the Council of Europe

1. The Council of Europe shall pay:
   a. the travel and subsistence expenses of a judge on an official journey;
   b. travel, subsistence and removal expenses incurred by judges and their household (spouse and children) when taking up or on termination of their duties.

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French Constitution implied that the ratification and entry into force, with respect to France, of the 6th Protocol to the General Agreement on the privileges and immunities of the Council of Europe, which enshrines the principle of this exemption, can only take place once a law authorizing such ratification has been passed.
2. On the death of a judge during his or her term of office, the Council of Europe shall defray:
   a. the cost of transporting the body of the judge from the place of death to the place of funeral;
   b. the cost of transporting the deceased judge's personal belongings;
   c. the travel costs of the survivors who were dependent on the judge and were part of the judge's household.

3. The rules issued by the Secretary General of the Council of Europe applicable to payment of expenses to staff members of the Council of Europe shall apply to judges, save that the amounts payable in respect of travel and subsistence expenses shall be governed by the rules issued by the Secretary General applicable to the reimbursement of the expenses of members of the Parliamentary Assembly and Ministers' Deputies when travelling at the charge of the Council of Europe.

**Article 5 – Social Protection**

1. Judges are required to ensure that they have arranged, at their own expense, for adequate insurance cover of the following risks, for the full period of their terms of office:
   - temporary incapacity to work due to illness or accident – the cover must be such as to replace the loss of salary indicated under Article 3, paragraph ii above;
   - costs of health care, including maternity expenses, for themselves and their dependants;
   - permanent incapacity to work due to an illness or an accident;
   - death.

   Judges are also required to provide, at their own expense, for their retirement or pension benefits as regards the period of their terms of office.

2. Judges shall provide the Council of Europe at the beginning of each year with proof that they have adequate coverage of the risks listed above. The Council of Europe will make available proposals for an insurance policy which covers the risks, the full premium to be paid by judges.

**APPENDIX II TO RESOLUTION (97)9**

**PROVISIONAL REGULATIONS GOVERNING THE CONDITIONS OF SERVICE OF AD HOC JUDGES**

1. For each day on which they exercise their functions ad hoc judges shall receive an allowance of an amount equal to 1/365th of the annual salary.
payable to judges of the Court by virtue of Article 1 § 1 of Appendix I above. The allowance shall be free of all taxation.⁵³

2. The Council shall also reimburse to ad hoc judges travel and subsistence expenses incurred by them in connection with the performance of their functions. The rules issued by the Secretary General of the Council of Europe applicable to the reimbursement of the expenses of members of the Parliamentary Assembly and Ministers' Deputies when travelling at the charge of the Council of Europe shall apply.

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⁵³ At the 600th meeting of the Ministers' Deputies (September 10, 1997), the French delegation stated that the exemption of Judges' salaries and remuneration from taxation had been agreed to by all ministerial departments concerned by this question.

The French delegation also recalled that the requirements laid down in Article 53 of the French Constitution implied that the ratification and entry into force, with respect to France, of the 6th Protocol to the General Agreement on the privileges and immunities of the Council of Europe, which enshrines the principle of this exemption, can only take place once a law authorizing such ratification has been passed.
Appendix VII

EUROPEAN COURT OF HUMAN RIGHTS

Balanced representation of women and men in the new European Court of Human Rights

The Deputies, in order to achieve a more balanced representation of women and men in the new European Court of Human Rights, invited the governments of States Parties to the European Convention on Human Rights:

i. to foster a more balanced representation of women and men when drawing up the national lists of candidates to be put forward for election to the Court;

ii. to ensure that the qualifications and experience of all the candidates put forward, whether men or women, allow their candidatures to be taken into consideration on an equal footing.

54. Declaration adopted by the Ministers’ Deputies at their 593rd meeting on May 28, 1997. See EUR. PARL. ASS., Order No. 519, supra note 25; see also text accompanying note 25.
Appendix VIII

Single Court Organizational Chart

Registrar and Deputy Registrars

Chambers Secretariat
  - Chamber 1
  - Chamber 2
  - Chamber 3
  - Chamber 4

Legal Secretariat
  - Legal Secretaries (grouped in 15 sections)
  - Research Division

Administration
  - Mail Office Archives Sessions
  - Personnel, Finance (budget and accounting)
  - Information Technology
  - Internal and Security Service
  - Language Service
  - Press and Public Relations
  - Document Production, Publications, Library
Appendix IX

RESOLUTION (98)35

ON THE REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS TO BE SET UP UNDER THE TERMS OF PROTOCOL No. 11 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(Adopted by the Committee of Ministers on February 18, 1998 at the 621st meeting of the Ministers' Deputies)

Having regard to Protocol No. 11 to the European Convention on Human Rights;

At the proposal of the Secretary General;

Having consulted the President of the European Court of Human Rights and the President of the European Commission of Human Rights;

Having consulted the Staff Committee in accordance with Article 6, paragraph 1, of the Regulations on Staff participation (Appendix I to the Staff Regulations),

The Deputies:

1. decide that upon the date of entry into force of Protocol No. 11, the Registry of the European Court of Human Rights will be established in accordance with Article 25 of the European Convention on Human Rights as amended by the said Protocol, in place of the Secretariat of the European Commission of Human Rights and the Registry of the present European Court of Human Rights;

2. approve in principle the transfer, as of the same date, of the staff allocated at that date to the Secretariat of the European Commission of Human Rights and the Registry of the European Court of Human Rights, with their posts, to the Registry of the new Court, it being understood that the Secretary General is satisfied that the persons concerned are qualified for their new tasks;

3. decide that, as from the date of entry into force of Protocol No. 11 and for the period specified in Article 5, paragraph 3 thereof, the Secretariat of the European Commission of Human Rights will be provided by the Registry of the new Court.
Appendix X

List of Judges Elected onto the New European Court of Human Rights

The following judges were elected by the Parliamentary Assembly in January and April 1998:56

Albania: Mr. Kristaq TRAJA (3 years)
Andorra: Mr. Josep CASADEVALL MEDRANO (3 years)
Austria: Dr. Willi FUHRMANN (3 years)
Belgium: Françoise TULKENS (6 years)
Bulgaria: Mrs. Damianova BOUTOUCHAROVA-DOITCHEVA (3 years)

Croatia: Mrs. Nina VAJIC (6 years)
Cyprus: Mr. Loukis LOUCAIDES (3 years)
Czech Republic: Mr. Karel JUNGWIERT (6 years)
Denmark: Mr. Peer LORENZEN (3 years)
Estonia: Mr. Rait MARUSTE (6 years)
Finland: Mr. Matti PELLONPÄÄ (6 years)
France: Mr. Jean-Paul COSTA (6 years)
Germany: Mr. Georg RESS (6 years)
Greece: Mr. Christos L. ROZAKIS (6 years)
Hungary: Mr. András BAKA (3 years)
Iceland: Mr. Gaukur JÖRUNDSSON (6 years)
Ireland: Mr. John HEDIGAN (6 years)
Italy: Mr. Benedetto CONFORTI (3 years)
Latvia: Mr. Egils LEVITS (3 years)
Liechtenstein: Mr. Lucius Conrad CAFLISCH (6 years)
Lithuania: Mr. Pranas KURIS (6 years)
Luxembourg: Mr. Marc FISCHBACH (3 years)
Malta: Mr. Giovanni BONELLO (6 years)
Moldova: Mr. Tudor PANTIRU (3 years)
Netherlands: Mrs. Wilhelmina THOMASSEN (6 years)
Norway: Mrs. Hanne Sophie GREVE (6 years)
Poland: Mr. Jerzy MAKARCZYK (6 years)
Portugal: Mr. Ireneu CABRAL BARRETO (6 years)

56. Of the 39 judges elected, 20 have been given a six-year mandate and 19 have been given a three-year mandate (as indicated in parentheses next to the name).

Romania: Mr. Corneliu BIRSAN (3 years)
San Marino: Mr. Luigi FERRARI' BRAVO (3 years)
Slovakia: Mrs. Viera STRÁZNICKÁ (6 years)
Slovenia: Mr. Bostjan ZUPANCIC (3 years)
Spain: Mr. Antonio PASTOR RIDRUEJO (3 years)
Sweden: Mrs. Elisabeth PALM (6 years)
Switzerland: Mr. Luzius WILDHABER (3 years)
"the former Yugoslav Republic of Macedonia": Mrs. Margarita CACA-NIKOLOVSKA (3 years)
Turkey: Mr. Riza TÜRMEN (3 years)
Ukraine: Mr. Volodymyr BUTKEVYCH (3 years)
United Kingdom: Mr. Nicholas BRATZA (6 years)

The judge in respect of Russia has not yet been elected.
## Appendix XI

### Composition of the Grand Chamber

<table>
<thead>
<tr>
<th>GRAND CHAMBER 1</th>
<th>GRAND CHAMBER 2</th>
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<tbody>
<tr>
<td>Mr. L. Wildhaber, President</td>
<td>Mr. L. Wildhaber, President</td>
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<tr>
<td>Mrs. E. Palm, Vice-President, President of Chamber, Section I</td>
<td>Mrs. E. Palm, Vice-President, President of Chamber, Section I</td>
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<tr>
<td>Mr. C. Rozakis, Vice-President, President of Chamber, Section II</td>
<td>Mr. C. Rozakis, Vice-President, President of Chamber, Section II</td>
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<tr>
<td>Mr. N. Bratza, President of Chamber, Section III</td>
<td>Mr. N. Bratza, President of Chamber, Section III</td>
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<td>Mr. M. Pellonpää, President of Chamber, Section IV</td>
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<tr>
<td>Mr. B. Conforti</td>
<td>Mr. L. Ferrari Bravo</td>
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<td>Mr. A. Pastor Ridruejo</td>
<td>Mr. G. Jörundsson</td>
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<td>Mr. G. Bonello</td>
<td>Mr. G. Res, Vice-President of Chamber, Section IV</td>
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<td>Mr. J. Makarczyk</td>
<td>Mr. L. Caflisch</td>
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<td>Mr. P. Küris</td>
<td>Mr. L. Loucaides</td>
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<td>Mr. R. Türmen</td>
<td>Mr. I. Cabral Barreto</td>
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<tr>
<td>Mrs. F. Tulkens</td>
<td>Mr. J.-P. Costa, Vice-President of Chamber, Section III</td>
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<tr>
<td>Mrs. V. Strážnická</td>
<td>Mr. W. Fuhrmann</td>
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<tr>
<td>Mr. C. Birsan</td>
<td>Mr. K. Jungwirt</td>
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<td>Mr. P. Lorenzen</td>
<td>Mr. B. Zupančič</td>
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<tr>
<td>Mr. M. Fischbach, Vice-President of Chamber, Section II</td>
<td>Mrs. N. Vajić</td>
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<td>Mr. V. Butkevych</td>
<td>Mr. J. Hedigan</td>
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<tr>
<td>Mr. J. Casadevall, Vice-President of Chamber, Section I</td>
<td>Mrs. W. Thomassen</td>
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<tr>
<td>Mrs. H.S. Greve</td>
<td>Mrs. M. Tsatsa-Nikolovska</td>
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<td>Mr. T. Pantiru</td>
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<td>Mr. R. Maruste</td>
<td>Mr. E. Levits</td>
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<td>Mrs. S. Botouchcharova</td>
<td>Mr. K. Traja</td>
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(Russian judge)

Elected staff members of the Registry (see Articles 25 and 26 of the Convention and Rules of Court, Rules 15-18; see <http://www.dhcour.coe.fr>):

- **Registrar:** Mr. M. de Salvia
- **Deputy Registrars:**
  - Mr. P. Mahoney (Grand Chamber Registrar)
  - Mrs. M. Buquicchio-de Boer
Appendix XII
Composition of the Sections*

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<td>Mr. J. Hedigan</td>
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<td></td>
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<td>Mr. E. Levits</td>
<td>(Russian judge)</td>
<td>Mrs. S. Botoucharova</td>
</tr>
</tbody>
</table>

* Section Registrar (staff member of Registry)

Mrs. M. O’Boyle   Mr. E. Fribergh   Mrs. S. Dollé   Mr. V. Berger

* The term "Section" means a Chamber set up by the plenary Court for a fixed period in pursuance of Article 26(b) of the Convention and the expression "President of the Section" means the judge elected by the plenary Court in pursuance of Article 26(c) of the Convention as President of such a Section. For more details consult Rules of the Court, adopted on November 4, 1998. These Rules are in force as of November 1, 1998; see <http://www.dhcour.coe.fr>.
The efforts of lawyers who represent clients in courts of the United States have transformed the role of the international law of human rights. General statements of policy have become the kind of law dispensed by American judges in American courtrooms.

On one level, because the Bill of Rights codifies a very large and progressive view of human rights and because the Bill of Rights is part of the Constitution, which is the highest law of the land, it could be argued that in any case invoking the Bill of Rights, the law of human rights has always been treated as the rule of decision in U.S. courts. This Article does not address that kind of case. Rather, this Article considers cases that, for one reason or another, are not adequately resolved by appeals to the U.S. Constitution: cases in which the international law of human rights is expressly cited as providing the rule of decision. If there were no such cases, then it would be reasonable to ask whether human rights law is anything more than aspirational and hortatory, a statement of hope for an improved future for everyone. But situations in which international human rights law is actually the rule of decision that determines whether the plaintiff wins or the defendant wins place us on the road toward raising international human rights to the level of domestic law, which determines the actual legal rights of actual living people.

Until 1979, the question whether the treaties of the United States that have human rights elements are self-executing always framed the direct application of human rights law before U.S. courts. In the 1950s, the Supreme Court of California in *Sei Fujii v. State*\(^1\) found that the human rights provisions of the United Nations Charter are not self-executing: They cannot be relied upon as generating the law of decision of a case without domestic

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1. 242 P.2d 617 (Cal. 1952).
legislative implementation. The Sei Fujii court concluded that the legislature never enacted such measures.

Human rights law will seldom be useful law in U.S. courts if its use is dependent upon the vehicle of a self-executing treaty to import treaty language into the courtroom. It will generally not be law in U.S. courts because the treaties to which the United States is a party that contain human rights elements either expressly or by implication are not self-executing. Moreover, the Congress of the United States has been slow at bringing international human rights norms, beyond those that are already parts of U.S. law by virtue of the Constitution, into American law.

In 1979, the case of Filartiga v. Pena-Irala presented the following fact pattern: A young Paraguayan woman, whose brother had been tortured to death by the police of Asunción, saw the man who had allegedly committed the murder on the streets of New York City. She went to see a lawyer and asked whether there might be any recourse against him in the U.S. courts for the murder of her brother.

Because it has never been seriously contested, one can assume that the murder was politically motivated. Specifically, it was an attempt by the police of Asunción to strike out at the father of the boy who was killed: Joel Filartiga, a physician and artist who was also a leading opposition figure in Paraguay in the days of the Stroessner regime, which did not countenance very much opposition.

Dolly Filartiga found the Center for Constitutional Rights in New York City, whose lawyers had long dreamed of the case that would test the contours of a statute enacted in 1789. That statute, passed immediately after the adoption of the Constitution, was Section nine of the First Judiciary Act, the very same statute that led to Marbury v. Madison, in which the Supreme Court of the United States first asserted its right to find legislative enactments unconstitutional. Section nine, now codified as 28 U.S.C. § 1350, provides

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2. See Sei Fujii v. State, 242 P.2d 617, 621 (Cal. 1952) (stating that future legislation clearly was needed).
3. Id. at 622.
4. 630 F.2d 876 (2d Cir. 1980).
5. Filartiga v. Pena-Irala, 630 F.2d 876, 878-79 (2d Cir. 1980). Although she did not know it at the time, Pena-Irala was in the United States illegally.
6. See id. at 879 (stating that civil complaint was served on Pena-Irala).
8. 5 U.S. (1 Cranch) 137 (1803).
9. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) (finding that courts resolve conflicts between Constitution and legislative acts).
that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\textsuperscript{10}

Certainly the drafters of the Alien Tort Claims Act (ATCA)\textsuperscript{11} did not envisage lawsuits over torture of Paraguayans by Paraguayans in Paraguay. Between 1789 and 1979, the statute was invoked successfully only twice: first, in the 1790s, in a case that involved the slave trade,\textsuperscript{12} and second, in 1960, in a child custody case from Maryland.\textsuperscript{13} In the latter case, a parent had kidnapped the child to whom the other parent had custody rights through the use of a false passport.\textsuperscript{14} The court held that it had jurisdiction over the subject matter because this offense was the violation of international law that the ATCA required.

In \textit{Filartiga}, at first instance, Judge Eugene Nickerson felt that he had to defer to the Second Circuit's decision in \textit{IIT v. Vencap Ltd.},\textsuperscript{15} which required that the plaintiff and the defendant had to be of different nationalities for international law to be implicated.\textsuperscript{16} The \textit{IIT} court described §1350 as a "legal Lohengrin" because no one knows its true origins, and it held that the statute did not confer federal jurisdiction absent an internationally recognized delict.\textsuperscript{17}

The terms of the ATCA are simple and straightforward. A tort suit is a suit for a civil wrong, for an injury. An alien is a noncitizen. And so in the case of Joel and Dolly Filartiga against Amerigo Pena-Irala, the police chief from Asunción, the first two elements of jurisdiction under the ATCA were met: The plaintiffs were aliens, and they were suing for the wrongful death of their son and brother, a tort suit alleging a violation of personal rights. But the third element required by the ATCA — that the tort must have been committed in violation of the law of nations, or of a treaty of the United States\textsuperscript{18} — was the element other plaintiffs had found problematic, and it was the challenge for the \textit{Filartiga} plaintiffs and their counsel.

No treaty even arguably applied in \textit{Filartiga}\.\textsuperscript{19} Therefore, the question for the court was this: If, as the complaint alleged, the defendant actually did

\begin{itemize}
\item[12.] Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607).
\item[14.] \textit{Id.} at 861.
\item[15.] 519 F.2d 1001 (2d Cir. 1975).
\item[16.] Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).
\item[17.] IIT v. Vencap Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
\item[19.] \textit{Filartiga}, 630 F.2d at 880.
\end{itemize}
torture to death a seventeen-year-old boy because of the political views of his father, then notwithstanding the fact that both victim and perpetrator were Paraguayan and that the place where the injury occurred was Paraguay, was international law violated?20

The plaintiffs argued that international human rights law now contains a legally-enshrined prohibition against certain kinds of abuse, including torture, regardless of nationality.21 According to them, the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and various other instruments, which are of legal significance even if they are not treaties within the meaning of Article VI of the United States Constitution, articulated this position.22 They contended that virtually every legal system in the world today contains a prohibition against torture.23 Furthermore, the Statute of the International Court of Justice provides that general principles recognized as law by civilized nations are a source of international law.24

Political developments in the late 1970s aided the Filartigas' arguments. The President of the United States, Jimmy Carter, had recently proclaimed before the General Assembly of the United Nations that the day was past when nations could lawfully treat their own citizens in inhuman ways without international consequences. Torture, President Carter suggested, violates international law irrespective of the nationalities of those involved.

The three elements of ATCA jurisdiction, therefore, appeared to be present, and it would have seemed to follow easily from that premise that the court had the authority to try the case. However, the United States District Court for the Eastern District of New York, in Brooklyn, where Pena-Irala was detained in an Immigration and Naturalization Service holding facility, dismissed it nonetheless. The court reluctantly concluded that, according to such binding precedent as IIIT, a violation of international law may be found only when the actor and victim are of different nationalities.25 Judge Nickerson held that his hands were tied: As a matter of law, no international law implications arise from actions by one citizen of a nation against another citizen of the same nation.26

The Filartigas appealed to the United States Court of Appeals for the Second Circuit in New York City. In a landmark opinion, Judge Kaufman

20. Id. at 884-85.
21. Id. at 879.
22. Id.
23. See id. at 880 (stating that virtually all nations denounce torture).
25. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).
26. Id.
held that the legal premise underlying the trial court's resolution of the case, if it had ever been correct, was no longer applicable.\textsuperscript{27} International law in the closing decades of the twentieth century, he wrote, does include a prohibition against certain kinds of actions even when performed by nations against their own citizens.\textsuperscript{28}

Judge Kaufman's resolution of \textit{Filartiga} determined not only that international law forbids torture by states of their own citizens, but also that these legal provisions are part of the law of the United States.\textsuperscript{29} This latter aspect of the decision is frequently overlooked, but it is vital to practicing lawyers: It provided the roadmap for the invocation of human rights norms in domestic cases.

The sources of international law at which the \textit{Filartiga} court looked included conventions that at the time had been signed but not ratified by the United States. The court cited these conventions as evidence of customary international law, as well as of general principles recognized by civilized nations. Under the Vienna Convention of the Law of Treaties,\textsuperscript{30} however, the fact that the United States had signed the conventions has an additional significance: A signatory is forbidden to act in a manner inconsistent with a treaty’s object and purpose, even if it is not bound to its incidents.\textsuperscript{31} The court therefore was correct to look at covenants of which the country was not a party, as well as international instruments and General Assembly resolutions, including the Universal Declaration, both because they are relevant to the general international obligations of the United States and because they may constitute elements of customary international law.

The Second Circuit placed particular emphasis on general principles, citing constitutions and basic laws that condemn torture.\textsuperscript{32} It located customary law just as the International Court of Justice would, by identifying state practice and \textit{opinio juris}.\textsuperscript{33} \textit{Filartiga}, therefore, does not shed modern light on the old question of whether any of the international human rights instruments are self-executing. Scholars continue to debate this issue, but judges have largely left it alone.

According to the normal method of textual analysis, however, it would appear that at least key provisions of the human rights treaties are self-execut-
ing. Frequently, in giving its advice and consent to the President in the process of treaty ratification, the Senate expresses the view that a particular treaty, or a particular provision of a treaty, is not self-executing. However, there is no reason to assign to that expression of opinion any particular legislative force. The courts can disregard it without fear, because the views of one house of the legislature do not make laws under the Constitution, and it is treaties, not resolutions of the Senate, that are "the Supreme Law of the Land."

The process of determining when treaties are self-executing is similar to deciding when statutes provide a private right of action. The analysis concerns the precision of the instrument's language, its identification of a target "zone of protected interests," the extent to which implementing legislation is necessary to make sense of the textual provisions, and so on. Even without arguing that *Sei Fujii* was wrongly decided, and it may not have been, because Articles 55 and 56 of the Charter call expressly for legislative or other measures to give them content, one could defend the proposition that such treaties as the Torture Convention are self-executing.

Finally, in *Filartiga*, it was not necessary as a matter of strict logic to find treaties to be self-executing because the plaintiffs were not seeking to invoke private rights allegedly created by treaties. The point was not that Paraguay violated a treaty in the torture of Joelito Filartiga; it was that his torture and murder by Amerigo Pena-Irala were nevertheless violations of the law of nations. That is all that § 1350 requires, and it is all that Judge Kaufman ultimately held.

The federal courts of the United States are courts of special jurisdiction: A jurisdictional basis under the Constitution must be present for any case to be brought in federal court. The Constitution lists the kinds of cases that the federal judiciary may hear; the state courts are competent otherwise. Generally, simple torts, contract breaches, divorces, and will contests do not present federal cases. No jurisdictional hook allows these matters to be brought in federal court.

The bases for bringing cases in federal, as opposed to state, court are very few. Federal jurisdiction exists if the plaintiff and the defendant are citizens of different states, or if one of them is an American and the other a foreigner, and the amount in controversy exceeds a statutory ceiling, currently $75,000. The other primary basis for bringing cases into federal court is that the com-

34. U.S. Const. art. VI, cl. 2.
36. See U.N. CHARTER art. 55 (stating that United Nations will promote general human rights and freedom); U.N. CHARTER art. 56 (stating that members pledge to take actions to achieve goals of general human rights and freedom).
plaint raises a question of interpretation or application of federal law. If a case does not come within one of those categories, it is extremely unlikely that a federal court can hear it.

In *Filartiga*, the plaintiff and defendant were both foreigners, so diversity jurisdiction was not present. Nor could it be said that the case "arose under" the ATCA, which does not create causes of action, but merely channels cases arising in tort into the federal courts. Therefore, Judge Kaufman reasoned, even if the three prerequisites for § 1350 jurisdiction were present in *Filartiga*, the court could still be powerless to hear it. For that reason, he demonstrated in his famous decision that the case did present a federal question, because it arose under international law, which is part of the law of the United States.

Through that logic, Judge Kaufman not only established the basis for federal jurisdiction in *Filartiga*, but also laid the groundwork for subsequent developments in § 1350 jurisprudence. Judge Kaufman started from the premise that international law, whether conventional or customary, has long been recognized as part of U.S. law. Mr. Justice Gray, as long ago as 1900, specifically so held in *The Paquete Habana*: International law is part of the law of the United States, to be invoked whenever needed to decide a case, just like any other provision of law.

*Filartiga* was such a case: A case in which interpretation and application of international law, and an understanding of what international law is, are vital to the determination of whether the plaintiff wins or the defendant wins, and even to the threshold question of whether the door of the courthouse is open or closed. Judge Kaufman's conclusion that customary international law is federal common law meant that deciding *Filartiga* did not create constitutional problems because, although there was no diversity of citizenship, the case did arise under federal law, and specifically, the international law of human rights.

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39. *Id.* § 1331.
40. Other exceptional categories of federal jurisdiction under the Constitution include cases involving admiralty, diplomatically protected persons, actions brought by or against the United States, and cases between states.
41. *Filartiga* v. Pena-Irala, 630 F.2d 876, 878-79 (2d Cir. 1980).
43. *Filartiga*, 630 F.2d at 887 (finding that Alien Tort Claims Act does not grant new rights, but presents opportunity for adjudication).
44. *Id.* at 887-88.
45. *Id.* at 887.
46. 175 U.S. 677 (1900).
On remand in *Filartiga*, another development followed, which was as dramatic as the Second Circuit's decision and was really quite inspiring. While Judge Kaufman had held that there was federal jurisdiction to hear this case, he did not decide the merits, as there had not yet been a trial. The case was remanded to the Eastern District of New York for that purpose.

By that time, Pena-Irala, who had ceased to contest his deportation, was out of the country. According to reports, he went back to Paraguay and immediately fled from there to Brazil: Paraguay did not want him either. No defendant appeared in court, and a default judgment was taken. The Magistrate Judge to whom that procedure was assigned required the plaintiffs to present evidence in support of their claims. They presented witnesses who testified about what had happened and about the terrible impact of the boy's murder on them. At the end of the trial, the Magistrate Judge issued an opinion finding that there had been a wrongful death and that damages were to be awarded, but he declined to award punitive damages, as international law, he said, does not recognize that concept. He also reduced the plaintiffs' claims for pain and suffering and other "moral damages" because he concluded that the law of Paraguay, where the incident occurred, does not recognize such awards. He reduced the $10 million judgment sought to approximately $500,000.

When a case is assigned to a Magistrate Judge for a preliminary decision, either party is free to take an appeal to the District Judge. Accordingly, the Filartigas appealed to Judge Nickerson. Judge Nickerson's decision on remand is inspiring, both as prose and as legal scholarship. He determined that the Magistrate Judge had erred in applying the law of Paraguay; the proper law in this type of case is international law because the acts complained of were wrongs under international law, and the rules of international law must therefore be the rules of decision. To do otherwise, Judge Nickerson wrote, would be to hold that international law is "a mere set of benevolent yearnings never to be given effect." International law is law, he

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49. *Id.*
50. *Id.*
51. *See id.* at 880 (stating that Pena-Irala returned to Paraguay).
53. *See id.* (stating that question of damages was referred to magistrate judge).
54. *Id.* at 864.
55. *Id.*
56. *Id.* at 860.
57. *Id.* at 863.
58. *Id.*
held, and as such it is to be applied to real cases. Judge Nickerson awarded millions of dollars in damages, which obviously were never paid.\(^9\)

The concept of a federal common law that is unwritten, which exists alongside the enactments of Congress, even if it is limited in scope, is not unfamiliar. One of its primary components is customary international law, which is binding both on and in the United States. Therefore, even if a case presented a human rights issue, but did not have an alien plaintiff or did not sound in tort and therefore would not satisfy the jurisdictional prerequisites of § 1350, federal jurisdiction could nevertheless be found under constitutional principles that permit the federal courts to hear cases "arising under the laws of the United States."

Since 1979, a number of other key decisions have begun to fill in the outline and the contours of human rights law as law of decision. In the years immediately following \textit{Filartiga}, a large number of Cuban refugees reached the shores of Florida. Following an off-hand remark by the United States President to the effect that Cubans were always welcome here, Fidel Castro expelled over 100,000 of his country's citizens. This gave Castro an opportunity to discard those he considered to be the detritus of his civilization, mainly inmates of mental hospitals or jails, and those whose political views were troublesome to his regime.

When the United States Immigration and Naturalization Service (INS) processed these individuals after they came on shore, INS officials asked the refugees a series of questions, one of which was whether they had ever committed a crime. Most of the "Mariel boatlift" refugees -- who were, after all, in large part prisoners -- knew that the proper answer to that question was "no." Because Castro did not send prison records along with the "Marielitos," the INS could not verify the answers. But occasionally one would tell the truth. A man by the name of Fernando Rodriguez-Fernandez was one of them. He confessed that he had committed two crimes in Cuba: He stole a suitcase in a bus station, and he attempted a prison break after his conviction for the theft.\(^0\)

The INS considered these to be crimes of moral turpitude and on that basis determined that Rodriguez-Fernandez was to be excluded from the United States.\(^1\) Although he was detained, as irony would have it, in Fort Leavenworth in Kansas, very near the geographical center of the country, as an excluded alien, he was notionally not on United States soil at all.\(^2\)

\(^9\) See id. at 867 (awarding total judgment of $10,385,364).


\(^1\) Rodriguez-Fernandez, 505 F. Supp. at 789.

\(^2\) Id.
After he was in Fort Leavenworth for a considerable while, with no apparent prospect for his release, lawyers acting on his behalf petitioned for a writ of habeas corpus to challenge his confinement. They argued that he had not been convicted of a crime, that he had not been afforded due process (in fact, he had had no process at all except that which went into the determination of excludability), and that he had not received a trial in the United States. The question presented to the court was whether the United States was violating his human rights by detaining him, potentially indefinitely, in a federal penitentiary.

All precedent, including decisions of the Supreme Court in Cold War cases, said that an excluded alien had no rights whatsoever. The U.S. government, therefore, found itself defending the proposition that excluded aliens were essentially not people: They had no legal rights and therefore no legal remedies. The government was unable to respond to an absurd proposition that seemed to follow from its argument: that it could do medical experimentation on excluded aliens, or that it could torture them. The United States contended that the precedents that restricted the rights of excluded aliens were binding on the United States District Court for the District of Kansas, before whom the Rodriguez-Fernandez case came. On appeal to the United States Court of Appeals for the Tenth Circuit in Denver, sitting in the very same court building in which the Timothy McVeigh trial was to take place years later, the government reiterated the argument that the court's hands were tied under the system of stare decisis that rules in this country. Courts, it said, have to obey the law as laid down by higher courts, meaning that the Tenth Circuit was bound to conclude that this man, an excluded alien, was without rights that could be enforced against the government.

A very wise judge in Kansas, who had probably never encountered an international law case before in his career, said that the government's position was clearly inconsistent with the character of the United States. It was impossible to conclude, he held, that a human being, physically present within the borders of the United States, is literally without legal rights. He said that any logic that leads to such an impossible conclusion must have a flawed

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63. Id. at 788.
64. Id. at 790.
65. Id.
66. See, e.g., Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953) (finding that excluded alien is entitled only to process that Congress affords).
68. See Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (stating that linchpin of government case was Supreme Court opinion).
70. Id. at 799.
premise, and therefore, that the premises should be reexamined. Every human being has a core of human rights just by virtue of being human. There could be no derogation from the *jus cogens* norms that protect those rights.

To the extent that a right by definition entails a remedy and that they are the obverse and the reverse of the same definitional coin, the *Rodriguez-Fernandez* holding meant that even excluded aliens may come before a United States federal court to complain that they have certain rights and that the United States government is violating those rights. The Reagan Administration's Department of Justice did not want such a blunt decision to go in the books, under which a federal court would actually order the freeing of a detained alien under these circumstances. The Tenth Circuit issued a very well-written, powerful decision, but the courts stopped short of actually ordering that Rodriguez-Fernandez be released. Ninety days later, the Justice Department "voluntarily" released him.

The days following the case that came to be reported under the name *Rodriguez-Fernandez v. Wilkinson* were very heady days for human rights lawyers. It looked as if a whole revolution had occurred between *Filartiga* and *Rodriguez-Fernandez*. Within two years, United States judges had woken up, the scales had fallen from their eyes, and suddenly they were aware of a new source of law and a new source of protection for individuals in the international law of human rights.

Legal systems, however, do not change like that: They evolve much more glacially, and this area was to be no exception. Throughout the 1980s, some of the more optimistic claims for human rights law underwent a gradual erosion. Events in Central America, and especially the activities of the United States in Nicaragua, caused human rights activists to assume extreme positions in attempting to concoct international human rights theories that would, they thought, enable judges to overturn aspects of U.S. foreign policy as unconstitutional or illegal. In one case, plaintiffs' counsel told a federal judge that U.S. policy in Nicaragua was inconsistent with binding norms of international law that forbid war. Advocates in the human rights movement actually appeared to believe that an American judge, wearing a black robe, in a courtroom at 3rd Street and Constitution Avenue in Washington, or in the federal building in Hammond, Indiana, or Cedar Rapids, Iowa, would pick up his or her gavel and pronounce the words, "Because the United Nations

71. *Id.* at 798.
72. *Id.* at 799.
Charter forbids war, the plaintiff has adequately demonstrated to my satisfaction that U.S. foreign policy of supporting the contras in Nicaragua is illegal, and I hereby enjoin it. Call the next case!"

Such a result was and is inconceivable: It was never going to happen, partly because human rights activists did not properly focus our youthful exuberance and partly because the cases were just not powerful cases. One case in particular stands out as marking a real problem for the emergence of human rights law as the law of decision in domestic litigation: Tel-Oren v. Libyan Arab Republic.75

The Tel-Oren plaintiffs were the surviving victims and the representatives of those killed in the bombing of a bus in the north of Israel, allegedly by the Palestine Liberation Organization (PLO).76 They brought their action under the ATCA, alleging that terrorism is a violation of the law of nations.77 The plaintiffs filed suit in the United States District Court for the District of Columbia against the following four defendants: the PLO, the government of Libya, the National Association of Arab Americans, and the Palestine Information Office.78 The last two defendants are American lobbying organizations that have headquarters in Washington. They send out leaflets and go to cocktail parties on the Hill and argue for their point of view on legislative and executive policy. The government of Libya is, of course, a sovereign entity, which, whether one likes it or not, has certain rights in the courts, including the right of sovereign immunity. The PLO is without legal personality, at least under the laws of the United States.

Tel-Oren was, therefore, a difficult case from the beginning, and it should have been dismissed summarily simply because the only two defendants who could actually be forced to appear before the court were, at best, remotely connected with the substance of the case. Furthermore, the two defendants who may have been responsible for what happened, the PLO and Libya, were not before the court. The case could and should have been resolved on that basis. But it was not.

Tel-Oren was dismissed in the district court on the grounds that the norms of international law on which the plaintiffs relied are not "self-executing."79 Specifically, according to Judge Joyce Hens Green, unless the norm of international law that forbids terrorism, assuming such a norm can be demonstrated, also includes the agreement of nations that it can be enforced

75. 726 F.2d 774 (D.C. Cir. 1984).
77. Id.
78. Tel-Oren, 517 F. Supp. at 544.
79. Id. at 549, 551.
through private actions in municipal courts, then the plaintiff has no legal right to assert.\textsuperscript{80}

Judge Green's decision was plainly inconsistent with the Second Circuit's opinion in \textit{Filartiga}. The principle that the international law of human rights may not be used as the law of decision in a case unless the relevant international norm itself provides for a private right of action— an explicit provision that a norm can be enforced in the courts— entails logically that international human rights law is not law at all. Not even the prohibition against torture in \textit{Filartiga} was found to contain a license for private rights of action. Because it derives from custom and not text, there is nothing in the norm condemning torture that has, after a hypothetical Article X, paragraph 1, "Nations are forbidden to torture anyone including their own citizens," a paragraph 2 that says, "This provision shall be enforceable in any domestic court with personal jurisdiction over a torturer." Customary international law simply does not develop or operate in that manner.

The decision of the United States Court of Appeals for the D.C. Circuit was per curiam, and three separate, passionate, and highly divergent opinions of Judges Edwards, Bork, and Robb followed the decision.\textsuperscript{81} The divisions among the judges, as well as the complexities in the \textit{Tel-Oren} facts, weakened the case's authoritativeness. But \textit{Tel-Oren} did demonstrate that human rights activists could not take a sound understanding of international law among U.S. judges for granted. Promoting the international law of human rights as the law of decision in U.S. courtrooms was going to require no small amount of effort, including that of educating the judiciary. Some human rights advocates attempted to take that stricture seriously. They have been somewhat successful on two fronts: the judicial, and the legislative.

In the mid-1980s, at the strong urging of various non-governmental organizations (NGOs), Congress passed the Torture Victims Protection Act of 1991 (TVPA),\textsuperscript{82} which locks the result in \textit{Filartiga} into statutory law. The TVPA provides that victims of torture in foreign countries may bring tort cases against their abusers over whom the courts of the United States have personal jurisdiction.\textsuperscript{83} It provides a statute of limitations, lays down procedures for service of process, and resolves other technical issues that might otherwise bar a potential torture victim plaintiff's cause of action.\textsuperscript{84} But it is limited to state-sponsored or state-endorsed torture: It does not assist victims

\textsuperscript{80} Id. at 549.

\textsuperscript{81} Tel-Oren, 726 F.2d at 775.


\textsuperscript{83} Id.

\textsuperscript{84} Id.
of apartheid, disappearance, or female genital mutilation, whose human rights abuse cases might someday come before the courts.

Some human rights lawyers, including this author, thought that the legislative initiative to enact the TVPA was counterproductive and had absolutely no chance of success. They thought that having Jesse Helms and others denouncing it on the floor of the Senate not only would kill the bill, but would be the death knell for the Filartiga holding itself. They imagined that the speeches that Helms and others would give, condemning the interference of foreigners in our American judiciary, would be cited in every domestic case involving the international law of human rights forever. But they were wrong: The bill passed. The President signed it. Progress was therefore made on the legislative front.

At the same time, one of the lessons of Filartiga actually came to be internalized by the judiciary. During the oral argument, one of the judges asked counsel representing the Filartigas the following question: Because the defendant apparently does not have much money, what was the point of this high-profile case, other than getting your name in the newspapers? Peter Weiss answered that the point was to send a message that the United States is not a haven for people like Pena-Irala. People who torture are not welcome here, and if they come here, they will be pursued by their victims, who will use the full arsenal of the United States judicial process to defend and to vindicate their rights.

Weiss's prediction turned out to be accurate. Ferdinand Marcos came to the United States and was sued. He and his estate had to go through a full-blown trial in the United States District Court for the District of Hawaii, in which witness after witness took the stand and testified about torture and mistreatment at the hands of Ferdinand Marcos. A judgment was entered against the Marcos estate and, this time, there is a real prospect not only that they will have some kind of psychological closure, but that human rights abuse victims will be compensated by their tormentors with real dollars.

The recent decision of the Second Circuit involving Radovan Karadzic also constitutes an important part of the good news. The plaintiffs were

85. Id.
86. At oral argument, a similarly troublesome question was asked of the defendant's counsel: Why make such an issue out of jurisdiction in the federal courthouse when no question existed that jurisdiction over the defendant would have been proper in the state supreme court, just across Foley Square in lower Manhattan? The court pointed out that, to assert jurisdiction in state court, all the Filartigas needed was a live defendant who was properly served and a proper allegation that the defendant had done something wrong.
87. In re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493, 495 (9th Cir. 1992).
88. Id. at 503 (affirming judgment).
people generally who claimed to have been subjected to ethnic cleansing in Bosnia, and women who claimed to have been the victims specifically of systematic rape and other sexual violence. Both groups sued Karadzic personally for the campaign of human rights violations of which he was the architect. He was served with process in the lobby of the Hotel Inter-Continental on East 48th Street in New York City.

The plaintiffs brought suit against Karadzic in the United States District Court for the Southern District of New York in Manhattan under the ATCA and also the TVPA. The plaintiffs made the same arguments that the plaintiffs made in Filartiga: They were aliens, their case was one in tort, and the actions that injured them constituted violations of international law.

At the threshold, it was necessary to determine whether or not Karadzic was properly served. Apparently, the process server attempted to hand Karadzic the papers, but they fell at his feet after his security guards intervened. He claimed not only that the service was ineffective, but also that he was entitled to diplomatic immunity, not least because he was in New York in connection with official business at the United Nations. In any event, it was resolved that the service was effective.

Karadzic did not attempt to argue that the horrible events alleged in the complaint had not happened. Presented by Ramsey Clark, a former Attorney General of the United States and the son of a Supreme Court justice, Karadzic's argument was much cleverer than that. Karadzic contended that he is not bound by international law. International law, he argued, is not simply a set of abstract normative propositions. In order to understand what international law is, one has to know to whom it is addressed. Torture, after all, is an internationally cognizable wrong only by virtue of who is doing it. Purely private acts do not fall within the scope of international law. So, if one should have the misfortune to be gunned down on the streets of Washington, or to be blown up in a federal office building in Oklahoma City, however

90. Id. at 236-37.
91. Id. at 237.
92. Id. at 246.
94. Id. at 739.
96. Id. at 246.
97. Id. at 247.
98. Id.
100. See id. (stating that only state actors come within purview of § 1350).
dreadful that might be, no violation of international law has occurred. Torture is different from mere thuggery, which may be criminal by all means, but it is criminal only under municipal law.

Karadzic's argument was an interesting position for an individual who considered himself to be the head of state of the so-called Republika Srpska, the Bosnian Serb entity. An obvious inconsistency exists between Karadzic's contention that service on him was improper because he was a diplomatically-protected person attending a meeting of the United Nations in his official capacity and the argument that he is not a subject of international law, but rather a private actor.

Nevertheless, Judge Peter Leisure of the United States District Court for the Southern District of New York agreed with Karadzic's position, and he held that to be bound by international law, one must have international legal personality. For an individual, international legal personality depends upon the actual or at least apparent authority to act on behalf of, in connection with, or under the umbrella of a state. Concluding that Karadzic's Republika Srpska is not a state, **inter alia**, because it is not widely recognized, Judge Leisure held that the acts were simply those of a gang of outlaws, just like a gang on the streets of Washington or Los Angeles or in the hills of Burma.

What happened to these plaintiffs may have been terrible and appalling, said Judge Leisure, and the acts themselves may have violated every norm of civilized conduct known, but there are no logically compelled international legal implications of even outrageous misconduct unless it was committed by or on behalf of an international legal person.

The United States Court of Appeals for the Second Circuit reversed, holding that the plaintiffs had adequately pleaded a cause of action against Radovan Karadzic. The Second Circuit held that there is no presumption that international law imposes obligations only on states and not on individuals, much less on groups organized under arms for the purpose of taking political power.

Situations in which international law bound individuals have always existed — piracy, abduction of ambassadors, and the trade in

101. *See id.* at 741 (finding that § 1350 does not redress acts of torture engaged in by private individuals).

102. *See id.* (finding that Karadzic's faction did not act under color of any state law).

103. *Id.* at 740-41.


105. *See id.* at 239 (holding that certain conduct violates international law whether undertaken by state or private actors).
slaves—are all international offenses that only individuals can commit.\textsuperscript{106} The addition to this list of new internationally-cognizable offenses that can be committed only by individuals in the late twentieth century is merely building on what has always been the law. Human rights abuses of at least certain types, when committed by individuals in circumstances that otherwise give rise to international implications—not on the streets of Detroit, for example, but on the streets of Sarajevo, where there are foreign armies and where international politics is being waged—are sufficient to create violations of international dimension out of what would otherwise be acts of simple criminality.

The Supreme Court of the United States declined to review the decision, and it therefore stands as law, albeit only of the Second Circuit (New York, Vermont, and Connecticut).\textsuperscript{107} The Second Circuit, however, is a very authoritative one, and it is the Second Circuit, after all, that began this trend toward the use of human rights norms as the law of decision in U.S. courtrooms in \textit{Filartiga}. There is reason to hope, therefore, that \textit{Doe v. Karadzic} is the wave of the future.

Positive developments have emerged even since the \textit{Karadzic} decision. International human rights scholars have begun to turn their attention to a potentially fruitful area, both to remedy and to deter violations: attempting to hold private American corporations that joint-venture with repressive regimes liable for the foreseeable human consequences of their activities. In a current case in California, for example, a group of Burmese victims of human rights abuses has filed suit under the ATCA and the TVPA against UNOCAL, which apparently has a joint venture with the governing junta in Burma, almost universally condemned for its illegality and brutality, to construct a natural gas pipeline.\textsuperscript{108} The plaintiffs claim to represent various classes of people who they allege were abused in connection with carrying out the joint venture's objectives: people who were forced into slavery or porterage, who were uprooted from their homes, whose villages were destroyed, and who were raped and killed.\textsuperscript{109}

Sovereign immunity almost certainly prevents a suit against the government of Burma in such a case. A government has not been the defendant in any of the successful human rights cases. Under current law, sovereign immunity means that governments are simply not amenable to the jurisdiction of the courts unless certain enumerated exceptions apply.\textsuperscript{110} The degree to

\textsuperscript{106} \textit{Id.}


\textsuperscript{108} \textit{Doe v. UNOCAL Corp., 963 F. Supp. 880, 883-84 (C.D. Cal. 1997)).

\textsuperscript{109} \textit{Id.} at 883.

which conduct was reprehensible, however, is not sufficient to create an exception.

There may be no judicial remedy against the Burmese governing junta for whatever might have happened on that pipeline, however, a remedy against the junta's American business partner could be possible. The common law decrees that if one participant in a joint pursuit commits a tort in the course of pursuing the shared objective, both are liable because they were engaged in a common venture. The argument in UNOCAL is that an immune defendant and a nonimmune defendant conspired together, and the nonimmune defendant can be sued and is liable. The federal trial court in California denied UNOCAL's motion to dismiss,¹¹¹ and this case is proceeding.

UNOCAL's lawyers will have some serious problems. Even if they are confident that they can file powerful motions to dismiss and for summary judgment, they are still going to have to take depositions, to produce documentary evidence, and to show all of their books and records in connection with the building of the pipeline. Moreover, a resolution to the effect that a private actor can be held jointly responsible with a government that abuses human rights is, in any event, a major development of human rights law.

Yet, for all the good news about the use of human rights law in American courtrooms, there is still no progress in bringing the techniques and the content of international law to bear on the most egregious human rights violations committed by the United States itself on a systematic basis. Challenges founded in the emerging respect for the international law of human rights have not been successful.

In the least defensible systematic abuse of human rights in the United States—the use of the death penalty—absolutely no inroads from international human rights law have permitted. Several years ago, the Supreme Court, in one of the last times it removed an entire class of people from death row, held that it was unconstitutional to execute someone who was under the age of sixteen at the time of commission of the crime. The Court struck down an Oklahoma law that permitted the execution of juveniles,¹¹² but in so doing went out of its way to ignore all the friends of the Court who had argued that international law provides an independent but compelling basis to forbid that kind of state action. The Supreme Court held that the execution of juveniles was inconsistent only with U.S. domestic constitutional law making not even a passing reference to the international authorities. The Supreme Court

¹¹¹ UNOCAL Corp., 963 F. Supp. at 897.
foreclosed any hope that the Court would ever expand the prohibition beyond that sixteen-year-old age limit.\footnote{Thompson, 487 U.S. at 838. Most recently, the Supreme Court of the United States and the governor of Virginia both denied the relevance of international law to death penalty decisions, even those involving foreigners. See Breard v. Greene, 118 S. Ct. 1352 (1998) (per curiam); International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 810 (Interim Protection Order of Apr. 9, 1998).}

Another area in which international human rights law was dramatically held not to have any relevance to evaluation of conduct of the United States involved the kidnaping (the government prefers the locution "irregular rendition") of a fugitive from Mexico: United States v. Alvarez-Machain.\footnote{504 U.S. 655 (1992).} In that case, representatives of the United States Drug Enforcement Administration (DEA) entered the territory of Mexico, a country with which we have an extradition treaty, captured someone suspected of killing a DEA agent and abducted him into the United States, where he was brought before the United States District Court for the Central District of California to stand trial.\footnote{United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992).} He challenged the ability of the court to try him on the grounds that his appearance was obtained illegally, but he failed.\footnote{Id. at 658.} The court held that it did not matter why or how he came to be there, and it rejected the claim that his presence was procured only by way of a violation of international law and that therefore the trial could not lawfully proceed.\footnote{Id. at 657.}

In the Supreme Court of the United States, six out of nine justices agreed with the district court. They found that although the U.S.-Mexico Extradition Treaty (the Treaty) provides procedures for extraditing suspected criminals, nothing in the Treaty says that those procedures are exclusive.\footnote{Id. at 658.} The United States, reasoned the Court, retains the power to do whatever is not expressly forbidden, and the victim of this international abduction has absolutely no right to insist that the Treaty's provisions be honored.\footnote{Id. at 664.} The irony in this case is that when Alvarez-Machain was finally tried, he was acquitted. The precedent, however, endures as another example of a double standard in the use of human rights law in the courts, with the United States not held accountable under the same rules applicable to other nations.

Considerable improvement over the last twenty years in the use of international human rights law in the courts of the United States has occurred. Judges increasingly take notice of international law arguments in broader
contexts, for example, in evaluating prison conditions: They have been invoked in cases alleging that conditions of detention constitute cruel and unusual punishment. The courts will look to conventions that the United States has signed, whether or not they are self-executing, at least to assist in the definition of acceptable standards. However, in the final analysis, courts appear particularly reluctant to order changes to U.S. government policy, or even to criticize it very aggressively, based on developments in international law.

This is understandable when considered in its domestic, political context. Senator Dole ran for President two years ago, campaigning against the GATT as an erosion of U.S. sovereignty. It is hardly surprising that U.S. courts would say that they "do not want our laws made by foreigners." A cynical, negative conclusion would suggest that this is a familiar pattern: The United States is the great champion of international law in the world, so long as it is winning, but the moment it stands to have its conduct condemned, it changes the rules. As the world's only superpower, the United States is probably uniquely situated to do that.

All in all, this cynicism is not merited. It is surely true that the United States, and its judiciary in particular, can be a beacon of hope for those whose rights are abused abroad, when the abusers seek to enjoy the benefits that their presence, or their business, in this country can bring. But certainly one has to temper one's optimism about the future of international human rights law in the courts of the United States until judges and political leaders accept the notion that, in the international legal order, the United States is subject to the laws and cannot make, repeal, or ignore elements of that body of law on its own initiative or for its own domestic or political reasons.

To become a worthy subject of international law was an important objective of the founders of this country. To remain so, and not to claim to be above the law, is a goal to which the American public, their heirs, might usefully dedicate themselves.

120. An obvious illustration of this point is the purported withdrawal of the United States from the compulsory jurisdiction of the International Court of Justice in a futile effort to avoid losing the judgment in the *Nicaragua* case.
New Challenges for the American Lawyer in International Human Rights

Susan L. Karamanian

I. Introduction

Every licensed lawyer in the United States takes an oath to support or uphold the Constitution of the United States and to support or uphold the laws of the respective state in which he or she is licensed. Every lawyer licensed to practice in a federal court in the United States similarly swears to uphold the laws of the United States Constitution. No explicit reference is made to the obligation of a lawyer to support or uphold international law, let alone the law of international human rights.

For many practitioners and courts alike, international norms on human rights are irrelevant, for "it is American conceptions of decency that are dispositive." Domestic lawyers, however, more often are invoking the law of international human rights in an effort to expand the protection afforded their clients' civil, criminal, social, political, and economic rights. At times, they succeed. Indeed, courts have entered substantial monetary judgments based on violations of the law of nations or based on violations of federal statutes.
that implicate international human rights principles.\(^3\)

Despite the apparent interest of some judges\(^4\) and the deliberate efforts of international human rights lawyers, acceptance of the Supreme Court's pronouncement in *The Paquete Habana*\(^5\) that "[i]nternational law is part of our law"\(^6\) still is not widespread. Further, even though certain domestic courts' application of international law and comparative constitutional law norms "is a step forward," little assurance can be had that these courts' decisions comport with the decisions of other tribunals, particularly those that focus on human rights, such as United Nations treaty bodies or regional human rights treaty bodies, and vice versa.\(^7\) The likelihood of inconsistency is magnified given that, at any moment, numerous United States courts may be reviewing cases that involve what even legal scholars admit is an evolving concept.\(^8\)

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5. 175 U.S. 677 (1900).

6. The Paquete Habana, 175 U.S. 677, 700 (1900). The Supreme Court found that the capture of two Cuban fishing vessels by the United States was unlawful and without probable cause. *Id.*


Within this fragile environment works a unique group of professionals, the lawyers. As the gatekeepers of justice, lawyers play an essential role. Lawyers, with specialized training and skills, have a license that enables them to appear in court to protect and promote rights. The rights at issue here are those that each individual has against the state because of his or her status as a human being. They are human rights. These rights have become of paramount importance during this century, in large part due to the deliberate efforts of lawyers, namely, international law professors, attorneys for various international human rights groups, and interested private practitioners. One international lawyer poignantly summarized the role of these lawyers: "It is somewhat paradoxical that the once-impregnable walls of the sovereign State, so carefully constructed by the jurists of the nineteenth century, are now being dismantled by the innovative and ingenious techniques of the jurists of the twentieth century."

This paper discusses the future role of the lawyer in international human rights. Its framework is based on Professor Anthony Kronman's observation in The Lost Lawyer: Failing Ideals of the Legal Profession that the lawyer must be more than a professional who has the "legal know-how." The lawyer in international human rights plays a highly public function. First and foremost, the lawyer must be devoted to the public good as defined by existing or emerging universally-accepted international norms. To paraphrase Professor Henkin, we lawyers must accept international human rights for ourselves.

This devotion means that the international human rights lawyer must continue to invoke universal norms in assuming the traditional and indispensable role as an advocate on behalf of a specific client in a specific dispute. He

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9. For example, paragraph 1 of "Preamble: A Lawyer's Responsibilities" to the Texas Disciplinary Rules of Professional Conduct states: "[A lawyer is a] public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system." TEX. GOV'T CODE ANN. tit. 2, subpart G, app. A; art. 10, § 9 (West Supp. 1998). Similarly, the American Bar Association has recommended that each local bar association adopt "A Lawyer's Creed of Professionalism" that recognizes that a lawyer has "a devotion to the public good."


12. See id. at 14 (stating that "the outstanding lawyer . . . is, to begin with, a devoted citizen").

or she should, however, do more or at least encourage other lawyers to do more. The lawyer must link international human rights law with the public good and exalt the cause of the public good. The lawyer should educate other lawyers, judges, and lay persons about internationally-accepted norms and urge them to use these norms in guiding these persons in their conduct and decisions. Citizens, clients, and government and nongovernment agencies should look to the international human rights lawyer for guidance and advice on the subject. In addition, the lawyer should work with other lawyers from around the world in documenting human rights abuses and monitoring enforcement in domestic and regional tribunals and in insisting that his own federal government submit to international scrutiny.

In sum, the lawyer should be "a public-spirited reformer who monitors [the] framework [of public norms] itself and leads others in campaigning for those repairs that are required to keep it responsive and fair." Absent a broad-based, activist approach, domestic efforts to enforce universally-recognized rights will continue to suffer from an apparent "crisis of legitimacy."

II. The American Lawyer in International Human Rights: A Brief Overview

Lawyers who promote or defend international human rights already serve a public good, one that is defined on behalf of individuals and in terms of internationally-accepted norms. While the public good aspect may be self-evident, a brief review should reaffirm and provide a theoretical basis for this conclusion.

A. International Law and the Public Good

As Professor Henkin remarks, "international non-conventional human rights law is \textit{jus cogens}, or is like \textit{jus cogens}." \textit{Jus cogens}, in turn, reflects "common consensus from which few dare dissent." Some federal courts

14. \textit{KRONMAN}, supra note 11, at 19. In Dean Kronman’s view, these qualities are elements of a "statesman," and those lawyers who possess them and certain other qualities, particularly a proper sense of judgment, fit within the nineteenth century ideal of the "lawyer-statesman." \textit{Id.} at 11-17. For various reasons, I prefer not to equate the "lawyer-statesman" model with the ideal international human rights lawyer, although I agree, as set forth in this paper, that certain attributes of that ideal are essential for the lawyer who seeks to promote or defend international human rights.


17. \textit{Id.} at 38. In a similar vein, the International Court of Justice has written that these norms, which include "principles and rules concerning the basic rights of the human person,"}
have recognized in human rights cases that *jus cogens* means, as the Vienna Convention on the Law of Treaties said, "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."

*Jus cogens* norms reflect the international community’s fundamental values; they are not based on the consent of states. They are so fundamental that they prevail over and invalidate international agreements and other rules of international law that conflict with them. They can be modified or derogated only by a subsequent *jus cogens* norm. Norms of *jus cogens* by definition reflect the public good.

Customary international law that does not rise to the esteem level of *jus cogens*, nevertheless, also is founded on principles of the public good. Customary international law arises from "a general and consistent practice of states followed by them from a sense of legal obligation." It is "international custom, as evidence of a general practice accepted as law." In ascertaining and administering customary international law, courts resort "to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators." International law is to be interpreted as it has evolved and as it exists among the nations of the world today.

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21. *Id.*

22. *Id.* § 102(2).


24. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)). Furthermore, jurists and commentators... by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Id.* at 880-81 (quoting The Paquete Habana, 175 U.S. at 700).

25. *Id.* at 881.
Prime evidence of the customs and usages of civilized nations are human rights treaties and resolutions. Foremost among these are the United Nations Charter and the Universal Declaration of Human Rights of 1948. The Charter, which "heralded also the birth of international human rights," and which in large part was written by lawyers, provides in article 1, paragraph 3 that the United Nations is "[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all." Article 55(c) provides for "universal respect for, and observance of, human rights and fundamental freedoms for all." The Universal Declaration is "the first comprehensive statement enumerating the basic rights of the individual to be promulgated by a universal international organization." It proclaims, among other things, that all human beings (1) "are born free and equal in dignity and rights;" (2) have civil and political rights, including the right to life, liberty, and security of person, the prohibition against slavery, torture, and cruel, inhuman, or degrading treatment, the right to be free from arbitrary arrest, detention, or exile, and the right to privacy, freedom of speech, religion, and assembly;" and (3) have economic, social, and cultural rights, including the right to work and to an education.

Federal courts frequently cite both the U.N. Charter and the Universal Declaration in defining the law of nations. They also have cited the American Convention on Human Rights, the International Covenant on Civil and

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29. Henkin, supra note 16, at 34.
31. Id. art. 55(c), reprinted in INSTRUMENTS, supra note 27, at 10.5. Article 56 provides that Member States "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Id. art. 56, reprinted in INSTRUMENTS, supra note 27, at 10.5.
32. Thomas Buergenthal, International Human Rights Law and Institutions: Accomplishments and Prospects, 63 WASH. L. REV. 1, 6 (1988). Professor Buergenthal also notes that the Universal Declaration "ranks with the Magna Carta, the French Declaration of the Rights of Man, and the American Declaration of Independence as a milestone in mankind's struggle for freedom and human dignity." Id.; see Henkin, supra note 16, at 40 n.31 (stating that Universal Declaration "is perhaps the most important document, excepting only the U.N. Charter").
33. Universal Declaration of Human Rights, supra note 28, art. 1.
34. Id. arts. 3-5, 9, 12, 18-20.
35. Id. arts. 23, 26.
36. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 879-83 (2d Cir. 1980).
NEW CHALLENGES FOR THE AMERICAN LAWYER

Political Rights,\textsuperscript{38} the Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{39} and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\textsuperscript{40} for the conclusion that the prohibition against official torture is a norm of customary international law.\textsuperscript{41} Federal courts have adopted a similar analysis of the Convention on the Prevention and Punishment of the Crime of Genocide\textsuperscript{42} for the proposition that "the proscription of genocide has applied equally to state and non-state actors."\textsuperscript{43} Indeed, "through their repeated reference to the Charter and the Universal Declaration" and other conventions, courts in the United States and abroad have contributed "to the incremental formation of a practice that has now ripened into customary law of international human rights."\textsuperscript{44}

B. Lawyers Promoting the Public Good

Lawyers who represent clients before tribunals seeking relief for violations of customary international law, or who otherwise participate in support of amici curiae or as expert witnesses, are promoting the public good. The same holds true for lawyers who prudently urge the tribunal to follow international human rights law in construing the Constitution or statutes of the United States. Lawyers seek to enforce established norms that reflect fundamental values of the international community in each of these instances. Without enforcement of these universally-recognized rights, the law of human rights merely would be a set of principles without much consequence.\textsuperscript{45}

\begin{itemize}
    \item U.N.T.S. 144 (entered into force July 18, 1978).
    \item 41. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 716-17 (9th Cir. 1992).
\end{itemize}
The seminal case in the United States federal courts, *Filartiga v. Pena-Irala*, exemplifies this point. In *Filartiga*, the plaintiffs, two citizens of Paraguay, sued a Paraguayan official for torturing their son/brother. They alleged jurisdiction under the Alien Tort Claims Act, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The plaintiffs claimed that torture violated the "law of nations," or established norms of the international law of human rights. The district court dismissed the case because the "law of nations" did not concern acts of a Paraguayan official against another Paraguayan citizen. In reversing the district court’s dismissal, the Second Circuit analyzed various sources of customary international law and concluded that "official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." Judge Kaufman, writing for the panel, also noted that "international law confers fundamental rights upon all people vis-a-vis their own governments."

While Judge Kaufman’s detailed examination of the sources of international law and the conclusions he reached based on his examination have proven to be of lasting importance, his concluding paragraph of the opinion is equally compelling. In particular, Judge Kaufman noted that after World War II, civilized nations "banded together to prescribe acceptable norms of international behavior . . . to recognize that respect for fundamental human rights is in their individual and collective interest." The torturer, like the pirate and slave trader before him, had become "*hostis humani generis*, an enemy of all mankind."

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46. 630 F.2d 876 (2d Cir. 1980).
47. *Filartiga* v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
48. *Id.* at 879.
50. *Filartiga*, 630 F.2d at 879.
51. *Id.* at 880.
53. *Id.* at 884.
54. *Id.* at 885.
55. *Id.* at 890 (emphasis added).
56. *Id.*
Filartiga opened the doors of the United States courthouses to other alien tort claims based on violations of the "law of nations." After Filartiga, federal courts have concluded that torture, murder, genocide, and slavery violate *jus cogens* norms of the international community.57 Those who commit these intolerable, inhumane acts are now recognized as the "enemy of all mankind."

Lawyers are indispensable to judicial enforcement of international human rights. In claims under the Alien Tort Claims Act, for example, American lawyers have served as counsel to various foreign plaintiffs. Many of the plaintiffs' attorneys are affiliated with groups such as the Center for Constitutional Rights and International Human Rights Clinic, which are committed to promoting international human rights. Lawyers also have served as counsel for amici curiae, including leading nongovernmental human rights organizations such as Amnesty International, the International League for Human Rights, the Lawyers' Committee for International Human Rights, the International Human Rights Law Groups, and Human Rights Watch. These groups have been at the forefront of the legal effort to implement human rights standards and "in marshaling public opinion against human rights abuses."58

Not to be forgotten are the lawyers for the United States government. In Filartiga, then-Assistant Attorney General Drew Days submitted an amicus curiae brief on behalf of the United States that confirmed "the universal abhorrence with which torture is viewed."59 *Kadic v. Karadzic*60 involved claims of torture, summary execution, acts of genocide, and war crimes under the Alien Tort Claims Act and the Torture Victim Protection Act of 1991 against Radovan Karadzic, the self-proclaimed president of an unrecognized Bosnian-Serb entity.61 The Legal Adviser to the United States Department of State and the United States Solicitor General submitted a "Statement of Interest" that "expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits."62

Lawyers are also involved as expert witnesses in defining the law of nations.63 In *Filartiga* for example, four distinguished international legal scholars submitted affidavits that "the law of nations prohibits absolutely the

57. See United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995).
59. Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (citing and quoting from Memorandum of United States as *Amicus Curiae*).
60. 70 F.3d 232 (2d Cir. 1995).
62. Id. at 250.
63. See supra note 24 (citing *Filartiga*).
use of torture." Law professors also play an important role to the extent that, in determining international law, courts refer to their learned treatises and books. We also should be mindful that some lawyers are judges. Federal judges are enforcing universally-accepted human rights in cases in which a federal statute, such as the Alien Tort Claims Act, prescribes application of the "law of nations." Certain judges look more frequently to international human rights law in analyzing what may appear to be routine domestic disputes. In other words, they are incorporating international human rights law into United States constitutional and statutory standards.

In *Alabama v. Engler*, for example, the Sixth Circuit concluded that it was required under the Constitution to extradite an inmate from Michigan to Alabama, even though Alabama uses the chain gang and one of its state senators recently had declared that slavery was "good for blacks." Judge Jones commented that "I only wish, however, that penal institutions will soon shed rather than irrationally embrace socially vindictive policies and procedures soundly condemned as violations of international human rights norms." Another example may be found in *Lipscomb v. Simmons* in which the court struck down as violative of the Fourteenth Amendment Oregon's practice of declaring that foster children who lived with relatives were ineligible to receive state funds because it denied the children the right to choose to live with family members. The court stated that the right to associate with family members is fundamental, citing the Universal Declaration, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. In a habeas case, *Caballero v. Caplinger*, a federal district court held that a federal statute allowing indefinite detention of an alien without the opportunity to have a bond hearing violated the Eighth Amend-

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64. *Filartiga*, 630 F.2d at 879 & n.4 (referring to affidavits of Richard Falk, Albert G. Milbank Professor of International Law and Practice at Princeton University and former Vice President of American Society of International Law; Thomas M. Franck, Professor of International Law at New York University, Director of New York University Center for International Studies, and current President of American Society of International Law; Richard Lillich, Howard W. Smith Professor of Law at University of Virginia School of Law; and Myres MacDougal, Sterling Professor of Law at Yale Law School and past President of American Society of International Law).
65. 85 F.3d 1205 (6th Cir. 1996).
67. *Id.* (Jones, J., concurring).
68. 884 F.2d 1242 (9th Cir. 1989).
70. *Id.* at 1244 n.1.
In support, Judge Berrigan cited the United Nations Charter, the Universal Declaration of Human Rights, and various conventions as representing "the collective consciousness of the international community, creating a hope if not an expectation of adherence."73

III. Toward a Broader, More Activist Approach for the American Lawyer in Recognizing and Enforcing International Human Rights

All lawyers are acting in the public good in promoting and defending international human rights. As a result of their work, certain United States courts have risen above the shield of sovereignty and have applied international law in recognizing specific universal human rights and in imposing remedies for violations of these human rights.74 But few United States courts have done so. Furthermore, the "well-established, universally recognized norms of international law" that have received judicial acknowledgment are few in number.

Lawyers need to continue to do what they do best in promoting the rule of law; in other words, they should be advocates. They must, however, expand and intensify their efforts on all fronts, and this means going beyond judicial tribunals. Furthermore, they need to become more organized, methodical, and efficient in the process.

A. Organizing and Educating Lawyers

In a recent law review article, two economists argue very persuasively that changes in the law occur, in part, not because of judges' preferences or even because of the preference of the litigants, but because of the preferences of lawyers.75 The law will "come to favor organized interest groups."76 When

73. Id. at 1379. Professor Lillich has observed that "[i]t's indirect incorporation' of both conventional and customary international human rights law is an exceptionally promising approach warranting even great attention and increased use in the future." Lillich, supra note 26, at 859-60. He also noted that this approach is not new; 40 years ago, Professor Schacter stated that "[i]t would be unrealistic to ignore the influence . . . of the Charter as a factor in resolving constitutional issues which hitherto have been in doubt." Id. at 860 n.48 (quoting Oscar Schacter, The Charter and the Constitution: The Human Rights Provisions in American Law, 4 VAND. L. REV. 643, 658 (1951)).
74. See supra notes 36-73 and accompanying text (describing Filartiga and other cases citing international law sources). But see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 805 (D.C. Cir. 1984) (Bork, J., concurring) (stating that it would violate separation of powers for plaintiff to have standing to sue for violation of international law).
76. Id. at 825.
no other organized parties with strong interests rise to the front in a specific matter, the law should tend to favor the interests of the lawyers.\textsuperscript{77}

Organized bar associations and other collections of lawyers, whether they be international, national, or regional in scope, either are, or have the potential to be, powerful interest groups. Indeed, it was nongovernmental human rights organizations, such as the International Commission of Jurists, a group of lawyers and judges "with a mission to develop the rule of law in the human rights area" that led the charge against human rights abuses.\textsuperscript{78} During the mid- and late-1970s, the International Bar Association, the American Bar Association, and the Union of Advocates "started to endorse human rights treaties and monitor human rights abuses and send observers to trials of human rights advocates."\textsuperscript{79} The Lawyers Committee "report[ed] on and help[ed] redress human rights abuses."\textsuperscript{80} These organizations have "become a significant nongovernmental force" because they have access to lawyers, as a whole, and to government leaders.\textsuperscript{81}

But as one observer properly notes, "[t]he struggle to secure fundamental human rights is ultimately a local struggle."\textsuperscript{82} All of the work of international and national bar associations could be for naught if lawyers at the local level are not involved. State bar associations, and possibly county bar associations, should have sections that at least address international human rights issues. Law schools also should hold classes and conduct seminars on the subject and offer practitioners continuing legal education on international human rights.

Finding interested lawyers at the local level should not be too difficult. In particular, criminal defense attorneys would be a good starting point. For example, a federal statute enacted within the last fifteen years permits pretrial seizure of an accused's assets when those assets are proven to be the product of criminal activity.\textsuperscript{83} The federal government has applied this statute to seize defense attorney's fees.\textsuperscript{84} An argument could be made, however, that the fee seizure statute violates international human rights law because it effectively deprives the defendant of the benefits of the presumption of innocence.\textsuperscript{85}

\textsuperscript{77} Id.
\textsuperscript{78} Shestack, supra note 45, at 561.
\textsuperscript{79} Id. at 562.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 562-63.
\textsuperscript{82} Thomas, supra note 15, at 16.
\textsuperscript{84} United States v. Monsanto, 491 U.S. 600, 607 (1989).
Similarly, for those criminal defense attorneys who work in one of the thirty-eight states in the United States that imposes capital punishment, understanding of the role of various international conventions and declarations and of the opportunity to file claims before regional tribunals, such as the Inter-American Commission on Human Rights, is becoming more important now that state and federal habeas review processes are being streamlined.86

The evolving law of international human rights also is relevant to the work of many private civil attorneys. For example, in *National Coalition Government of Burma v. Unocal*,87 the plaintiffs alleged that Unocal was liable under the Alien Tort Claims Act for alleged human rights abuses occurring at a gas pipeline project in Burma.88 Unocal moved to dismiss on the grounds that it was not a state actor as required for liability under the Alien Tort Claims Act.89 The court held that plaintiffs' pleading of a joint venture relationship between Burma and Unocal was sufficient to state a claim because "Unocal may have been 'a willful participant in joint action with the State or its agents.'"90 If Unocal ultimately is held liable under a joint-venture theory, no doubt more plaintiffs' attorneys will be looking for creative ways to sue solvent multinational corporations for international human rights abuses.91

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89. *Id.* at 335.

90. *Id.* at 348 (quoting Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989)).

91. *But see Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 384 (E.D. La. 1997) (dismissing plaintiff's claims for cultural genocide, human rights violations, and international environmental torts). In *Beanal*, an Indonesian citizen filed a class action lawsuit against Freeport-McMoRan and a related entity under the Alien Tort Claims Act and the Torture Victim Protection Act. *Id.* at 366. Plaintiff alleged that Freeport violated the law of nations, namely that it engaged in environmental torts, human rights abuses, and cultural genocide. *Id.* The claims arose from Freeport's operation of an open pit copper, gold, and silver mine in Irian Jaya, Indonesia. *Id.* Plaintiff alleged that Freeport's security guards "in conjunction with third parties" engaged in arbitrary arrest and detention, torture, surveillance, and destruction of property that caused severe physical pain and suffering. *Id.* at 369. Plaintiff also alleged that Freeport engaged in "cultural genocide" through the "deliberate, contrived and planned cultural demise of the Amungme culture," of which plaintiff is a member. *Id.* The district court
Federal judges also should receive training in the law of international human rights. The session at the 1996 Judicial Conference of the Second Circuit devoted to international human rights was enlightening as evidenced by the follow-up questions and comments. A similar session for judges in all of the other ten federal circuits could perhaps make the federal judiciary "familiar with the law of nations," so that they may feel more "comfortable navigating by it."  

B. Educating the Public

Lawyers should educate the general public about universal human rights norms as part of their civic obligations. They should express concern when human rights are violated and not be deterred if their statements possibly could be construed to interfere improperly with the affairs of the State. They should advise the public about the need for the United States to subject itself

disclosed the complaint without prejudice under Federal Rule of Civil Procedure 12(b)(6). Id. at 384. It first concluded that, under Kadid, certain of the alleged acts violated the law of nations, regardless of whether they were committed by a state or private actor (for example, genocide), whereas other conduct violated the law of nations only if committed by a state actor (for example, murder and torture). Id. at 371. The district court found that plaintiff had not pleaded genocide because it did not plead that Freeport committed acts with the intent to destroy the Amungme group, as opposed to its culture. Id. at 372-73. The court also dismissed the claims requiring state conduct on the grounds that plaintiff had not pleaded that Freeport acted under color of state law. Id. at 374, 380. Moreover, it dismissed plaintiff's claim under the Torture Victim Protection Act on the grounds that that statute does not apply to a corporation. Id. at 381-82. Finally, the court ruled that plaintiff's international environmental torts claims "do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content." Id. at 384. After the original dismissal, plaintiff filed two other amended complaints, both of which were dismissed and the latter of which was dismissed with prejudice. Beanal v. Freeport-McMoRan, Inc., Civ. No. 96-1474 (E.D. La. Mar. 3, 1998). The case is on appeal to the United States Court of Appeals for the Fifth Circuit.

92. See supra note 4 (describing conference).

93. Judicial Conference, supra note 4, 170 F.R.D. at 312-14. For example, Judge Jacobs asked whether if Canada enacted a law comparable to the Alien Tort Claims Act, a judgment could be entered and enforced against the Governor of Texas for violating international norms, including torture, for holding prisoners on Texas's death row. Id. at 312. Judge Laval asked if state actors who participate in the death process could be held accountable if an international criminal tribunal is ever established that would have jurisdiction over all crimes against humanity. Id. at 314.

94. Harry A. Blackmun, The Supreme Court and the Law of Nations, 104 YALE L.J. 39, 49 (1994) (observing that Supreme Court "enforces some principles of international law and some of its obligations some of the time" and reasoning that it appears this is so because of Court's concern about separation of powers and judicial competence and because modern jurists lack diplomatic experience of early Justices).

NEW CHALLENGES FOR THE AMERICAN LAWYER

II

to monitoring so that it could "be said to truly follow the ideas of the protec-
tion of human rights and can also speak with much more legitimacy when [it]
address[es] human rights concerns or violations in other States."96 As one
United Nations official remarks:

Irrespective of where we serve in the legal community, however, we all have
a special responsibility to advance human rights. We are privileged be-
cause we have had the opportunity of studying the role of human rights in
society under the rule of law. We have an obligation to share this knowl-
edge with others. For a genuine observation of human rights, it is impor-
tant that this knowledge also be spread to the grass roots.97

C. Litigation

When appropriate, lawyers should continue to assert claims based on
international human rights norms. As the Filartiga court recognized, stan-
dards of international law are "evolving," and the courts should apply the
international law in effect when the issue is raised.98 Thus, the lawyer needs
to keep abreast of all of the new developments from whatever possible
sources, including new conventions, declarations, and cases.

Lawyers should act deliberately in identifying those norms that are
sufficiently specific, universal, and obligatory to meet the test of Filartiga.
For example, the Ninth Circuit in Hilao v. Estate of Marcos99 held that while
"cruel, inhuman, or degrading treatment" is a universally-recognized norm
under international law, it is not sufficiently specific to allow a claim for its
violation under the Alien Tort Claims Act.100 But the district court in Xuncax
v. Gramajo101 found that torture, ransacking of homes, and bombings qualify
as specific examples of "cruel, inhuman or degrading" activity in violation of
international law.102 Clearly, over the next few years, parties will litigate the
scope of "cruel, inhuman or degrading."103

96. Id. at 525.
97. Id. at 528-29.
98. See supra note 25 and accompanying text (citing Filartiga).
99. 103 F.3d 767 (9th Cir. 1996).
100. Hilao v. Estate of Marcos, 103 F.3d 767, 795 (9th Cir. 1996).
103. Another example of the area in which more litigation is likely is "international
(S.D.N.Y. Apr. 11, 1994); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 670 (S.D.N.Y.
1991); I PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: FRAMEWORKS, STANDARDS
AND IMPLEMENTATION 183-86 (Philipe Sands ed., 1995)).
Further, lawyers should be mindful of the Torture Victim Protection Act, which now provides a federal cause of action for official torture and extrajudicial killing. 104 But they should also realize that the Torture Victim Protection Act requires a showing that the individuals who have committed torture or extrajudicial killing must have acted "under actual or apparent authority, or color of law, of any foreign nation." 105

It is likely that Congress will enact new laws that require courts to examine international human rights principles. For example, the Antiterrorism and Effective Death Penalty Act of 1996 106 may prompt important decisions on issues such as exemption from the sovereign immunity doctrine and state-sponsored terrorism.

At all times, though, the lawyer should examine each case from the perspective of relevant international human rights principles and, when appropriate, attempt to incorporate those principles into the analysis. As the late Professor Lillich wrote, using the "'indirect incorporation' approach seems to be a sensible strategy for human rights lawyers and a wise policy for U.S. courts concerned with developing the promising relationship between the U.S. Constitution and international human rights law." 107

IV. Conclusion

Professor Kronman reminds us that lawyers should aspire to serve the public good, to be devoted citizens committed to the spirit of the law. As such, we must be advocates for international human rights. And we must do more.

On the day Justice Blackmun announced his retirement from the Supreme Court, he just happened to be giving the keynote address at the Annual Meeting of the American Society of International Law. That day also coincided with Professor Henkin's retirement as President of the Society. Justice Blackmun's concluding statement was a simple reminder to everyone of the work that remains: "I look forward to the day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind." 108 For that day to ever come, we as lawyers must assume our solemn responsibilities on behalf of all of mankind.

104. See supra note 61 and accompanying text (discussing claims in Kadic).
106. See supra note 3 (discussing case finding violation of Act).
107. Lillich, supra note 26, at 860 (footnote omitted).
The Right of Self-Determination in the Twenty-First Century

Hurst Hannum*

I. Introduction

One can address the right of self-determination from a number of different perspectives. For example, the exercise of this right in the past decade has had a dramatic effect on theories of international organizations, the role of force, and conflict resolution. Claims of self-determination led in part to the destruction of the former Yugoslavia, and the specter of secessionist movements has magnified the attention given to the rights of minorities and indigenous peoples.

In the following discussion, I will link self-determination to human rights in two different ways. First, I explore self-determination as a human right, addressing issues of content and definition. Second, I discuss the impact of self-determination claims on other human rights.

II. Self-Determination as a Human Right

Self-determination is a human right. Although there are many hortatory references to self-determination in General Assembly resolutions and elsewhere, the only legally binding documents in which the right of self-determination is proclaimed are the two international covenants.1 The first paragraph of common article 1 states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."2

Although the quoted language fails to answer several questions, at least some aspects of the right have become clear through subsequent reflection and

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2. International Covenant on Civil and Political Rights, supra note 1, art. 1; International Covenant on Economic, Social and Cultural Rights, supra note 1, art. 1.
interpretation. The first clarification is that self-determination is a right that belongs to collectivities known as "peoples," not to individuals. Thus, the Human Rights Committee has consistently made clear that claims that the right of self-determination has been violated cannot be raised under the First Optional Protocol, which applies only to individuals.\(^3\) I think that the Committee is probably wrong to exclude self-determination claims automatically from the scope of individual complaints, but its jurisprudence has been consistent on this point.

It also is clear that self-determination is a right that belongs to peoples, but not to minorities.\(^4\) This truism may only shift the debate to definitions and semantics, but the distinction between minorities and peoples remains an article of faith for states and international bodies concerned with monitoring human rights.

There are numerous problems in defining both "peoples" and what they are entitled to "determine." Without reviewing the entire history of self-determination, let me just outline how the concept has passed through at least two distinct phases and is now entering a third one.\(^5\) Initially, meaning perhaps the middle of the nineteenth century when the phrase "self-determination" came into common usage, self-determination was not a right but was a principle. It was a principle that first allowed disparate people who spoke the same language, such as Germans and Italians, to group themselves together and form a new state. This "grouping," of course, did not occur without coercion and, in some cases, a good deal of violence. A bit later, at the end of World War I, the principle of self-determination provided a guiding principle or rationale for dismembering the defeated Austro-Hungarian and Ottoman empires.

As a political principle, but not a right under international law, self-determination in this period was subject to many limitations. The most obvious limitation, consistent with \textit{realpolitik} concerns, was that the successful exercise of self-determination required the support of the victorious powers if there had been a war or the support of major powers even absent a war. Philosophically, "external" self-determination or independence would be rejected if the resulting state would not be economically and politically viable. Self-serving political restrictions made the principle of self-determination applicable to Europe, for instance, but not to colonial empires; thus to Poland, but not to Ireland.


\(^4\) \textit{See id.}

Following a somewhat confused period between the two world wars, the adoption of the United Nations Charter in 1945 marked the beginning of the second phase. This second phase began, as did the first phase, by identifying self-determination as a principle rather than as a right. Self-determination was proclaimed in a manner that did not necessarily require the dismemberment of colonial empires; if it had included such an understanding, Britain, France, and Belgium simply would not have adhered to the Charter. Yet, at the same time, use of the word "peoples" must have implied that self-determination meant more than simply a reaffirmation of the sovereign equality of states.

This situation gradually changed, and I think that one of the great contributions of the United Nations to international law was in promoting the shift from proclaiming a principle of self-determination in the Charter to recognizing a right of self-determination some twenty years later. The problem is that, during this transition, the United Nations continued to refer rhetorically to the right of all peoples to self-determination, when what it really meant was the right of colonial territories to independence. And those are two very different concepts.

Self-determination from 1960 on, at least as articulated by the United Nations, had nothing to do with ethnicity, language, or culture. Although there were some exceptions – the division of British India, Rwanda-Urundi, and a few others – the accepted mantra was that colonial territories would become independent. It did not matter how many "peoples" were found within them, although obviously each contained many different peoples, nations, and ethnic groups. Thus, in general, territories, not peoples, enjoyed the right to independence.

It was also clear during this period that, although there were other theoretical options – for example, Hawaii and Alaska exercised their right to self-determination by becoming part of the United States – the international preference was for independence. This result could, and often was, achieved with only minimal preparation or even consultation with the colony concerned, although any option other than independence, such as free association or full integration, required the full and informed consent of the people involved.


8. See Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called For Under Article 73e of the Charter,
Thus, in the second half of the twentieth century, a territorial right to independence for former colonies replaced the nineteenth century principle of allowing ethnic, linguistic, or religious groups to form various kinds of political units that might or might not become independent states. In the post-colonial period, what I would identify as the third phase of self-determination, some are attempting to join those two principles in order to create a new right in international law: the right of every people—defined ethnically, culturally, or religiously—to have its own independent state.

Although this new position has its adherents, it is clear that international law has not yet recognized such a new paradigm. One reason for this is that, because practically all of the world’s surface is now divided among sovereign states, self-determination defined as the right to create a new state would necessarily imply a right to secession. However, no state, no foreign ministry, and very few disinterested writers or scholars suggest that every people has the right to a state, and they implicitly or explicitly reject a right to secession.  

This is the current state of international law, whether one is talking about popular groups like Tibetans or unpopular groups like Tamils in Sri Lanka. There simply is no right of secession under international law, nor has there been even preliminary agreement on the criteria that might be used in the future to determine when secession should be supported. Of course, there is no prohibition in international law against secession, either. If a country disintegrates as the result of a civil war, international law poses no barrier to recognition of the two or more succeeding states. That is, however, a quite different position than recognizing the right of a group to secede from an existing state.

Cementing the world’s frontiers forever is an overly conservative position, however, and I would like to suggest at least two exceptions to the no-right-to-secession rule that I articulate. The first exception would recognize a right of secession when there have been massive and discriminatory human rights violations that approach genocide. The violations need not constitute genocide under the technical definition of that term, but I do believe that they must be both massive and discriminatory. So-called "cultural genocide," for example, in which a culture may be radically affected by modernization or by a surrounding dominant culture but not otherwise subjected to human rights


9. There are today only 17 non-self-governing territories recognized by the United Nations, most of which are small islands controlled by the United Kingdom or the United States.

violations, would not justify secession. Rather, this category seeks to provide a remedy in those rare situations in which there is an explicit attempt to destroy a culture or people. One could argue, although one would have to look at the facts very closely, that the repression of Kurds in Iraq and conceivably Tibetans might be among the situations that would fall into this exception.

The other and more difficult exception might arise when a group, community, or region has been systematically excluded from political and economic power or when a minimum level of minority rights or a reasonable demand for self-government has been consistently denied. I want to emphasize that this exception would not apply when a central government refuses to agree to whatever the minority or the region wants. Rather, it would apply only when the central government has been so intransigent that, for example, it refuses to allow the minority to speak its own language, it excludes minority members from participation in the parliament, or it refuses to accede to demands for minimal local or regional power-sharing.

Leaving aside these two possible exceptions to the rule, I now return to the basic proposition that self-determination today does not mean either independence or secession. If that is correct, is there any reason that we still talk about self-determination as a human right? Is there anything left of it? I would suggest that there is. What is left—the contemporary content of self-determination—reflects the right's position in the two covenants and offers an opportunity to ensure that it continues to have meaning and validity into the next century.

Here, too, I am suggesting what the law should be, rather than describing what I think it is at present. First, we should keep in mind that self-determination, except in the narrow context of decolonization, is not absolute. This point should not be surprising, because there are very few absolute rights. Recognizing that one has a right to self-determination does not imply that one can always exercise the right to its maximum extent any more than exercising the right to free expression means that one is absolutely free to say whatever one wants under all conceivable circumstances.

I suggest that we can find meaningful content to self-determination by looking at two other human rights, or at least aspects of two human rights, on which there is a much greater degree of consensus than is the case if one focuses on self-determination per se. These related rights are as follows: (1) the protection of the cultural, religious, linguistic, and ethnic identity of individuals and groups; and (2) the right of individuals and groups to participate effectively in the economic and the political life of the country.

Protecting the identity of groups is not very popular in the United States or in some other countries, such as Sweden. It is clear, however, that, particu-
larly during the past decade, greater attention is being given to the issues of minority and indigenous rights, reflecting what I believe is a consensus on the importance of preserving one's identity both as an individual and as a member of a group. Related to this is a growing consensus that diversity and pluralism are, in themselves, worthwhile goals to pursue. Thus, there is room to include protection of identity in a contemporary understanding of self-determination.

The second aspect, participation, is derived to some extent from economic development discussions, in which the right of popular participation in decision-making was identified as a way of ensuring that assistance received by states would better serve the purpose for which it was intended. This concept was extraordinarily subversive, because, once one effectively participates in economic decision-making, a need to participate effectively in all sorts of other decision-making processes almost inevitably follows.

More recently, the belief that a new democratic era has arrived has reinforced this notion of participation. Determining what is and what is not effective participation is, of course, difficult. Ensuring participation opens up a whole range of possibilities, ranging from representation in the central government to different forms of federalism, consociationalism, and autonomy. As a principle, however, it is not inherently less manageable than due process or fair trial, even if the answer to whether the people in a particular region or group participate effectively in governing themselves, both through the central government and locally, is not always immediately apparent. The idea of effective participation identifies another component of self-determination that should not be overly threatening to the states that are expected to implement it.

A final suggestion in defining self-determination for the twenty-first century is to impose a limit or a price on its exercise by requiring that any ethnic group that succeeds in establishing a new state based on principles of ethnicity, religion, language, or culture should be willing to grant to other groups within the new state the same right of self-determination and secession that it has just exercised. Pursuant to this principle, Serbs would have had a right to secede from Croatia and Bosnia-Hercegovina, and Crees would be able to leave an independent Quebec. Such a principle might cause potential


12. I remain disturbed by the fact that the Clinton Administration decided to rename the Bureau of Human Rights the Bureau of Democracy, Human Rights and Labor. This suggests that neither democracy nor labor is included in human rights or that democracy and labor are somehow more important than human rights. Both are dangerous positions to maintain.
secessionists to think more carefully about the consequences of their actions
and would give newly trapped minorities a way out without resorting to
violence.

Even with, or perhaps because of, the exceptions and the nuances I
outline, self-determination as a human right remains relatively vague. Unfor-
tunately, it is unlikely that any existing human rights mechanism or even a
new mechanism will be of much assistance in defining the right in the foresee-
able future, because few states are willing to allow an international forum to
judge a situation that might, if a claim to self-determination and secession is
upheld, result in the destruction of the state itself. Some things are too impor-
tant to be left to lawyers, and I think that self-determination might be one of
those issues.

III. Impact of Self-Determination Claims on Other Human Rights

The situation in Kosovo and recent statements by the U.S. House of
Representatives and Secretary of State Madeline Albright demanding that
Serbia recognize the "legitimate rights" of the people of Kosovo raise several
questions: What are those rights? Do they have anything to do with human
rights? Does the United States support the political goal of an independent
Kosovo or a Kosovo united with Albania? Do Kosovo Albanians have a right
to autonomy? Do they have a right to return to the status they enjoyed in
Yugoslavia in 1989, even though we certainly are not returning anything else
to its 1989 position? The obvious danger is that, whenever self-determination
is involved, a destructive confusion of political goals, basic human rights
norms, and humanitarian issues may make it more difficult to deal with any
of these aspects successfully.13

The other potential impact of self-determination claims is to encourage
violent conflict. Although it is a truism, it needs to be reiterated that more
human rights are violated during wars than at any other time. If policymakers
do not arrive at a better understanding of how to respond to claims for self-
determination, such claims are likely to increase. It is very likely that the
number of violent conflicts will increase as well, and increased conflict will
have a direct impact on the entire gamut of international human rights.

At the same time, I think that if we reverse the lens and look at "ordinary"
human rights first, and if we can imagine that all the human rights that we
want to have protected are protected, violence is much less likely to ensue.
Disputes over self-determination will not disappear, but they will be resolved

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13. For further discussion of these issues, see Hurst Hannum, Whose Rights in Kosovo,
and Just What Rights? It is Unclear What is Being Demanded of Serbia, BOSTON GLOBE, Apr.
by countries such as Canada, the United Kingdom, and Belgium, as opposed to being decided by countries such as Russia or Yugoslavia. If one creates a genuinely democratic rights-respecting regime, it is less likely that people will want to leave it. If, however, they do leave it, it is also more likely that any separation will occur peacefully.

This approach suggests that, even when self-determination is purportedly the issue, it is better to try to address denials of human rights before trying to address the denial of so-called self-determination. As a practical matter, a nongovernmental organization or human rights activist is more likely to be able to influence a government by focusing on respect for human rights than by entering the quagmire of self-determination and secession. I think that one is also more likely to protect what we would all agree are human rights — for example, physical integrity, use of language, and protection of culture — without confusing those rights with political goals. Even if we may share some of the latter goals, it is essential to keep them distinct from the universally recognized and legally articulated provisions of international human rights law.

IV. Conclusion

For better or for worse, self-determination will not disappear as an issue that has the potential to create serious conflict in the future. Self-determination is not a new issue, however. Self-determination claims did not start at the end of the Cold War, as numerous conflicts in Africa and Asia remind us. But we do need to guard against the usurpation of the slogan and the symbol of self-determination and its use as a purely partisan political tool by both governments and disaffected groups. Because self-determination is such an emotional concept, appeals by "ethnic entrepreneurs" are always likely to create an atmosphere in which violence and greater violations of human rights are more, rather than less, likely. This position may be relatively conservative, but I believe that it is a solid human rights position.

As the immortal Mick Jagger said, "You can't always get what you want/You can't always get what you want/But if you try sometimes/You just might find/You get what you need."14

14. ROLLING STONES, You Can't Always Get What You Want, on LET IT BLEED (Decca Records 1969).
The Mid-Life Crisis of the Universal Declaration of Human Rights

Hilary Charlesworth

I. Introduction

A half century in a human life is regarded as a particularly significant anniversary because it is viewed as mid-life - fifty years is at least the halfway point in a person's earthly existence. We anticipate that, by the age of fifty, a person is at the apogee of their development. We expect them to have fulfilled any promise they showed as a young person and to have tied up loose ends. We are impatient with any signs of unexploited talent and missed opportunities. At the same time, the age of fifty is sometimes associated with mid-life crises that propel middle aged individuals into dramatic change in personal relationships or in work. Mid-life crises take a variety of forms. Sometimes a mid-life crisis is an attempt to live a more authentic existence, an existence that is truer to the real desires of the person than the imposed traditional lifestyle they previously have followed. Other mid-life crises may be attempts to slough off responsibilities and to cling to a youth that has passed.

These somewhat contradictory currents are implicated in the fiftieth anniversary of the Universal Declaration of Human Rights (Universal Declaration).1 Some reactions to the fiftieth anniversary will be purely celebratory - it is, after all, a great feat that this set of human rights standards adopted in the tense post-war world has achieved widespread acceptance, at least in the sense that no state has denounced it, and more positively in the sense that it has been widely implemented in national legal systems. Other responses to the fiftieth anniversary will be tempered by the sustained resistance to many of the Universal Declaration's provisions. Some states are reluctant to be bound fully to the treaty translations of the Universal Declaration's provisions. Some states claim that the Universal Declaration and the United Nations (U.N.) system of human rights protection is a reflection of Western values and therefore is a vehicle of cultural imperialism. Some activists and scholars claim that in our

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globalized world, the provisions of the Universal Declaration are completely inadequate to respond to the real threats facing humanity.

In this paper, I focus on one element of mid-life benchmarks: What relevance is the Universal Declaration — and the body of human rights law it has generated — to women's lives around the world? My argument is that the Universal Declaration can be likened to a certain type of fifty-year-old man. It was born in an era when the rights of men to control and dominate the public spheres of the economy, politics, law, and culture were unquestioned. It may have been shaken a little by the increasing claims of women to participate in life beyond the private sphere, but it nonetheless has settled into a rather self-satisfied middle age in which society accommodates women by changing slogans or vocabulary. The Universal Declaration needs a mid-life crisis of identity to force it to reexamine its existence in a radical way and to launch it into an energetic middle age that is not set in traditional male patterns. This is, of course, an unpredictable journey that may antagonize those who have relied on the Universal Declaration as a stable symbol of international values.

First, I will set forth the limited attention that the text of the Universal Declaration gives to women's lives. Then, I will describe some of the recent feminist critiques of the U.N. human rights system and the U.N.'s responses to these critiques. Finally, I will present some possible outcomes of a productive mid-life crisis of the Universal Declaration.

II. Text of the Universal Declaration

Eleanor Roosevelt chaired the Commission on Human Rights's (CHR) drafting committee that was responsible for the Universal Declaration. All of the other committee members were men. The language of the Universal Declaration reflects this uneven representation of the sexes. The new Commission on the Status of Women (CSW), however, kept a watching brief on the creation of the instrument. John Humphrey's account of the drafting of the Universal Declaration notes that the CSW successfully objected to Rene Cassin's draft of article 1 that stated: "All men are brothers. Being endowed [with] reason, members of one family, they are free and possess equal dignity and rights." The final version of article 1 refers to human "beings" as born free and equal in dignity and rights, but article 1 nevertheless retains a reference to "the spirit of brotherhood." Throughout the Universal Declaration, "man" is used as a general category (although the terms "human beings" and "person" are also used) and the male pronoun is used consistently. We now

3. Universal Declaration of Human Rights, supra note 1, art. 1.
4. Id.
know that such word use is significant in reinforcing hierarchies based on gender, even if the drafters intended the language to be generic. The origins of the use of the masculine as generic were to give prominence and deference to men.\(^5\) It is still often unclear whether a writer’s intention in using masculine terms is to signify a generic category. As Helen Bequaert Holmes writes regarding the use of "generic" masculine terms, "[a] man is sure that he is included; a woman is uncertain."

The Universal Declaration does, however, implicitly or explicitly acknowledge women in a number of articles. Article 2 promises entitlement to the rights set out in the Universal Declaration "without distinction of any kind," including sex.\(^7\) A more general guarantee of nondiscrimination in article 7 does not refer to any categories of discrimination.\(^8\) Article 16 sets forth the right for "[m]en and women of full age" to marry and to have a family.\(^9\) The right to an adequate standard of living in article 25 refers specifically to the need for security in the event of widowhood.\(^10\) It also states that "[m]otherhood and childhood are entitled to special care and assistance."\(^11\)

The Universal Declaration’s acknowledgment of women’s lives clearly is quite limited. Women enter the picture only insofar as they are connected to men. The Universal Declaration depicts women as wives and mothers and, in the latter capacity, as particularly vulnerable individuals. The constant references to the family in the Universal Declaration reinforce the restricted image of women. In fact, the Universal Declaration presents the family as "the natural and fundamental group unit of society" and as a unit that is "entitled to protection by society and the State."\(^12\) The language of the Universal Declaration suggests that a family comprises only a heterosexual married couple and their offspring. Indeed, the Universal Declaration assumes that the primary purpose of marriage is to have children. In a marriage, a woman will be economically dependent on her husband such that, if she is widowed, she will have a special claim to social security.\(^13\) One could interpret the Universal Declaration as indicating that the right to leave a marriage is very limited, although the Universal Declaration does provide equal rights to men and

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7. Universal Declaration of Human Rights, supra note 1, art. 2.
8. See id. art. 7 (implying that women and men enjoy same protections under law).
9. Id. art. 16.
10. See id. art. 25 (stating that everyone has right to adequate standard of living).
11. Id.
12. Id. art. 16.
13. Id. art. 25.
women on dissolution of marriage. The Universal Declaration's emphasis on the family as the foundation of society also may suggest that human rights are not applicable within the family context. The sacrosanct image of the family in the Universal Declaration discourages proper scrutiny of whether the rights to life, liberty, freedom from slavery, and security of the person are realized within particular family contexts.

Fifty years after its drafting, we can see that the Universal Declaration has limits. For example, the Universal Declaration contains no reference to self-determination nor to the rights of minorities. Can we now single out its provisions and silences with respect to women? One might argue that this would be an unfair use of current standards to assess a fifty-year-old document. However, international concern with the position of women in particular contexts was well-established at the time of the drafting of the Universal Declaration. For example, prior to the Universal Declaration, there were conventions on trafficking in women and on women in the work place. This suggests that human rights relevant to women's lives were seen as a discrete and separate category to the "general" human rights guarantees that were designed with men in mind. Moreover, the Universal Declaration's image of women is reflected in all of the subsequent "general" international human rights treaties. These documents similarly rely on a generalized male experience and attend to a very limited notion of women's lives. Women's submission to male authority appears as a "natural" consequence of their reproductive role. In other words, as Spike Peterson writes, "a woman's capacity for biological reproduction becomes essentialized as her nature; the 'givenness' of this capacity is then extended to the entire process of social reproduction, thereby consigning women to a restricted 'family' domain."

The Universal Declaration, then, began its life with a limited acknowledgment of women's lives and of the different human rights issues that women face. Much of the extensive literature on the Universal Declaration reinforces this lack of relevance that the Universal Declaration has to women's lives. For example, a volume of essays published to commemorate the thirtieth anniversary of the Universal Declaration did not contain any reference to women's human rights. It identified the major unfinished business as implemen-

14. Id. art. 16.
15. See Holmes, supra note 6, at 253.
18. Id.
According to these essays, the first standard-setting phase of the human rights system was largely complete. The only question that the authors raised regarding the nature of the standards was a concern about the differing concepts of human rights that were held by Western, Socialist, and Third World states. The contributors to the book cautioned against abandoning the notion of universality of rights and argued that "certain common values . . . transcend differences of race, faith, political structure, culture and economic development . . . which are based on the equality, freedom and solidarity of all men."

III. Feminist Critiques of the U.N. Human Rights System

Although treaties devoted to particular rights of women were adopted by the U.N. system in the 1950s, recognition that the U.N. human rights system did not adequately respond to women's situations did not begin until after the 1975 Mexico World Conference on the International Women's Year that launched the U.N. Decade for Women (1976-85). The adoption of the Convention on the Elimination of All Forms of Discrimination Against Women in 1979 elaborated on the norm of nondiscrimination on the basis of sex. It took another decade for women to begin interrogating the generally applicable human rights instruments and to show that, in fact, they gave particular prominence and protection to men's lives.

There is now significant literature critiquing the international system for the protection of human rights from a feminist perspective. Following are the main themes of this work:


1. Feminist activists and scholars point out that there exists an absence of women in the processes of defining and implementing human rights standards. For example, none of the human rights treaty-monitoring bodies (apart from the Committee on the Elimination of Discrimination Against Women) have an equal number of women and men members. Many see this non-participation by women as a human rights issue in itself. Many scholars also conclude that the lack of participation by women is connected to the lopsided concerns of the traditional human rights canon.28

2. The monitoring and enforcement of the specialized women's treaties is weaker than that of their "general" counterparts. For example, the Convention on the Elimination of All Forms of Discrimination Against Women is monitored only through a reporting system.29 The International Convention on the Elimination of All Forms of Racial Discrimination,30 the International Covenant on Civil and Political Rights,31 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,32 on the other hand, offer reporting as well as individual33 and state complaint34 mechanisms. Moreover, the institutions designed to promote and monitor the observance of women's human rights have less resources than the comparable institutions of "general" human rights.35

3. The traditional human rights canon does not cover issues that have a particular significance for women. For example, the issues of illiteracy, development, and sexual violence are dealt with in "soft" law instruments but are not addressed in legally binding norms. Moreover, international law focuses on states as the primary violators of human rights. More significant are the activities of nonstate actors, such as international monetary institutions, which have the power to impose social and economic conditions that can

28. Id. at 438-39.
32. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027.
34. Id. art. 41.
adversely affect women's lives through their loans.  

4. The ideas of equality and nondiscrimination that animate the Convention on the Elimination of All Forms of Discrimination Against Women, the flagship of women's human rights, are very limited in the sense that they promise equality on male-defined terms only. The terms of the Convention require that women be treated in the same way as a similarly situated man. The Convention does not recognize the effects of structural discrimination against women.  

5. Feminists have argued that the focus on activities that occur in the public sphere introduces a significant bias against women into human rights law. For example, the accepted international definition of "torture" requires the involvement of a "public official." Also, the guarantee of a right to work applies to the paid, public workforce only. Although many women do suffer from this public type of human rights violation, the violations of rights that take place in the "private" sphere are much more significant in women's lives globally.  

6. More generally, the model of human nature that underlies the human rights tradition is gendered and cannot claim to have an "objective" core. The Western, liberal, and individualistic underpinnings of human rights law all contribute to its male bias. Feminists from the South have particularly criticized the Western framework of human rights law and indeed of much feminist criticism.

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38. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 32, art. 1.


40. See, e.g., Hilary Charlesworth, Worlds Apart: Public/Private Distinctions in International Law, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 243, 248-51 (Margaret Thornton ed., 1995) (discussing neglect of women's private rights in international laws); Celina Romany, State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, supra note 26, at 85, 85-87 (discussing neglect of women's human rights in private sphere of familial relationships). Not all feminist critics of international human rights law share this view. Karen Engle, for example, argues that it may be in women's best interests to resist legal incursions into the "private" sphere. Using the analogy of international trade law, she speculates that the province of the most powerful may be outside of the scope of international legal regulation. Karen Engle, After the Collapse of the Public/Private Distinction: Strategizing Women's Rights, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143, 149-50 (Dorinda G. Dallmeyer ed., 1993).

41. See Peterson, supra note 17, at 308-32.

42. See, e.g., J. Oloka-Onyango & Sylvia Tamale, "The Personal Is Political," or Why
7. Even when women can be shown to have suffered violations of human rights in the traditional, male-defined sense, these violations are given much less attention and publicity than is accorded to violations of men's rights. For example, the reports by the special rapporteurs of the Commission on Human Rights have typically ignored human rights violations against women.\textsuperscript{43} The methods of investigating and documenting human rights abuses can often obscure or even conceal abuses against women. As a result, the U.N.'s "fact finding" in Rwanda in 1994 did not detect systematic sexual violence against women until nine months after the attack and genocide, when women began to give birth in unprecedented numbers.\textsuperscript{44}

8. Society justifies many violations of women's rights on the grounds that the violations are an aspect of particular religious or cultural practices.\textsuperscript{45} States, religious communities, and individuals invoke the rights to religious freedom or cultural integrity as "trumping" women's rights.\textsuperscript{46} The pattern of reservations to the Convention on the Elimination of All Forms of Discrimination Against Women provides a good example of this phenomenon.\textsuperscript{47}

IV. U.N. Responses

How has the U.N. system responded to the wave of feminist critiques of its protection of human rights? On one level, the response has been surprisingly rapid and impressive. For example, at the United Nations World Conference on Human Rights in 1993, the international community formally recognized that the human rights system did not adequately respond to women's lives.\textsuperscript{48} The community committed itself to the furtherance of the belief that the human rights of women were "an inalienable, integral and indivisible part of universal human rights."\textsuperscript{49} It also accepted that gender-specific violations

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\textsuperscript{46} Id. at 167-69.


\textsuperscript{49} Id.
of human rights were part of the human rights agenda. 50 Another significant development was the adoption by the U.N. General Assembly of the Declaration on the Elimination of Violence Against Women in December 1993. 51 The Declaration contains a broad definition of the notion of gender-based violence. 52 It acknowledges gender-based violence as an international issue and more specifically, as an issue of sex discrimination. 53 The Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women in September 1995, identifies the human rights of women as a critical area of concern. 54

While these developments have generally been hailed by feminist scholars and activists, they are worth a closer look. How far do they respond to the criticisms of the international human rights system outlined above? It is striking that the assertion that "[w]omen's rights are human rights," while contained in the Beijing Declaration, 55 is not reiterated in the more action-oriented Platform for Action because of an apparent anxiety of states about recognizing "new" human rights. 56 Thus, the Platform distinguishes between human rights of women (meaning the application of the traditional human rights canon to women), which are universal and women's rights (meaning rights that are of especial relevance to women only), which are not universal. Moreover, the model of women's existence presupposed by the Beijing Platform is quite restricted. Although the Platform for Action gives a nod in the direction of the diversity of women's experiences, 57 it nevertheless presents

50. Id. art. 2.


52. Id. art. 2.

53. Id. art. 5.


55. Id. ¶ 14.


57. Paragraph 46 of Chapter IV of the Beijing Platform for Action states:

The Platform for Action recognizes that women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other status. Many women encounter specific obstacles related to their family status, particularly as single parents; and to their socio-economic status, including their living conditions in rural, isolated or impoverished areas. Additional barriers also exist for refugee women, other displaced women, including internally displaced women as well for immigrant women and migrant women, including women migrant workers. Many women are also particularly affected by environmental disasters, serious and infectious diseases and various forms of violence against women.

Beijing Declaration and Platform for Action, supra note 54, ¶ 46.
women in a very limited and encumbered way. The major role for women remains that which is described in the Universal Declaration -- wife and mother. As Dianne Otto points out in her analysis of the Beijing negotiations, the only acknowledged development in the role of women is that women are expected to participate in decision-making structures and to play a part in the free market economy. Attempts to raise the diversity of women's identities, most particularly with respect to sexual orientation, were unsuccessful at Beijing.

The new international concern with women's rights also is limited in the way it understands the notion of equality. Although there have been significant moves to recognize some gendered harms, particularly violence against women, the major remedy for the global subordination of women has been to increase women's roles in decision-making. This simply allows women access to a world that is already constituted by men. Dianne Otto argues that "[i]n the absence of a recognition that the decision-making structures must themselves change, it is not clear what difference women's equal participation could make. Ultimately, it may merely equally implicate women in the perpetuation of the masculinist liberal forms of minimalist representative democracy and capitalist economics." The new international discourse on women's rights also gives prominence to civil and political rights of women at the expense of economic and social rights. Health and reproductive rights are much more likely to be controversial in international fora than civil rights. Although the feminization of poverty clearly is acknowledged in the Beijing Platform, it was not placed squarely in a rights context. It has been noted that the Platform "assumes ... that capitalism has the ability to deliver economic equality to the poor women of the world and ... that the obligation of states to guarantee certain economic and social rights is made redundant by the more 'efficient' processes of free market forces." The practices of international monetary institutions such as the World Bank and International Monetary Fund also have serious implications for economic and social rights. The narrow notion of development that animates these institutions elevates private

59. Id. at 25.
60. Beijing Declaration and Platform for Action, supra note 54, ¶¶ 142(a), 253(a).
61. Otto, supra note 56.
62. See Beijing Declaration and Platform for Action, supra note 54, ¶¶ 162-164 (expressing Holy See's reservation on Beijing Platform's section on women and health).
63. Id. ¶¶ 47-57.
64. Id. But see id. at 27 (referring, in Strategic Objective A.2, to women's equal rights to economic resources but refraining from elaborating on that idea).
65. Otto, supra note 56.
sector interests over public funding for food, health, education, and social security.  

In the last few years, the various levels of the U.N. human rights machinery have shown an interest in women's rights. In March 1994, the CHR appointed Radhika Coomaraswamy as Special Rapporteur on Violence Against Women. Coomaraswamy is the first Special Rapporteur with a gender-specific mandate. Some of the human rights treaty monitoring bodies have announced changes to their procedures in order to better respond to women's concerns. In 1995, for example, the Centre for Human Rights in collaboration with the United Nations Development Fund for Women organized a meeting of experts to create guidelines for "mainstreaming" gender perspectives into the human rights system. Also, the CSW currently is considering a draft Optional Protocol to the Women's Convention that would allow individual and group complaints of noncompliance with the Convention.

Thus, the international community seems to have accepted the rhetoric of women's rights. What effect has this had in practice? I will focus on the commitment to "gender mainstreaming" in the U.N. human rights treaty bodies. The treaty monitoring bodies' responses to calls for "gender mainstreaming" have been varied. The reactions differ depending on the presence of at least one or two committee members who have a true commitment to the issue. At one end of the spectrum, there have been significant advances. For example, the Committee on Economic, Social and Cultural Rights, which monitors the International Covenant on Economic, Social and Cultural Rights, has taken the task of gender mainstreaming seriously, referring to the position of women in its concluding observations on states parties' reports and in general comments. Its reporting guidelines, however, are uneven with respect to gender issues. Gender is not referred to with respect to some important articles, such as the right to free primary education set out in article 14 of the International Covenant on Economic, Social and Cultural Rights. In contrast, the Commit-

66. See Orford, supra note 36.
71. See Gallagher, supra note 44, at 301.
tee on the Elimination of Racial Discrimination, which monitors the International Convention on the Elimination of All Forms of Racial Discrimination, does not include gender considerations at all in its concluding observations or in its general comments, although the intersection of race and sex discrimination is an important and controversial area.\textsuperscript{72} The Chairman of CERD stated in 1996 that directives to integrate gender into states parties’ reports were "fundamentally misconceived."\textsuperscript{73} Similarly, the Committee Against Torture has not displayed any concern with the gendered aspects of torture.\textsuperscript{74}

The Human Rights Committee, the committee that monitors the International Covenant on Civil and Political Rights, is regarded as one of the most progressive of the treaty monitoring bodies with respect to women, due at least recently in large part to its distinguished women members such as Elizabeth Evatt and Cecilia Medina. It has adopted a number of useful general comments on articles of the International Covenant on Civil and Political Rights that show a sensitivity to gender issues. Also, in 1995, the Committee amended its reporting guidelines to request states parties to provide information on the position of women.

As Jane Connors observes, however, the Committee is not consistent in its concern with gender.\textsuperscript{75} Most of the Committee’s general comments do not address the position of women. A 1994 general comment on torture did not examine the gendered dimensions of the right to be free from torture, although it did refer to the need for states parties to address the infliction of torture or cruel, inhuman, or degrading treatment by private actors.\textsuperscript{76} On the other hand, the Committee has used its concluding observations in a number of cases in a progressive way. For example, in 1996, the Committee’s concluding comments on Peru’s periodic report under the International Covenant on Civil and Political Rights express concern "about criminalization of abortion even in cases of rape," which results in "backyard" abortions as the major cause of maternal mortality.\textsuperscript{77} The Committee stated that "these provisions not only mean that women are subject to inhumane treatment but are possibly incompatible with articles 3, 6 and 7 of the Covenant."\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{72} See id. at 304.
\item \textsuperscript{73} See id.
\item \textsuperscript{74} See id.
\item \textsuperscript{75} Jane Connors, \textit{General Human Rights Instruments and Their Relevance to Women}, in \textit{Advancing the Human Rights of Women: Using International Standards in Domestic Litigation} 27, 33 (Andrew C. Byrnes et al. eds., 1997).
\item \textsuperscript{76} Compilations of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, General cmt. 20(44), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).
\item \textsuperscript{78} Id. at 393.
\end{itemize}
The Committee has given a mixed reception to complaints under the Optional Protocol involving gender issues. The Committee has found that cases of direct discrimination on the basis of sex — for example, a Mauritian law that gave greater status to foreign wives of Mauritian men than to foreign husbands of Mauritian women — breach the article 26 guarantee of nondiscrimination. However, in other cases of direct discrimination on the basis of sex, the Committee has permitted a considerable margin of appreciation to states. For example, in Vos v. The Netherlands, the Committee found that a Dutch law that allowed disabled men to retain a disability allowance on the death of their wives but that did not allow disabled women to retain disability on the death of their husbands was not a violation of article 26. The Committee also has had much more difficulty with cases that involve laws or practices that are facially gender neutral but that, in effect, discriminate against women.

Overall, gender mainstreaming has had a mixed fate. It has been relatively easy to obtain a revision of reporting guidelines but much more difficult to obtain practical follow-through on these revisions, such as through the systematic questioning of states.

V. Future Development of Women's Rights in International Law

The sheaf of resolutions that the various U.N. bodies adopted in commemoration of the fiftieth anniversary of the Universal Declaration acknowledge in various ways that there are significant problems with the international protection of rights. These resolutions outline the major concerns with the Universal Declaration's protection of rights as nondissemination and nonimplementation of the pertinent Universal Declaration provisions. In other words, the problems are external to the Universal Declaration and to the U.N. human rights system itself. The U.N. bodies see the Universal Declaration as having a continuing and universal relevance. To these U.N. bodies, then, the cure for the mid-life crisis is better coordination, better promotion, better evaluation, better information, and better implementation. I argue, in contrast, that for women, the Universal Declaration and its progeny themselves may be the problem.

82. See Brautigam, supra note 77, at 394.
83. See, e.g., G.A. Res. 51/88, U.N. GAOR, 51st Sess., 82d plen. mtg. at 231, U.N. Doc. A/51/49 (1996) (stating that it recognizes "the Declaration as the source of inspiration and the basis of subsequent progress in the field of human rights" and that it is "[c]oncerned that international human rights standards are not fully and universally respected, that human rights continue to be violated in all parts of the world").
The U.N. human rights system and the Universal Declaration have grown into middle age. Like many fifty-year-old men today, the Universal Declaration is rather smug in its attitude towards women. The U.N.'s reactions to criticism of the Universal Declaration include simply ignoring the issue and hoping that, in time, it will go away. Another argument sometimes made is that taking the specificity of women's lives into account will undermine the objectivity and universality of the system. Yet another reaction is that of the double message—the public use of "politically correct" language acknowledging the problem and the announcement of special programs to alleviate it, but failure to tailor the programs to the specific problem or to give enough weight or resources to the programs to ensure their success. The human rights system appears to have learned that the art of politically correct rhetoric is an effective tool in silencing potential critics. It finds it very hard, however, to institute significant change. The human rights system's responses to the criticisms of feminist activists and scholars have been very mixed. Generally, the human rights system has only recognized claims of women that involve rights violations akin to those that men might sustain. Recognition of rights violations in the "private" sphere are still the exception. For example, the negotiations on the text of the Declaration on the Elimination of Violence Against Women, in which some states resisted the definition of violence against women as a human rights issue on the grounds that this would water down the concept of human rights, indicate the problems of enlarging the androcentric focus of human rights law. The overarching slogan of the U.N. human rights system with respect to women seems to be just "add women and stir." A mid-life crisis is necessary for the system to change course in a more radical way to ensure that there is substantive change.

There has been much debate among feminists about whether human rights discourse is a useful strategy. Many have argued, for example, that civil and political rights are manipulable, individualistic, and unlikely to respond to the more general structural disadvantages that women face. In my view, however, the significance of human rights discourse outweighs its disadvantages. Human rights provide an alternative language and framework to the existing welfare and protection approach to the global situation of women as victims or dependents. Human rights allow women to claim specific entitlements from a specified obligation-holder. Moreover, there are international, regional, and national systems in place that can be invoked to protect human rights.

84. Connors, supra note 75, at 37.
88. See Brautigam, supra note 77, at 390.
Human rights discourse is the dominant progressive moral philosophy operating at the global level. It is important for women to engage in such discourse and contest its parameters.

What might the Universal Declaration's mid-life crisis produce? One outcome could be attention to the gendered model of human nature embedded in the human rights system. Just as some men at fifty suddenly regret the limitations of traditional male roles, the human rights system should develop rights responding to the life experiences of women, rather than forcing women to articulate their concerns in terms of rights based on male lives. Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence Against Women, proposes the creation of a "fourth generation" of women's rights. This "fourth generation" of rights includes "new" rights such as the right to sexual autonomy as well as a reinterpretation of the earlier generations of rights in order to respond to women's concerns.

The use of an equality paradigm in women's human rights law needs to be reassessed. While it can offer some progress for women, it also can rationalize the deeper inequities in social structures around the world. As Nicola Lacey writes, the idea of equality as sameness cuts little ice when men and women are simply running different races. Dianne Otto proposes that women reclaim the language of equity from states that have used it to signal a lesser standard than equality to achieve substantive redistributive outcomes. She also emphasizes the need to respond to the diversity of women's experiences in a meaningful way. One way to do this is to focus on economic and social rights that would draw attention to "the operation of systems of privilege among women" and the inequitable structures of global capital.

A mid-life crisis of the Universal Declaration may cause the U.N. to rethink the significance of arguments of cultural relativism with respect to women's rights. Radhika Coomaraswamy argues that, in Asia, the next decade especially will be marked by the collision of national cultural movements and the development of women's rights. The debate about cultural difference in the human rights arena tends to accept male-defined versions of culture as

89. RADHIKACOOMARASWAMY, REINVENTING INTERNATIONAL LAW: WOMEN'S RIGHTS AS HUMAN RIGHTS 4 (1997); Peterson, supra note 17, at 303-04. See generally Anne Orford, Locating the International: Military and Monetary Interventions after the Cold War, 38 HARV. INT'L L.J. 443 (1997) (investigating way in which moral philosophies have been generated in international sphere).

90. COOMARASWAMY, supra note 89, at 25.

91. Id.


93. Otto, supra note 56.

94. Id.

95. Id.; see Orford, supra note 36.

96. COOMARASWAMY, supra note 89, at 27.
authoritative. New feminist understandings of culture need to be developed. Arati Rao proposes that we pay close attention to the politics of arguments based on culture in human rights discourse.\textsuperscript{97} For Rao, a critical assessment of claims based on culture requires investigating the status of the speaker, in whose name the argument from culture is advanced, and the degree of participation in culture formation of the social groups primarily affected by the cultural practices in question.\textsuperscript{98}

Another outcome of a mid-life crisis would be thoroughgoing gender mainstreaming in the U.N. human rights system, both in the way that the rights protected by human rights treaties are understood and in the way that the U.N. human rights machinery deals with them. The development of an optional complaints procedure to the Women’s Convention through the CSW may have radical potential, especially if such a development allows consideration of structural gender inequality.

\textbf{VI. Conclusion}

One might say that a basic flaw in my analogy of the Universal Declaration to a man’s life is that the Universal Declaration was created to be both universal and eternal. As Sean MacBride said at the time of the thirtieth anniversary of the Universal Declaration, "the precepts of the [U]niversal Declaration are immutable and will remain valid forever: the right to life, freedom from torture, the right to be free from arbitrary arrest and detention and other such rights know no bounds of time."\textsuperscript{99} Emphasis on its middle age may imply that the Universal Declaration will naturally fade away sometime before its centenary. But the language of rights cannot be fixed. It will always be contested and its meaning constantly renegotiated. A popular guide to coping with middle age quotes Carl Jung’s statement that: "We cannot live the afternoon of life according to the programme of life’s morning; for what was great in the morning will be little at evening, and what in the morning was true will at evening have become a lie."\textsuperscript{100} In this spirit, I argue that the Universal Declaration is not based on immutable truth. It is a product of a situated and partial understanding of the human condition generated by men. If we understand the implicit commitments of the Universal Declaration, we open up transformative terrain.

\textsuperscript{97} Rao, \textit{supra} note 45, at 168.

\textsuperscript{98} Id.

\textsuperscript{99} Sean MacBride, \textit{Message, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION, supra} note 2, at ix.

International Law and Abolition of the Death Penalty

William A. Schabas

I. Introduction

The Universal Declaration of Human Rights (Universal Declaration), adopted December 10, 1948, proclaimed that "[e]veryone has the right to life" and "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The same approach was taken in the American Declaration of the Rights and Duties of Man, adopted May 4, 1948. At the time, the vast majority of United Nations Member States still employed capital punishment. Moreover, the death penalty was also recognized as an appropriate penalty for major war criminals and was imposed by the postwar tribunals at Nuremberg and Tokyo. When the Universal Declaration's provisions were transformed into treaty law in universal and regional instruments, the death penalty was specifically mentioned as a form of exception to the right to life.

Fifty years later, as we commemorate the anniversary of the adoption of the Universal Declaration of Human Rights, the compatibility of the death penalty with these human rights norms is a matter of concern for legal scholars and practitioners alike.
penalty with international human rights norms seems less and less certain. The second generation of international criminal tribunals—the ad hoc tribunals for the former Yugoslavia and Rwanda and the nascent international criminal court—rule out the possibility of the death penalty, even for the most heinous crimes. The basic international human rights treaties have been completed with additional protocols that prohibit capital punishment. Fifty-one states are now bound by these international legal norms abolishing the death penalty, and the number should continue to grow rapidly.

The importance of international standard-setting was evidenced by parallel developments in domestic legal systems. The list has grown steadily from a handful of abolitionist states in 1945 to considerably more than half the countries in the world having abolished the death penalty de facto or de jure. According to the United Nations Secretary General in his January 16, 1998

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7. See Jean-Bernard Marie, International Instruments Relating to Human Rights, 18 HUM. RTS. L.J. 79, 84-86 (1997) (noting that Andorra, Australia, Austria, Bolivia, Brazil, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Macedonia, Malta, Mexico, Moldova, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Romania, San Marino, Seychelles, Slovakia, Slovenia, Spain, Surinam, Sweden, Switzerland, Uruguay, and Venezuela have ratified abolitionist treaties). These states are abolitionist either de jure or de facto and have either signed or ratified one or more of the abolitionist treaties. Id.

8. Albania, Belgium, Bosnia and Herzegovina, Cyprus, Estonia, Lithuania, Russia, and Ukraine have indicated their intention to be bound by international norms prohibiting the death penalty, either by signing an abolitionist instrument or by publicly declaring their intention to ratify.
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report to the Commission on Human Rights, 102 states have abolished the death penalty and 90 retain it. Those that retain it find themselves increasingly subject to international pressure in favor of abolition. Sometimes, this pressure is quite direct, as evidenced by the refusal of certain countries to grant extradition when a fugitive will be exposed to a capital sentence. Abolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterized by terror, injustice, and repression. In some countries, abolition is effected by explicit reference in constitutional instruments to the international treaties prohibiting the death penalty. In others, it has been the contribution of the judiciary that has brought about abolition of the death penalty. Judges have applied constitutions that make no specific mention of the death penalty but enshrine the right to life and prohibit cruel, inhuman, and degrading treatment or punishment.

Thus, the question of abolition of the death penalty stands as one of the sharpest examples of both the evolution of human rights norms and the ongoing relevance of the broadly-worded texts in the Universal Declaration. In 1948, René Cassin and Eleanor Roosevelt rejected suggestions that the Universal Declaration contain a reference to capital punishment as an exception to the right to life. They did so not because international law had reached the stage of abolition, but because they saw such a trend emerging and wanted the Universal Declaration to retain its relevance for decades and perhaps centuries to come. Half a century later, we must acknowledge their clairvoyance. While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal. The many signs of this development are the subject of this paper.


12. Several recent works provide detailed overviews of international legal issues relating to abolition of the death penalty. See generally Capital Punishment: Global Issues and Prospects (Peter Hodgkinson & Andrew Rutherford eds., 1996) (discussing death penalty throughout world); Hood, supra note 10 (same); Schabas, supra note 11 (describing movement away from capital punishment in international community). For a discussion of the death penalty in the United States, see generally The Death Penalty in America, Current Con-
II. International Legal Norms Concerning the Death Penalty

The issue of the death penalty is associated with two fundamental human rights norms: the right to life and the protection against cruel, inhuman, and degrading punishments. Both norms can trace their roots to the great instruments of Anglo-American constitutional law. The guarantee against "cruel and unusual punishments" was set out in the English Bill of Rights of 1689. It was aimed at some of the more barbaric accompaniments of execution that characterized Stuart England, such as drawing and quartering, disemboweling while alive, and amputation. The "right to life" was immortalized by the words of Thomas Jefferson in the Declaration of Independence of 1776. The American revolutionaries sought to protect the right not to be deprived of life "without due process of law," a not-so-tacit recognition of the legitimacy of capital punishment. From a historical standpoint, then, neither of these norms could be considered to challenge capital punishment. Yet in their more modern formulation, both of these rights have served to restrict and in some cases to prohibit the death penalty.

A. The Right to Life

The drafters of the Universal Declaration of Human Rights of 1948 looked to domestic constitutions for inspiration in preparing a document that they termed "a common standard of achievement for all peoples and all nations." Most of these constitutions were inspired to a greater or lesser extent by the principles of the English Bill of Rights, the American Declaration of Independence and Bill of Rights, and the French Declaration des TROVERSIES (Hugo Adam Bedau ed., 1997).

14. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
16. See Universal Declaration of Human Rights, supra note 1; see also SCHABAS, supra note 11, at 23-45 (providing academic comment on article 3 of Universal Declaration); ALBERT VERDOODT, NAISSANCE ET SIGNIFICATION DE LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME 99-100 (1964) (same); Lilly E. Landerer, Capital Punishment as a Human Rights Issue Before the United Nations, 4 HUM. RTS. J. 511, 511-34 (1971) (same).
17. See SCHABAS, supra note 11, at 29 n.12.
18. Universal Declaration of Human Rights, supra note 1, preamble.
19. See 1 W. & M. ch. 2 (1688) (Eng.).
20. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).
21. See U.S. CONST. amends. I - X.
droits de l'homme et du citoyen. High on the list of this new international catalogue of human rights was the "right to life." However, the scope of this right had become considerably different, and broader, than it had been when it was first announced in the eighteenth century, as many participants in the drafting process took pains to point out.

As such, the Universal Declaration makes no mention of the death penalty. But distinct from the domestic constitutions from which it is derived, the Universal Declaration also does not explicitly refer to the death penalty as an exception to the right to life. Indeed, unlike the case of the American Bill of Rights, it cannot be said that the drafters of the Universal Declaration sought to preserve the death penalty as an implicit limitation on the right to life. The debates in the General Assembly's Third Committee during the autumn of 1948 make this quite clear.

The original draft of the Universal Declaration, prepared by John P. Humphrey in early 1947, recognized a right to life that "can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached." But Eleanor Roosevelt, who chaired the Drafting Committee, cited movement underway in some states to abolish the death penalty and suggested that it might be better not to make any explicit mention of the matter. Her views found support from the Soviet delegate, Koretsky, who argued that the United Nations should in no way signify approval of the death penalty. René Cassin cautioned that even countries that had no death penalty must take into account the fact that some are in the process of abolishing it. Cassin reworked Humphrey's draft and removed any reference to the death penalty. His proposal found its way, virtually unchanged, into the final version of the Universal Declaration, despite some unsuccessful attempts to return to the original proposal. It is clear from the travaux préparatoires that the death penalty was considered to be fundamen-
tally incompatible with the protection of the right to life, and that its abolition, although not immediately realizable, should be the "common standard of achievement" of the Member States of the United Nations. Subsequent interpretation by General Assembly and Economic and Social Council resolutions supports this conclusion.

The Universal Declaration was not intended to establish binding treaty obligations. However, it provided the normative framework for the International Covenant on Civil and Political Rights and the three major regional human rights treaties. A chronological perspective on the adoption of these treaty provisions shows that although the death penalty was retained as an exception or limitation on the right to life, it has been progressively restricted in scope.

The European Convention of Human Rights (European Convention), adopted less than two years after the Universal Declaration, recognizes the right to life, "save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." It reflects the postwar context in Europe, when war crimes trials (and the resulting executions) were still fresh in the collective memory. The provision was almost immediately anachronistic. There have been only a handful of execu-


tions within Member States of the Council of Europe since 1950. By the early 1970s, the Council of Europe had begun work on a protocol to the Convention, which was adopted in 1983,\textsuperscript{34} that modifies article 2 by abolishing the death penalty in peacetime.\textsuperscript{35} In 1989, the European Court of Human Rights observed that capital punishment has been abolished de facto in the Contracting States of the European Convention.\textsuperscript{36}

Negotiation of a human rights treaty took considerably more time in the United Nations than in the Council of Europe. Although drafting work was already underway as early as 1947, it was not until 1966 that the treaty intended to accompany the Universal Declaration, the International Covenant on Civil and Political Rights (International Covenant), was adopted.\textsuperscript{37} It took yet another ten years before the instrument had obtained the necessary thirty-five ratifications for it to enter into force. The "right to life" provision, article 6, was drafted during the 1957 session of the Third Committee of the General Assembly.\textsuperscript{38} Although only seven years younger than the corresponding text

\textsuperscript{34} See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, \textit{supra} note 6, at 2-4 (abolishing death penalty).


\textsuperscript{37} See \textit{International Covenant on Civil and Political Rights, supra} note 4, at 171.

\textsuperscript{38} See \textit{id.} at 174-75 (discussing right to life). Article 6 states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant
in the European Convention, it already shows the remarkable and rapid evolution of international law regarding the death penalty. Article 6 of the International Covenant also includes the death penalty as an exception to the right to life, but it lists detailed safeguards and restrictions on its implementation. The death penalty may only be imposed for the "most serious crimes," it cannot be pronounced unless rigorous procedural rules are respected, and it may not be applied to pregnant women or to individuals for crimes committed while under the age of eighteen. Furthermore, article 6 of the International Covenant clearly points to abolition of the death penalty as a human rights objective and implies that states that have already abolished the death penalty may not reintroduce it. It too has been amended by an additional protocol, which was adopted in 1989 and which proclaimed the death penalty abolished in time of peace and war.

The second major regional human rights treaty is the American Convention on Human Rights (American Convention), adopted in 1969 but in force only since 1978. Here too, the progress is evident. Taking article 6 of the

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Id. (footnote omitted).

39. See id.
40. See id.
43. See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, supra note 6, art. 1, at 207.
44. See American Convention on Human Rights, supra note 4, at 123; SCHABAS, supra...
International Covenant as a model, the American Convention tightens the restrictions on the use of the death penalty and affirms explicitly that states may not reintroduce capital punishment once they have abolished it.\(^4\) This renders the American Convention an abolitionist instrument, to the extent that ratifying states that have already abolished the death penalty are now bound as a matter of international law not to use the death penalty. In 1990, an abolitionist protocol patterned generally on the Second Optional Protocol was adopted within the inter-American system.\(^4\)

The third major regional treaty is the African Charter of Human and Peoples’ Rights (African Charter),\(^4\) adopted in 1981 and in force since 1986. It too enshrines the right to life, but unlike the European, American and universal instruments, it makes no mention of capital punishment as an exception or limitation to this right.\(^4\) There is little interpretative material to assist in construing the African Charter’s right to life provision. Some scholars point to African practice, in which a majority of states still employs the death penalty, and conclude that the African Charter in no way forbids capital punishment.\(^4\) Nevertheless, the African Charter is to be interpreted in light


\(^{46}\) See Protocol to the American Convention on Human Rights to Abolish the Death Penalty, supra note 6, at 9-11 (abolishing death penalty).


\(^{48}\) See African Charter on Human and Peoples’ Rights, supra note 47.

of other international human rights instruments, including "the Universal Declaration of Human Rights [and] other instruments adopted by the United Nations." At the very least, then, the restrictions and limitations on the death penalty found in the International Covenant must apply. Several African states have already abolished the death penalty, the most recent being South Africa, and this will surely influence future interpretation of the African Charter.

The recent Arab Charter of Human Rights, adopted September 15, 1994, but not yet ratified by any members of the League of Arab States, proclaims the right to life. Three distinct provisions, articles 10, 11, and 12, recognize the legitimacy of the death penalty in the case of "serious violations of general law," but prohibit the death penalty for political crimes and exclude capital punishment for crimes committed under the age of eighteen and for both pregnant women and nursing mothers for a period of up to two years following childbirth. In international fora such as the United Nations, Arab, and more generally, Islamic, nations have been among the most aggressive advo-

50. African Charter on Human and Peoples' Rights, supra note 47, art. 60.


53. Recently, the Supreme Court of Nigeria heard an application contesting the legality of the death penalty based inter alia on article 5 of the African Charter. See Nemi v. The State, [1994] 1 L.R.C. 376, 388-89, 400 (S.C.N.). The court held that the application was inadmissible on procedural grounds, but noted that the matter was sure to return to the court in the near future. Id. According to Chief Justice Bello, the application has "alerted the court to appreciate the gravity and constitutional importance of the question. It is anticipated that the occasion for its determination is likely to be presented soon." Id.


56. See Charte arabe des droits de l'homme, supra note 54, at 212-14.
cates of retention of the death penalty, defending its use in the name of obedience to Islamic law and the strictures of the chari 'a.57

Observers sometimes cite the right to life provisions of the International Covenant on Civil and Political Rights and those of the regional treaties, which allow the death penalty as a limitation or exception to the right, in defense of the affirmation that abolition of the death penalty is not an international norm.58 This is incorrect. Abolition can be deemed an international norm since at least as early as 1948, if a dynamic interpretation of articles 3 and 5 of the Universal Declaration of Human Rights is adopted.59 By the time article 6 of the draft International Covenant on Civil and Political Rights was adopted in 1957, there could be no doubt that abolition of the death penalty had found its way into positive international human rights law. What would be an exaggeration at this stage in the development of international human rights law would be the affirmation that abolition is a universal norm or a customary norm.

The notion that fundamental rights are subject to limitations is well accepted in human rights law. Generally, such limits exist as a counterbalance to individual rights and express the collective rights concerns of the community as a whole. Thus, for example, prohibitions on hate propaganda constitute limits on freedom of expression that are not only authorized but required by international law.60 As we have seen, in several instruments, the death penalty is expressed as a limitation to the right to life. But it is a unique

57. For example, during debate at the 1994 session of the General Assembly, the Sudanese delegate noted that "capital punishment was a divine right according to some religions, in particular Islam.... [C]apital punishment was enshrined in the Koran and millions of inhabitants of the Muslim world believed that it was a teaching of God." U.N. GAOR General Comm., 49th Sess., 5th mtg. § 13, at 4, U.N. Doc. A/BUR/49/SR.5 (1994); see FRÉDÉRIC SUDRE, DROIT INTERNATIONAL ET EUROPÉEN DES DROITS DE L'HOMME 85-87 (1989) (discussing capital punishment in Islamic law); N. Hosni, La peine de mort en droit égyptien et en droit islamique, 58 REVUE INTERNATIONALE DE DROIT PÉNAL 407-20 (1987) (same); Tunis Conference Declaration on the Death Penalty in the Legislation of Arab States, in THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT, supra note 51, at 233-36 (same); A. Wazir, Quelques aspects de la peine de mort en droit pénal islamique, 58 REVUE INTERNATIONALE DE DROIT PÉNAL 421-29 (1987) (same).

58. See, e.g., The State v. Makwanyane and Mchunu, 1995 (3) SA 391, ¶ 36 (CC) (Chaskalson, President). According to President Chaskalson, "[c]apital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of section 11(2) [of the interim constitution of South Africa]." Id.

59. See Universal Declaration of Human Rights, supra note 1, arts. 3, 5.

limitation, born of political compromise rather than respect for collective rights, and couched in terms that express the desirability of its abolition.

B. The Prohibition of Cruel, Inhuman, and Degrading Punishment

The same international legal instruments that protect the right to life also affirm the prohibition of torture and cruel, inhuman, and degrading treatment or punishment. The travaux préparatoires of these instruments indicate that their drafters considered that the issue of the death penalty fell within the context of the right to life, rather than within the issues that are considered under the rubric of the prohibition of torture or cruel punishment. Yet a literal reading of the norm leads to the inescapable observation that capital punishment, in that it may be considered "cruel, inhuman or degrading," is a breach of international norms. While the two norms co-exist in human rights law, and to the extent that the formulation of the right to life appears to authorize the death penalty, there is an essential and inevitable tension with a norm that, at least potentially, may prohibit it. "Cruel" punishment is obviously not a static notion, as it reflects the "evolving standards of decency that mark the progress of a maturing society." International tribunals recognize that human rights norms must be interpreted in an evolutive or dynamic manner. Therefore, even if the death penalty was not deemed "cruel" in 1948, 1957, or 1969, it may well be today or at some future date.

In 1989, a majority of the European Court of Human Rights stopped short of concluding that the death penalty constituted cruel, inhuman, and degrading punishment prohibited by article 3 of the European Convention in Soering v. United Kingdom. Amnesty International, which intervened in the Soering case as an amicus curiae, argued that although article 2 § 1 of the European Convention authorized capital punishment as an exception to the right to life, the provision had become inoperative because of the progressively evolving content of article 3, which prohibits inhuman and degrading punishment. The court looked to subsequent state practice for elements that would assist

61. See African Charter of Human and Peoples' Rights, supra note 47, art. 5; American Convention on Human Rights, supra note 4, art. 5, § 2, at 146; International Covenant on Civil and Political Rights, supra note 4, art. 7, at 175; Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 4, art. 3, at 224; Universal Declaration of Human Rights, supra note 1, art. 5.
65. See id. ¶ 8 at 10.
in interpretation. As the court noted, during the 1980s, the members of the Council of Europe had chosen to address the issue of abolition of the death penalty in the form of an optional or additional protocol to the European Convention, and not a mandatory or amending protocol. Therefore, the European Court of Human Rights concluded, it was going too far to suggest that the European Convention now prohibits the death penalty, despite the terms of article 2. The Strasbourg bench reasoned that, had the Member States of the Council of Europe sought for the European Convention to evolve in such a way as to outlaw capital punishment as a form of inhuman and degrading punishment, contrary to article 3, they would not have proceeded by an optional protocol. Judge Jan de Meyer was alone in adopting a more radical and dynamic view of the European Convention:

The second sentence of Article 2 § 1 of the Convention [which permits the death penalty as an exception to the right to life] was adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions, capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.

Still, the court found a way to apply the prohibition of inhuman and degrading punishment to the death penalty. The Soering case involved the threat of extradition to the United States from the United Kingdom of an individual charged with murder and therefore subject to execution by lethal injection in the Commonwealth of Virginia. It was not the death penalty itself that the European Court of Human Rights found offensive to the European Convention, but rather the "death row phenomenon," or the years-long wait for the scaffold under gruesome conditions, both physical and psychological.

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68. See id.
69. See id. at 41.
70. Id. at 51 (de Meyer, J., concurring).
71. Id. at 11-12.
The "death row phenomenon" has been one of the most vexing issues to confront international human rights adjudicative bodies, and some of them, such as the European Court, have been quick to condemn it, while others, such as the Human Rights Committee, have taken the contrary view. The Human Rights Committee has held that delay in and of itself in implementation of the death penalty following sentence cannot be termed cruel, inhuman, and degrading treatment or punishment. This view appears to be altering, perhaps


because of the result of a growing weight of authority from domestic tribunals that have examined the same question, as well as a consequence of the changing composition of the Committee. As for the death penalty itself, the Committee shares the view of the European Court that the death penalty cannot be deemed "cruel" and therefore contrary to article 7 of the International Covenant, precisely because it is authorized as an exception to the right to life in article 6.78

Methods of execution may themselves be cruel, inhuman, and degrading. The Human Rights Committee has affirmed that the use of the gas chamber in the State of California involves excessive and gratuitous suffering and that it is therefore contrary to article 7 of the International Covenant. But this puts human rights bodies in the uncomfortable and inappropriate position of ruling on what is a more humane way to kill an individual. The Committee has since concluded that execution by lethal injection is not cruel, inhuman, and degrading despite uncontested evidence tendered before it showing that


this more modern and fashionable method of execution also may involve terrible suffering.\textsuperscript{81}

Serious issues of cultural relativism arise in the interpretation of the norm prohibiting "cruel, inhuman and degrading punishment." The scope of the three adjectives obviously depends upon value judgments, and these will vary depending on social and cultural conditions. When Commission on Human Rights rapporteur Gaspar Biro suggested in February 1994 that the death penalty as imposed in the Sudan was contrary to articles 6 and 7 of the International Covenant,\textsuperscript{82} his "blasphemy" in attacking "Islamic punishments" was condemned.\textsuperscript{83} In fact, however, enthusiasm for the death penalty appears to cut across cultural lines, as its most aggressive defenders on the international plane are the United States, China, Singapore, and the Sudan!

C. Customary Norms

Customary international law exists when there is evidence of state practice accompanied by unequivocal manifestations of policy or opinio juris.\textsuperscript{84} With somewhat less than half of the world’s states still employing the death penalty, it would be too ambitious to assert that abolition is a customary norm of international law. However, a strong argument can be made that some or all of the limitations on the use of the death penalty enumerated in article 6 of the International Covenant have attained the status of customary law.

The requirement that strict procedural safeguards accompany any capital trial undoubtedly has become customary international law. The universal condemnation of summary executions within the human rights bodies of the United Nations shows that there is unanimity on this point. Moreover, common article 3 of the Geneva Conventions, often cited as the lowest common denominator of humane behavior, proscribes "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are

\begin{itemize}
  \item \textsuperscript{81} Cox v. Canada, supra note 75, § 17.3, at 417.
  \item \textsuperscript{84} See Statute of the International Court of Justice, art. 38, 1989 I.C.J. Acts & Docs. 61, 77 (discussing which law ICJ may apply).
\end{itemize}
recognized as indispensable by civilized peoples.\textsuperscript{85} The International Court of Justice has held that common article 3 codifies a customary rule.\textsuperscript{86}

Another customary principle is the prohibition on executions for crimes committed by young persons. This rule respects an undisputed principle of criminal law, namely that children have diminished criminal liability due to their immaturity. The Inter-American Commission on Human Rights has stated that there is a customary norm prohibiting executions for juvenile offenses, although it has stopped short of fixing the minimum age at eighteen.\textsuperscript{87} The Commission was only prepared to conclude that a norm setting the minimum age at eighteen was "emerging."\textsuperscript{88} More recently, the Human Rights Committee has suggested a corresponding hesitation in its recent General Comment on reservations, which affirmed that the execution of "children" and pregnant women was contrary to customary norms, but did not specify the precise minimum age.\textsuperscript{89} Both the International Covenant\textsuperscript{90} and the American Convention on Human Rights,\textsuperscript{91} as well as the Convention on the Rights of the Child,\textsuperscript{92} the fourth Geneva Convention, and its two additional protocols, however, specify eighteen as the minimum age.\textsuperscript{93}

\begin{figure}[h]
\begin{itemize}
\item \textsuperscript{86} See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14, 129-30, 148 (June 27) (discussing article 3 and violations thereof); see also Prosecutor v. Tadic Case No. IT-94-1-AR72, Int’l Crim. Tribunal for the Former Yugoslavia, Appeals Chamber Decision, § 98 (Oct. 2, 1995).
\item \textsuperscript{88} See id.
\item \textsuperscript{90} See International Covenant on Civil and Political Rights, supra note 4, art. 6(5), at 175.
\item \textsuperscript{91} See American Convention on Human Rights, supra note 4, art. 4(5), at 146.
When the United States of America ratified the International Covenant in 1992, it included a reservation to article 6 § 5, which is the provision concerning juvenile executions. Several European states objected that the reservation was incompatible with the object and purpose of the International Covenant and therefore invalid. The Human Rights Committee, in its consideration of the initial report by the United States pursuant to article 40 of the International Covenant in March and April 1995, has also concluded that the reservation is inadmissible. This is a strong argument for the position that there is a customary norm prohibiting executions for crimes committed while under eighteen.

**D. The Death Penalty in Wartime**

Most domestic legislation establishes distinct rules concerning the death penalty in time of war, when it is employed more frequently and with less concern for procedural safeguards. This distinction has been carried over into the abolitionist protocols. In the case of Protocol No. 6 to the European

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Convention of Human Rights, execution in wartime is simply excluded from its scope. The Protocol prohibits the death penalty only in time of peace, allowing that "[a] State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war." This compromise in the drafting process of the first abolitionist treaty reflected the fact that many European states had abolished capital punishment only in time of peace. Increasingly, however, European states have abolished the death penalty altogether. The Steering Committee for Human Rights of the Council of Europe is studying the possibility of a draft protocol to the European Convention that would abolish the death penalty in war as well as in peace. The protocol to the International Covenant takes a different approach, outlawing capital punishment in all circumstances, but allowing states to make a reservation if they seek to preserve the possibility of imposing the death penalty in wartime for serious crimes of a military nature. Only one state party to the Protocol, Spain, has formulated such a reservation.

The humanitarian law treaties provide specific rules concerning the death penalty in wartime. Two groups of individuals are contemplated by the legal rules concerning the death penalty in time of war—combatants taken prisoner and noncombatant civilians in the hands of a belligerent. The protection of prisoners of war is governed principally by the third Geneva Convention of 1949 (third Convention). According to the third Convention, prisoners of war are subject to the laws, regulations, and orders in effect in the armed forces of the detaining power. If the death penalty is applicable in the laws of the detaining power, then a prisoner of war may be exposed to the threat of capital punishment. The third Convention specifically envisions this possibility in two articles whose aim is to mitigate the rigors of the death penalty and

98. See Gilbert Guillaume, supra note 35, at 1067-72.
100. See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, supra note 6, art. 2, at 207. The Protocol to the American Convention adopts the same approach. See Protocol to the American Convention on Human Rights to Abolish the Death Penalty, supra note 6, art. 2, at 9.
102. See Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, supra note 85, at 135.
103. Id. art. 82, at 200.
encourage commutation or even exchange of prisoners. These provisions are a more extensive version of an article in the 1929 Geneva Convention that protected prisoners of war facing the death penalty. Civilians in the hands of a belligerent were slower to receive comprehensive protection in the international humanitarian conventions, but the grave abuses of capital punishment, mainly by the Nazi occupying forces during World War II, compelled the elaboration of specific norms in the fourth Geneva Convention (fourth Convention). The fourth Convention limits the nature of capital crimes ratione materiae, prohibits the execution of persons for crimes committed while under the age of eighteen, and establishes a six month moratorium on execution after sentencing. It also provides that an occupying power may never impose the death penalty if it has been abolished under the laws of the occupied state prior to the hostilities. The norms in the fourth Convention have been expanded somewhat by Protocol Additional I, which prohibits the death penalty for offenses related to armed conflict in the case of pregnant women or mothers having dependent infants and for offenders under the age of eighteen at the time of the crime. The death penalty provisions in Protocol Additional II, which deals with noninternational armed conflicts, largely repeat the norms found in article 6 of the International Covenant and reflect the human rights scope of that instrument. Serious violations of Protocol Additional II may be prosecuted by the International Criminal Tribunal for Rwanda. Arguably, the pronouncement of the death penalty on persons under the age of eighteen years at the time of the crime constitutes such an infraction. How ironic it is, then, that the Rwanda Statute was adopted with the support of the United States, which continues to allow

104. Id. arts. 100, 101, at 210-12.
108. See id.
109. See id. art. 68.
111. See Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), supra note 93, art. 6, § 4, at 614 (discussing death penalty).
112. See STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, supra note 5, art. 4.
sentencing and execution of juvenile offenders.

E. International Law and Domestic Courts

The classic weakness of international human rights law is in its means of implementation. Increasingly, however, international human rights law is being applied by domestic courts, and this contributes immensely to its effectiveness. In some countries, it is given primacy over incompatible domestic legislation. In others, it has been used by courts to assist in interpreting the scope of constitutional norms that have usually been inspired by the international instruments. Death penalty jurisprudence provides one of the most dramatic examples of this synergy between international and domestic human rights law.

Courts of several states, including South Africa,\textsuperscript{113} Zimbabwe,\textsuperscript{114} Canada,\textsuperscript{115} Tanzania,\textsuperscript{116} and the United Kingdom,\textsuperscript{117} have found international law to be particularly helpful in the interpretation of such notions as the right to life and the prohibition of cruel, inhuman, and degrading punishment. In a recent judgment of the South African Constitutional Court, which found capital punishment to be incompatible with the right to life and the protection against cruel, inhuman, and degrading punishment, President Arthur Chaskalson wrote: "The international and foreign authorities are of value because they analyze arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention."\textsuperscript{118} In writing the decision, he provided a detailed analysis of the international instruments as well as the case law of such bodies as the Human Rights Committee and the European Court of Human Rights.

III. International Organizations

As an important human rights issue, the death penalty has been the object of initiatives within several international organizations, including the United Nations, the Council of Europe, the Organization for Security and Co-operation in Europe, and the European Union. Although this activity has not

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\textsuperscript{113} See The State v. Makwanyane and Mchunu, 1995 (3) SA 391 (CC).
\textsuperscript{116} See Republic v. Mbushuu, [1994] 2 L.R.C. 335 (High Court of Tanzania).
\textsuperscript{118} Makwanyane and Mchunu, 1995 (3) SA 391, § 34.
always resulted in the creation of positive legal norms, it is a source of "soft law" and an important reference in the evolution of international custom.

A. The United Nations

In parallel with the drafting of international legal norms found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, different bodies of the United Nations have been involved in a variety of initiatives aimed at limiting and eventually abolishing the death penalty. As a general rule, these have originated in the Commission on Human Rights and its Sub-Commission and, when there was sufficient unanimity, resulted in resolutions in the Economic and Social Council and the General Assembly.119

An early resolution, presented at the 1968 session of the Commission on Human Rights, observed that "the major trend among experts and practitioners in the field is towards the abolition of capital punishment."120 It cited a series of safeguards respecting appeal, pardon, and reprieve and mandated delay of execution until the exhaustion of such procedures. It invited governments to provide for a six month moratorium before implementing the death penalty.121 In the General Assembly, many retentionist states even supported the draft resolution, noting that it confined itself to the "humanitarian" aspect of the question,122 although more militant abolitionist states criticized its timidity, saying it would not "induce Governments to abolish the death penalty."123


121. See id. at 134-36, 162-64.


Commission's resolution, with some minor amendments, was then adopted by the General Assembly. A few years later, an Assembly resolution declared that "the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing the punishment in all countries." The United Nations Congress on Crime Prevention and Control, held every five years, has also provided a forum for debate on the death penalty. In 1975, the Congress successfully resisted attempts by nongovernmental organizations to raise the issue of capital punishment at its Geneva session because the issue was not on the agenda. At the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1980 in Caracas, more time was devoted to the issue of capital punishment than to any other question. A draft resolution called for restriction and eventual abolition of the death penalty and added that abolition would be "a significant contribution to the strengthening of human rights, in particular the right to life." A controversial provision urged states that had not abolished capital punishment to "consider establishing a moratorium in its application, or creating other conditions under which capital punishment is not imposed or is not executed, so as to permit those states to study the effects of abolition on a provisional basis." But faced with some stiff opposition and inadequate time to complete the discussions, the sponsors withdrew the revised draft resolution. At the 1990 Congress held in Havana, a resolution on


126. See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT: THE DEATH PENALTY 33 n.7 (1979).


130. See id. at 59.

131. See id. at 51-52; see also Roger S. Clark, Human Rights and the U.N. Committee on Crime Prevention and Control, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 68, 75 (1989) (noting
capital punishment was proposed that returned to the idea of a moratorium on the death penalty, "at least on a three year basis." The resolution was adopted in Committee by forty votes to twenty-one, with sixteen abstentions, but was rejected in plenary session because it failed to obtain a two-thirds majority.

The Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty were drafted by the Committee on Crime Prevention and Control (the Commission) at its March 1984 session. The safeguards expand upon the restrictions on use of the death penalty found in article 6 of the International Covenant. They specify that use of capital punishment must be confined to "intentional crimes, with lethal or other extremely grave consequences." With respect to categories of persons excluded from the death penalty, they add "new mothers" and "persons who have become insane" to juvenile offenders and pregnant women, who were already expressly protected by article 6 § 5 of the International Covenant. The death penalty can only be imposed "when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts." The safeguards were later endorsed in resolutions by the Economic and Social Council, the General Assembly, and the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985. In 1988, the safeguards were themselves strength-
ened by a new resolution of the Committee on Crime Prevention and Control, which addressed additional matters, such as the prohibition of execution of the mentally handicapped.\footnote{142}

In 1994, at the forty-ninth session, a General Assembly draft resolution called for a moratorium on the death penalty.\footnote{143} The resolution originated from a newly-formed nongovernmental organization, "Hands Off Cain – the International League for Abolition of the Death Penalty Before the Year 2000," which had obtained the support of the Italian Parliament for the draft resolution. A series of preambular paragraphs referred to earlier General Assembly resolutions on the death penalty, the 1984 safeguards, relevant provisions in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, the statutes of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, and the draft statute of the proposed International Criminal Court.\footnote{144} The first of three dispositive paragraphs invited states that still maintain the death penalty to comply with their obligations under the International Covenant and the Convention on the Rights of the Child and, in particular, to exclude pregnant women and juveniles from execution.\footnote{145} The second paragraph invited states that had not abolished the death penalty to consider the progressive restriction of the number of offences for which the death penalty may be imposed and to exclude the insane from capital punishment.\footnote{146}

The final paragraph encourage[d] all States that have not yet abolished the death penalty to consider the opportunity of instituting a moratorium on pending executions with a view to ensuring that the principle that no State should dispose of the life of any human being be affirmed in every part of the world by the year 2000.\footnote{147}
Italy eventually obtained forty-nine cosponsors for the resolution. However, Singapore was able to obtain the support of several retentionist states and, with a procedural gambit, succeeded in blocking adoption of the resolution.

Capital punishment returned to the United Nations agenda at the 1996 session of the Commission on Crime Prevention and Criminal Justice, which considered a draft resolution entitled "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty." The 1996 resolution calls upon Member States in which the death penalty has not been abolished to apply effectively the safeguards guaranteeing protection of the rights of those facing the death penalty, to ensure that each defendant facing a possible death penalty is given all guarantees to ensure a fair trial, to ensure that defendants who do not sufficiently understand the language used in court are fully informed by way of interpretation or translation of all the charges against them and the content of the relevant evidence deliberated in court, to allow adequate time for the preparation of appeals and for the completion of appeals proceedings as well as for petitions for clemency, to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question, and to effectively apply the Standard Minimum Rules for the Treatment of Prisoners in order to keep the suffering of prisoners under sentence of death to a minimum and to avoid any exacerbation of such suffering. The resolution was subsequently endorsed by the Economic and Social Council.

Italy recovered from the frustration of the 1994 General Assembly and presented a resolution to the 1997 session of the Commission on Human Rights

148. See Schabas, supra note 11, at 187 n.314 (listing Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Cambodia, Cape Verde, Chile, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Marshall Islands, Micronesia, Monaco, New Zealand, Nicaragua, Norway, Panama, Paraguay, Portugal, Romania, San Marino, Sao Tomé and Principe, Slovak Republic, Solomon Islands, Spain, Sweden, Uruguay, Vanuatu, and Venezuela as co-sponsors for resolution).


152. Cf. Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty, supra note 150.

153. See id.
calling for, *inter alia*, a moratorium on the death penalty. The preamble refers to the right to life provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, as well as relevant resolutions of the General Assembly and the Economic and Social Council. It notes deep concern that several countries impose the death penalty in disregard of the limitations provided for in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, as well as the safeguards promoted to guarantee the protection of the rights of those facing the death penalty. The resolution states the Commission's conviction "that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights."

In its operative paragraphs, it calls for accession or ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. States that still maintain the death penalty are urged to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably, not to impose the death penalty for any but the most serious crimes, not to impose it for crimes committed by persons below eighteen years of age, to exclude pregnant women from capital punishment, and to ensure the right to seek pardon or commutation of sentence. It requests states to consider suspending executions and imposing a moratorium on the death penalty. The resolution was passed by a roll-call vote, twenty-seven in favor and eleven opposed, with fourteen abstaining.

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155. *Id.* at 1.
156. *Id.* at 2.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

161. See United Nations, Commission on Human Rights Approves Measures on Abolition of Death Penalty, Protection of Migrant Workers, Minorities, at 3, U.N. Doc. HR/CN/789 (1997). The resolution is recorded as 1997/12. The following countries were in favor of the resolution: Angola, Argentina, Austria, Belarus, Brazil, Bulgaria, Canada, Cape Verde, Chile, Colombia, Czech Republic, Denmark, Ecuador, France, Germany, Ireland, Italy, Mexico, Mozambique, Nepal, Netherlands, Nicaragua, Russian Federation, South Africa, Ukraine, and Uruguay. *Id.* at 4. The following countries were against the resolution: Algeria, Bangladesh, Bhutan, China, Egypt, Indonesia, Japan, Malaysia, Pakistan, Republic of Korea, and United States of America. *Id.* The following countries abstained from the vote on the resolution: Benin, Cuba, El Salvador, Ethiopia, Gabon, Guinea, India, Madagascar, Philippines, Sri Lanka, Uganda, United Kingdom, Zaire, and Zimbabwe. *Id.*
terms of the 1997 resolution require that the matter return to the Commission agenda in 1998.

Although the Commission on Human Rights has not designated a special rapporteur with specific responsibility for capital punishment, its special rapporteur on extrajudicial, summary, or arbitrary executions, Senegalese lawyer Bacre Waly Ndiaye, has taken a considerable interest in the subject and clearly views it as part of his mandate. In his 1997 annual report to the Commission on Human Rights, Ndiaye set forth his views on the desirability of abolishing the death penalty. He stated that "given that the loss of life is irreparable . . . the abolition of capital punishment is most desirable in order fully to respect the right to life." He added that when "there is a fundamental right to life, there is no right to capital punishment." In his report, Ndiaye noted such positive developments as the abolition of the death penalty by Belgium in July 1996. He expressed concern about the expansion of the scope of the death penalty in Estonia and Libya and regretted the fact that some states resumed executions after a lull of many years, notably Bahrain, Comoros, Guatemala, Thailand, and Zimbabwe. The special rapporteur referred to the importance of maintaining the highest procedural standards in capital trials, including public hearings. Ndiaye was disturbed by reports that the death penalty was imposed in secrecy in some countries, such as Belarus, China, Kazakhstan, and Ukraine. Ndiaye noted that:

As in previous years, the Special Rapporteur received numerous reports indicating that in some cases the practice of capital punishment in the United States does not conform to a number of safeguards and guarantees contained in international instruments relating to the rights of those facing the death penalty. The imposition of the death penalty on mentally retarded persons, the lack of adequate defence, the absence of obligatory appeals


164. See Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, supra note 162, at 22.

165. See id. at 21.

166. See id. at 22.
and racial bias continue to be the main concerns.\textsuperscript{167}

In his report, he also stated that:

\begin{quote}
[He] remains deeply concerned that death sentences continue to be handed down after trials which allegedly fall short of the international guarantees for a fair trial, including lack of adequate defence during the trials and appeals procedures. An issue of special concern to the Special Rapporteur remains the imposition and application of the death penalty on persons reported to be mentally retarded or mentally ill. Moreover, the Special Rapporteur continues to be concerned about those cases which were allegedly tainted by racial bias on the part of the judges or prosecution and about the non-mandatory nature of the appeals procedure after conviction in capital cases in some states.\textsuperscript{168}
\end{quote}

Throughout 1996, the special rapporteur sent urgent appeals to the United States of America concerning death sentences imposed on the mentally retarded in cases following trial in which the right to an adequate defense had allegedly not been fully ensured, in which individuals had been sentenced to death without resorting to their right to lodge any legal or clemency appeal, and in which they had been sentenced to death despite strong indications casting doubt on their guilt.\textsuperscript{169} Ndiaye sent a special appeal to the United States in the case of Joseph Roger O'Dell who, according to his report to the Commission on Human Rights, "had reportedly extraordinary proof of innocence which could not be considered because the law of the State of Virginia does not allow new evidence into court 21 days after conviction."\textsuperscript{170} Despite an international campaign, O'Dell was executed in July 1997. Ndiaye also noted that, in response to his urgent appeals, the United States government provided nothing more than a reply in the form of a description of the legal safeguards provided to defendants in the United States in criminal cases.\textsuperscript{171}

Ndiaye had inquired on several occasions as to whether the United States would "consider extending him an invitation to carry out an on-site visit."\textsuperscript{172} As a result of repeated initiatives, on October 17, 1996, he received a written invitation from the government to visit the United States and conduct his investigation.\textsuperscript{173} In October 1997, Special Rapporteur Ndiaye conducted a two

\begin{thebibliography}{99}
\bibitem{168} Id. § 551, at 130.
\bibitem{169} Id. § 544, at 127-28.
\bibitem{170} Id.
\bibitem{171} Id. § 546, at 129.
\bibitem{172} Id. §§ 547, 548, at 129.
\bibitem{173} Id. § 549, at 130.
\end{thebibliography}
week mission to the United States, where he attempted to visit death row prisoners in Florida, Texas, and California. At California’s San Quentin Penitentiary, he was refused permission by authorities to meet with designated prisoners. Ndiaye’s visit provoked the ire of Senator Jesse Helms, chair of the Senate Foreign Relations Committee, who in a letter to William Richardson, United States Permanent Representative to the United Nations, described the mission as an "an absurd U.N. charade." Senator Helms asked, "Bill, is this man confusing the United States with some other country or is this an intentional insult to the United States and to our nation’s legal system?" Ndiaye replied: "I am very surprised that a country that is usually so open and has been helpful to me on other missions, such as my attempts to investigate human rights abuses in the Congo, should consider my visit an insult.”

B. Council of Europe

The Council of Europe, now composed of forty Member States covering virtually all of the European continent as well as much of northern Asia, was the first regional system to incorporate a fully abolitionist international norm when, in 1983, it adopted Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty. In 1994, the Parliamentary Assembly of the Council of Europe adopted a resolution calling upon Member States that had not yet done so to ratify Protocol No. 6. The resolution praised Greece, which in 1993 had abolished the death penalty for crimes committed in wartime as well as in peacetime. It stated:

In view of the irrefutable arguments against the imposition of capital punishment, it calls on the parliaments of all member states of the Council of Europe, and of all states whose legislative assemblies enjoy special guest status at the Assembly, which retain capital punishment for crimes committed in peacetime and/or in wartime, to strike it from their statute books completely.

It urged all heads of state and all parliaments in whose countries death sen-

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175. Id.
176. Id.
179. See EUR. PARL. ASS. RES. 1044, supra note 178, § 3.
tences are passed to grant clemency to those convicted and subject to the death penalty." It also affirmed that willingness to ratify Protocol No. 6 be made a prerequisite for membership of the Council of Europe. Significantly, in the Dayton Peace Agreement, signed at Paris on December 14, 1995, the new state of Bosnia and Herzegovina was held to the highest standard of compliance with contemporary human rights norms, including ratification of Protocol No. 6 and the incorporation of its terms as the fundamental law of the new republic.

The Parliamentary Assembly also adopted a "recommendation" that deplored the fact that the death penalty was still provided by law in eleven Council of Europe Member States and seven states whose legislative assemblies have special status with respect to the organization. An indication that the death penalty is far from a theoretical issue in Europe, it expressed shock that 59 people were legally put to death in those states in 1993 and that at least 575 prisoners were known currently to be awaiting their execution. The Assembly said that application of the death penalty "may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of article 3 of the European Convention on Human Rights." It recommended that the Committee of Ministers draft an additional protocol to the European Convention on Human Rights, abolishing the death penalty both in peace and wartime, and obliging the parties not to reintroduce it under any circumstances. The recommendation also proposed establishing a control mechanism that would oblige states in which the death penalty is still provided by law to set up commissions with a view to abolishing capital punishment. A moratorium would be declared on all executions while the commissions fulfill their tasks. The commissions would be required to notify the Secretary General of the Council of Europe of any death sentences passed and any executions scheduled without delay.
uled an execution would be required to halt it for a period of six months from the time of notification of the Secretary General. During this time the Secretary General would be empowered to send a delegation to conduct an investigation and make a recommendation to the country concerned. Finally, all states would be bound not to allow the extradition of any person to a country in which the person risked being sentenced to death and subjected to the extreme conditions on "death row."

The Committee of Ministers of the Council of Europe, in a January 1996 interim reply, indicated that the proposals of the Parliamentary Assembly were being examined. The Parliamentary Assembly adopted a new recommendation on June 28, 1996 calling for the Committee of Ministers to follow up on the 1994 proposals without delay. On June 28, 1996, the Parliamentary Assembly adopted a resolution reaffirming its opposition to the death penalty. The Assembly declared that all states joining the Council of Europe must impose a moratorium on executions, without delay, and indicate their willingness to ratify Protocol No. 6. The resolution added that

the Assembly reminds applicant states to the Council of Europe that the willingness to sign and ratify Protocol No. 6 of the European Convention on Human Rights and to introduce a moratorium upon accession has become a prerequisite for membership of the Council of Europe on the part of the Assembly.

Resolution 1097 was also an answer to reports that the Russian Federation and Ukraine, which had recently joined the Council of Europe, were not honoring their commitments. The Resolution condemned Ukraine "for apparently violating its commitments to introduce a moratorium on executions of the death penalty upon its accession to the Council of Europe." As for Russia, the Parliamentary Assembly demanded that it respect the Assembly's undertakings to stop all executions. The resolution stated that further executions could imperil the continued membership of the two states in the Council of Europe. The Assembly extended its warning to Latvia, where apparently

189. Id. § 6(ii)(e).
190. Id.
191. Id.
194. See id. § 6.
195. Id.
196. Id. § 2.
197. Id. § 3.
198. Id. § 4.
two executions had been carried out since it joined the Council.\textsuperscript{199} Amnesty International has reported that in 1996 Ukraine carried out 167 executions and Russia carried out 140 executions, putting the two states at the top of the list for executions world-wide, with the exception of China, whose title to first place in the standings has been undisputed for many years.\textsuperscript{200} In order to advance the debate within Ukraine, the Parliamentary Assembly of the Council of Europe held a seminar on the abolition of the death penalty in Kiev on November 28-29, 1996 at which international experts debated the issues with members of the Ukrainian judicial community.\textsuperscript{201}

Since then, Russia and Ukraine signed Protocol No. 6, on April 17, 1997 and May 5, 1997, respectively. These states must still ratify the instrument, although pursuant to the Vienna Convention on the Law of Treaties:

\begin{quote}
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . \textsuperscript{202}
\end{quote}

It appears that the Russian Federation has, in effect, respected the moratorium and that executions have stopped.\textsuperscript{203} The evidence from Ukraine is more ambiguous.

On October 11, 1997, at the Second Summit of the Council of Europe, the Heads of State and Government of the Council of Europe adopted a series of declarations, including one dealing with capital punishment.\textsuperscript{204} In their declarations to the Summit, several of the leaders insisted upon the importance of abolition of the death penalty as one of the central human rights goals of the Council. These included Romano Prodi of Italy,\textsuperscript{205} Jean-Claude Juncker

\begin{footnotes}
\item 199. \textit{Id.} § 2.
\item 203. The Committee Against Torture recently urged Ukraine to make its moratorium on the death penalty permanent. \textit{See} UNITED NATIONS, COMMITTEE AGAINST TORTURE CONCLUDES EIGHTEENTH SESSION IN GENEVA, 28 APRIL-9 MAY, at 2, U.N. Doc. HR/4326 (1997).
\item 204. \textit{See} Council of Europe, \textit{Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Final Declaration} [hereinafter \textit{Final Declaration}].
\item 205. \textit{See} Council of Europe, \textit{Second Summit of the Council of Europe, 10-11 October 1997 in Strasbourg: Statement by Mr. Romano Prodi, President of the Council of Ministers of Italy} [http://www.coe.fr/summit/discours/eprodi.htm].
\end{footnotes}
of Luxembourg, and Poul Nyrup Rasmussen of Denmark. Russian president Boris Yeltsin announced: "Russia has introduced a moratorium on capital punishment and we are strictly complying with this undertaking. I know that the European public opinion was shocked by public executions in Chechnya. Russia's leadership is taking all necessary measures to contain such manifestations of medieval barbarity." The President of Latvia, Guntis Ulmanis, explained that a year earlier, he had imposed a moratorium on executions, and that it is still in force. In the Final Declaration of the Summit, the heads of state and government "call[ed] for the universal abolition of the death penalty and insist[ed] on the maintenance, in the meantime, of existing moratoria on executions in Europe."

C. European Union

Death penalty issues have frequently been raised within the European Parliament, which has adopted a number of resolutions on the subject over the years. As early as 1981, a resolution called for abolition of the death penalty in the European Community. Following the coming into force of Protocol No. 6, the European Parliament urged Member States to ratify that abolitionist instrument. In 1989, the European Parliament adopted the "Declaration of Fundamental Rights and Freedoms," which proclaims the abolition of the death penalty. In 1990, the president of the European Parliament an-
nounced that he had forwarded a motion for a resolution on abolition of the
death penalty in the United States. Subsequently, the Political Affairs
Committee decided to prepare a report on the death penalty and appointed
Maria Adelaide Aglietta as rapporteur. In 1992, a motion for a resolution was
prepared that named those European Union states, namely Greece, Belgium,
Italy, Spain, and the United Kingdom, whose legislation still provided for the
death penalty in the case of exceptional crimes, to abolish it altogether. It
also urged all member states that had not yet done so to ratify Protocol No. 6
as well as the Second Optional Protocol to the International Covenant on Civil
and Political Rights. The resolution also called upon member states to
refuse extradition to states where capital punishment still exists, unless suffi-
cient guarantees that it will not be imposed were obtained. The resolution
stated that:

[The European Parliament hopes that those countries which are members
of the Council of Europe, and have not done so, will undertake to abolish
the death penalty (in the case of exceptional crimes, this applies to Cyprus,
Malta and Switzerland, and in the case of both ordinary and exceptional
crimes, to Turkey and Poland), together with those countries which are
members of the CSCE, in which the death penalty still exists (Bulgaria,
United States of America, Commonwealth of Independent States, Yugoslav-
ia, Lithuania, Estonia, Latvia, and Albania).]

It urged the United Nations to adopt a "binding decision imposing a general
moratorium on the death penalty."

Death penalty practice has also been a factor in assessing human rights
within states whose recognition is being considered by the European Union.
In its opinion on the recognition of Slovenia, the Arbitration Commission
presided by French judge Robert Badinter took note of the abolition of the
death penalty in the Constitution of Slovenia.

In October 1997, the European Union adopted the Treaty of Amster-
dam, which amends the various conventions concerning the body and its

215. See id. (discussing abolition of death penalty in European Union) (footnote omitted).
216. See id. (discussing abolition of death penalty in European Union).
217. See id. (discussing abolition of death penalty in European Union).
218. See id. (discussing abolition of death penalty in European Union).
219. See id. (discussing abolition of death penalty in European Union).
220. See id. (discussing abolition of death penalty in European Union).
221. See Opinion No. 7, On International Recognition of the Republic of Slovenia by the
prohibition on death penalty in Slovenian Constitution).
222. See Treaty of Amsterdam, in THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY
components. The instrument was completed with a series of declarations, the first of which concerns the death penalty. It states:

With reference to Article F(2) of the Treaty on European Union, the Conference recalls that Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and which has been signed and ratified by a large majority of Member States, provides for the abolition of the death penalty. In this context, the Conference notes the fact that since the signature of the abovementioned Protocol on 28 April 1983, the death penalty has been abolished in most of the Member States of the Union and has not been applied in any of them. 223

IV. International Criminal Law

The first truly international trials were held in the aftermath of World War II and led, in many cases, to capital executions. 224 The Charter of the International Military Tribunal authorized the Nuremberg court to impose upon a convicted war criminal "death or such other punishment as shall be determined by it to be just." 225 Many of the Nazi defendants were condemned to death, although a few received lengthy prison terms and some were acquitted. The Soviet judge expressed, as an individual opinion, the minority view that all of those convicted should also have been sentenced to death. Those condemned to death were subsequently executed within a few weeks, with the exception of Göring, who committed suicide hours before the time fixed for sentence. 226 A series of successor trials were held in Nuremberg pursuant to Control Council Law No. 10. 227 Again, large numbers of defendants were sentenced to death or to various lesser punishments, including life imprisonment or lengthy terms of detention. At the Tokyo Trial, seven defendants were sentenced to death and fifteen defendants were sentenced to life impris-

223. See Declaration on the Abolition of the Death Penalty, in The Treaty of Amsterdam: Text and Commentary, supra note 222, at 309.
224. See William A. Schabas, War Crimes, Crimes against Humanity and the Death Penalty, 60 ALB. L. REV. 733, 733 (1997) (noting that "the first international war crimes tribunals, created in the aftermath of the Second World War, made widespread use of the death penalty").
225. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, supra note 3, art. 27, at 300.
The president of the Tokyo Tribunal penned a separate opinion that seemed to favor sentences other than death:

> It may well be that the punishment of imprisonment for life under sustained conditions of hardship in an isolated place or places outside Japan — the usual conditions in such cases — would be a greater deterrent to men like the accused than the speedy termination of existence on the scaffold or before a firing squad.

In answer to arguments that these sentences breached the rule *nulla poena sine lege*, it was said that "[i]nternational law lays down that a war criminal may be punished with death whatever crimes he may have committed." The 1940 United States Army Manual *Rules of Land Warfare* declared that "[a]ll war crimes are subject to the death penalty, although a lesser penalty may be imposed." A postwar Norwegian court answered a defendant’s plea that the death penalty did not apply to the offense as charged by finding that violations of the laws and customs of war had always been punishable by death at international law. Early efforts to establish an international criminal justice system considered the appropriateness of the death penalty. A preliminary draft of the Convention for the Prevention and Punishment of the Crime of Genocide suggested that the maximum penalty for genocide be capital punishment. A group of three experts involved in drafting the Genocide Convention, Donnadieu de Vabres, Pella, and Lemkin, revived provisions from a 1937 treaty that had never come into force that
provided for capital punishment for serious international crimes. But only a few years later, a draft provision proposed by the International Law Commission for its Draft Code of Offences Against The Peace and Security of Mankind avoided any categorical reference to capital punishment: "The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence."  

A General Assembly committee subsequently recommended that the statute of the proposed international criminal court contain only the most general of provisions dealing with sentencing and suggested the phrase "the court shall impose such penalties as it may determine." Moreover, the General Assembly committee even stated that the statute might exclude certain forms of punishment, such as the death penalty.

The Cold War intervened to arrest further developments in international justice, and only in 1989 did the General Assembly revive the proposal to establish an international court. In the interim, as we have already discussed, international human rights law progressed from a somewhat benign tolerance of capital punishment to direct and outright opposition. When the issue of sentencing came before the International Law Commission in 1991, special rapporteur Doudou Thiam formally prescribed that capital punishment be excluded from the Code of Crimes Against the Peace and Security of Mankind and that a maximum sentence of life imprisonment be provided. Although a few members of the Commission argued that capital punishment should not be abandoned, the vast majority disagreed, given the international trend in


237. Id. § 111.


favors of abolition of the death penalty. Several members also expressed their reservations about sentences of life imprisonment, which they said were also a form of cruel, inhuman, and degrading punishment. The draft statute for an international criminal court, adopted by the Commission in 1994, stated that a person convicted under the statute would be subject to imprisonment, up to and including life imprisonment, but capital punishment was not envisioned. During subsequent debates on the statute in the Preparatory Committee and the Sixth Committee of the General Assembly, there have been occasional, isolated attempts to revive capital punishment, but these now seem clearly condemned to rejection.


240. See Summary Records of the 2207th Meeting, supra note 238, §§ 23-24; Summary Records of the 2208th Meeting, supra note 238, §§ 2, 21, 30; Summary Records of the 2209th Meeting, supra note 238, §§ 5, 29; Summary Records of the 2210th Meeting, supra note 238, §§ 25, 33, 46; Summary Records of the 2212th Meeting, supra note 239, § 4; Summary Records of the 2213th Meeting, supra note 239, §§ 12, 23, 33.

241. Summary Records of the 2208th Meeting, supra note 238, §§ 10 (Graefrath), 21 (Calero Rodriguez); Summary Records of the 2209th Meeting, supra note 238, § 19 (Barboza); Summary Records of the 2210th Meeting, supra note 238, § 47 (Njenga); Summary Records of the 2212th Meeting, supra note 239, § 4 (Solari Tudela); see Document A/46/10, supra note 238, § 88. The German Constitutional Court has suggested that life imprisonment without possibility of parole constitutes cruel, inhuman and degrading punishment. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 314-20 (1989) (discussing Life Imprisonment Case (1977) 45 BVerGE 187).


While the debate had been underway in the International Law Commission and the Preparatory Committee, the Security Council had also addressed the issue of sentencing when it set up the ad hoc tribunals for the former Yugoslavia and Rwanda. The statutes of the two ad hoc tribunals contain brief provisions dealing with sentencing, proposing essentially that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labor, and fines) and that they be established while taking into account the "general practice" of the criminal courts in the former Yugoslavia or Rwanda. The exclusion of the death penalty by the International Tribunal is a particularly sore point with Rwanda. In the Security Council, Rwanda claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts to execution if those tried by the international tribunal—presumably the masterminds of the genocide—would only be subject to life imprisonment.

Rwanda's representative stated that "[s]ince it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence." He also stated, "[t]hat situation is not conducive to national reconciliation in...


246. Id.
Rwanda. But to counter this argument, the representative of New Zealand reminded Rwanda that "[f]or over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable—and a dreadful step backwards—to introduce it here." Since domestic trials began in Rwanda in December 1996, more than one hundred persons have been sentenced to death, although these sentences have not yet been carried out. In fact, Rwanda has not imposed capital punishment since 1982, and in 1992, President Habyarimana systematically commuted all outstanding death sentences. According to the United Nations Secretary-General, Rwanda is now considered a de facto abolitionist state because it has not conducted executions for more than ten years. Even the program of the Rwandese Patriotic Front calls for abolition of the death penalty. Furthermore, in the 1993 Arusha peace accords, which have constitutional force in Rwanda, the government undertook to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at Abolition of the Death Penalty, although it has not yet formally taken this step. Recent legislation adopted by Rwanda in order to expedite trials of genocide suspects abolishes the death penalty for the vast majority of offenders, who would otherwise be subject to capital punishment under the country’s Code pénal.

V. Extradition

Extradition has become an important indirect way in which international law promotes the abolition of the death penalty. Since the late nineteenth century, extradition treaties have contained clauses by which states parties may refuse extradition for capital offenses in the requesting state unless a satisfactory assurance will be given that the death penalty not be imposed. Such
provisions can be found as early as 1889, in the South American Convention, in the 1892 extradition treaty between the United Kingdom and Portugal, in the 1908 extradition treaty between the United States and Portugal, and in the 1912 treaty prepared by the International Commission of Jurists. These clauses have now become a form of "boilerplate" international law and are contained in model extradition treaties adopted within international organizations including the United Nations. Several important cases have been heard by courts in Europe and Canada concerning extradition to the United States. As a result of the case law of the European Court of Human Rights, extradition to the United States from Europe is now virtually contingent on such assurances, while in Canada, the position is not nearly as clear.

The European Commission of Human Rights first addressed the question of extradition to the death rows on the other side of the Atlantic in *Kirkwood v. United Kingdom*, a case originating in California. Kirkwood's application was declared inadmissible, not because the argument itself was flawed, but because he had failed to demonstrate that detention on "death row" was inhuman and degrading treatment within the meaning of article 3. The issue returned to the Strasbourg organs several years later in the case of Jens Soering, who had been arrested in the United Kingdom under an extradition warrant issued at the request of the United States. In a judgment issued on July 7, 1989, the European Court of Human Rights confirmed that circum-

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stances relating to a death sentence could give rise to issues respecting the prohibition of inhuman and degrading treatment or punishment and concluded that if the United Kingdom were to extradite Soering to Virginia, this would constitute a breach of the European Convention.

Although the court has not revisited the question since *Soering*, the European Commission on Human Rights has been called upon to interpret the *Soering* judgment. In January 1994, it ruled an application from an individual subject to extradition to the United States for a capital offense to be inadmissible. The Commission considered the guarantees that had been provided by the Dallas County prosecutor to the French government, stating that if extradition were granted, "the State of Texas [would] not seek the death penalty," to be sufficient. Texas law stated that the death penalty could only be pronounced if requested by the prosecution. The fugitive had claimed that the undertaking was "vague and imprecise." Furthermore, she argued that it had been furnished by the federal authorities through diplomatic channels and did not bind the executive or judicial authorities of the State of Texas. The Commission compared the facts with those in *Soering*, in which the prosecutor had made a clear intention to seek the death penalty. The Commission found the Texas prosecutor's attitude to be fundamentally different and concurred with an earlier decision of the French Conseil d'État holding the undertaking to be satisfactory.

Still more recently, the Commission considered the case of Lei Ch'an Wa, threatened with extradition from Macao to China for a capital crime, trafficking in narcotics. The representative of the Chinese news agency Xinhua, which unofficially represented China's interests in Macao, had stated that the death penalty would not be imposed in the event of extradition, which was allowed by the Portuguese extradition legislation in force in Macao.
However, Portugal's constitution says that extradition is forbidden for crimes for which the death penalty is provided in the receiving state's legislation. In other words, extradition was forbidden by the constitution, despite the existence of an assurance from the representative of China. The Constitutional Court held that under the circumstances, extradition was prohibited. However, once the Constitutional Court had settled the matter, the problem was resolved, and the Commission decided that it was unnecessary to examine further the application. In another case, involving extradition from Austria to the Russian Federation to stand trial for murder, the Commission noted a maximum sentence of ten years in the Penal Code of the Russian Federation, observed that the two accomplices had been sentenced to nine years, and concluded that "there are no substantial grounds for believing that the applicant faces a real risk of being subjected to the death penalty in the Russian Federation." Protocol No. 6 has also been cited in domestic law in cases concerning extradition of fugitives to states imposing the death penalty. On two occasions, the French Conseil d'État has refused to extradite, expressing the view that Protocol No. 6 establishes a European ordre public that prohibits extradition in capital cases. The Supreme Court of the Netherlands took a similar view, invoking the Protocol in refusing to return a United States serviceman, although required to do so by the NATO Status of Forces Agreement. The court considered that the European Convention and its Protocol

276. Agreement Between the Parties to the 1949 North Atlantic Treaty Regarding the
No. 6 took precedence over the other treaty.

In June 1996, Italy's Constitutional Court took judicial opposition to extradition for capital crimes one step further when it refused to send Pietro Venezia to the United States despite assurances from American prosecutors that the death penalty would not be sought or imposed.277 Venezia's extradition to Dade County, Florida had been requested by the United States, pursuant to the Treaty of Extradition dated October 13, 1983.278 Article IX of the treaty entitles Italy to request that extradition be conditional upon an undertaking by the United States that the death penalty not be imposed.279 The United States government gave assurances in the form of a note verbale on July 28, 1994, August 24, 1995, and January 12, 1996.280 But this was not enough for the Italian Constitutional Court.

According to the judgment of the court, the prohibition of capital punishment is of special importance, like all sentences that violate humanitarian principles, in the first part of the Constitution.281 The right to life is the first of the inviolable human rights, enshrined in article 2.282 The judgment also stated that the absolute character of this constitutional guarantee is of significance to the exercise of powers attributed to all public authorities under the republican system, and specifically with respect to international judicial cooperation for the purposes of mutual judicial assistance.283 The court noted that it had already stated that the participation of Italy in punishments that cannot be imposed within Italy in peacetime constitutes a breach of the Constitution.284


Note that on 19 June 1995, the States parties to the NATO treaty finalized the Agreement among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces together with an Additional Protocol. Article 1 of the Additional Protocol states: "Insofar as it has jurisdiction according to the provisions of the agreement, each State party to the present additional protocol shall not carry out a death sentence with regard to any member of a force and its civilian component, and their dependants from any other State party to the present additional protocol."

SCHABAS, supra note 11, at 254 n.174.


279. See id. art. IX.

280. See Bianchi, supra note 276, at 728.

281. See id. at 727.

282. See id. at 728.

283. See id.

284. See id.
Referring to the mechanism by which the Italian authorities consider the sufficiency of the undertaking by the United States authorities not to impose capital punishment, the Italian Constitutional Court held that:

The extradition of a fugitive indicted for a crime for which capital punishment is provided by the law of the requesting state would violate Articles 2 and 27 of the Italian Constitution, regardless of the sufficiency of the assurances provided by the requesting state that the death penalty would not be imposed or, if imposed, would not be executed.285

As a result, the court declared provisions of the code of penal procedure designed to give effect to the extradition treaty between Italy and the United States to be contrary to the Constitution.286 It also declared that the portion of Law 225 of March 26, 1984, implementing article IX of the extradition treaty, was unconstitutional.287 Venezia had also filed an application with the European Commission of Human Rights. The Commission decided to strike the case from its docket as a result of the judgment of the Italian Constitutional Court.288

Canadian courts have been reluctant to follow the European precedents,289 although a recent judgment suggests that they will be increasingly severe in granting extradition in capital cases. In United States of America v. Burns and Rafay,290 issued on June 30, 1997, the British Columbia Court of Appeal overruled the decision of the Canadian Minister of Justice to allow extradition in a capital offense without seeking an assurance that the death penalty would be imposed.291 Article VI of the Extradition Treaty between Canada and the United States declares:

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.292

285. See id.
286. See id.
287. See id.
Burns and Rafay were both eighteen at the time of the crime, a brutal murder of Rafay's parents. They were charged by the State of Washington with aggravated first degree murder, punishable by sentence of death. Although Canada abolished the death penalty for common law crimes in 1976. Although the death penalty still exists under military law, it has not been imposed for more than fifty years, and a pending revision of the National Defense Act plans to eliminate capital punishment from the Canadian statute books altogether.

Justice Donald, writing for the majority of the British Columbia Court of Appeal, admitted that he could not refuse extradition on the basis of section 12 of the Canadian Charter of Rights of Freedoms, which prohibits cruel and unusual punishment, or section 7 of the Charter, which enshrines the right to life, given the 1991 judgment of the Supreme Court of Canada in Kindler v. Canada. However, he concluded that because Burns and Rafay were Canadian citizens, their extradition would violate § 6(1) of the Charter, which declares that "[e]very citizen of Canada has the right to enter, remain in and leave Canada," as dissenting Justice McEachern noted, § 6(1) is subject to the limitation clause of § 1, which instructs the courts to subject Charter rights to the test of "reasonable limits in a free and democratic society." Following an analytical approach developed by the European Court of Human Rights in the application of similar provisions, Canadian courts consider whether the legal rule that violates the Charter right has a legitimate purpose.

294. Id. at 530-31.
295. Id. at 531.
297. Id. § 7.
and whether it constitutes a minimal infringement upon the right in question. The Supreme Court of Canada had already determined that extradition constitutes an acceptable limit on the right of Canadians to remain in Canada. But according to Justice Donald, execution of Burns and Rafay would violate their right to return to Canada upon completion of their sentence, something that extradition for noncapital offenses would not. Given alternatives, specifically a sentence of life imprisonment, it was clear that extradition without an assurance that the death penalty would not be imposed failed the minimal impairment test. He wrote:

The simple point taken by the applicants in the present case, with which I am in full agreement, is that their return to Canada is impossible if they are put to death. . . . By handing over the applicants to the American authorities without an assurance, the Minister will maximally, not minimally, impair the applicants' rights of citizenship.

Although bound by precedent of the Supreme Court of Canada that allows the extradition of noncitizens for capital offenses — case law that, incidentally, has been criticized by other courts in other countries — Justice Donald's reasons suggest that he is opposed to extradition for capital offenses in general. He wrote:

With respect, the Minister appears to have given only lip service to a fundamentally important aspect of Canadian policy, namely, that we have decided through our elected representatives that we will not put our killers to death [on the reflected] will of the majority and their concern for the sanctity of life and the dignity of the person.

He cited the reasons of Supreme Court Justice Peter Cory, who dissented in *Kindler*, referring to the fact that Canada's Parliament rejected the death penalty in two separate free votes. Criticizing the executive decision to extradite Burns and Rafay without the assurance that capital punishment would not be imposed, he stated:

The Minister confesses his support for abolition but then fails to act on his conviction. Apart from trying to have it both ways, the problem with the

304. *Id.* at 534.
307. *Id.*
Minister's thinking is that he treats the policy question about the death penalty in Canada as undecided and at large. This approach led him to give effect to the minority view on the death penalty as far as these applicants are concerned.308

Burns and Rafay is being appealed to the Supreme Court of Canada. That court, in a four to three decision, authorized the extradition of Joseph Kindler in 1991. Yet even the Kinder decision suggests the court's discomfort with the death penalty, as six of the seven justices indicated that capital punishment, were it to be imposed in Canada, would violate the right to life and the prohibition of cruel and unusual punishment.

VI. Conclusion

In his 1995 report to the Economic and Social Council,309 English criminologist Roger Hood concluded that "there has been a considerable shift towards the abolition of the death penalty both de jure and in practice" in the years 1989 through 1993.310 After consulting other sources, Professor Hood observed that "it appears that since 1989 24 countries have abolished capital punishment, 22 of them for all crimes in peacetime or in wartime."311 Over the same period, the death penalty was reintroduced in four states.312 Professor Hood stated that "the picture that emerges is that an unprecedented number of countries have abolished or suspended the use of the death penalty."313 Amnesty International issued revised figures in July 1997 that declared that ninety-nine states have abolished the death penalty in law or in practice, whereas ninety-four retain the death penalty. Amnesty International adds that "the number of countries which actually execute prisoners in any one year is much smaller."314

Capital punishment remains in force in many countries, and while the situation continues to evolve, quite convincingly, in favor of abolition, it is too early to speak of customary or universal norms. There is nothing unusual

308. Id. at 542.
311. Id. § 34.
312. Id. § 38.
313. Id. § 87.
314. AMNESTY INTERNATIONAL, Facts and Figures on the Death Penalty, AI Index: ACT 50/08/97, July 1997. For an even more optimistic assessment, see generally THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT, supra note 51.
here. One need only think of the emergence of other fundamental rights, such as the prohibition of slavery and torture, sometimes qualified, with little debate, as peremptory or *jus cogens* norms. Yet not so long ago — barely a century, in the case of slavery — it was impossible to speak of any international consensus on these matters. With that comparison in mind, can it be unrealistic to look to the universal abolition of the death penalty, the consequence of its international prohibition by human rights law, at some point in coming decades?
Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After Seminole Tribe: The Eleventh Amendment and Other Immunity Doctrines

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Introduction

Consider the following appropriations of intellectual property that might be committed by public employees: (1) During the course of her development of a new technique for cheaply producing large amounts of the anti-cancer drug taxol, a professor at a public university makes unauthorized uses of a patented cloning process; (2) In the course of training new accountants in a state tax office, a supervisor makes and distributes photocopies of a substantial portion of a popular accounting text; (3) In order to calm parents who are worried about the quality of the food in a public elementary school cafeteria, the principal misleads them into believing that the food is made by a popular local catering service; (4) In the course of her regulatory duties, an employee of a state environmental agency releases confidential business information to the public without the owner’s consent; (5) In order to commemorate famous residents of its state, the head of the state’s tourism office strikes and sells medals of several popular entertainers. Given the likely inadequacy of a suit for infringement against an individual who has committed a wrongful act, owners of patents, copyrights, trademarks, trade secrets, and publicity rights have begun to bring suits against the governments that benefit from misappropriations by their officials.

The answer to the simple but important question of whether a state or local government can be held liable for the unauthorized appropriation of private intellectual property turns out to be frustratingly complex. The result of a lawsuit brought by an aggrieved rights-holder will turn on numerous variables: Is the named defendant in the suit the state government, a state
employee acting in his official capacity, a municipality, a municipal employee
acting in his official capacity, or an individual? Is the requested relief mon-
tary or injunctive? Is the intellectual property at issue a patent, copyright,
trademark, trade secret, publicity right, or the right to be free from false
advertising? Is the suit brought in state or federal court? Is the cause of
action based on state law or federal law? Is the appropriation an exercise of
a state’s right of eminent domain or an inverse condemnation of property
under the Takings Clause?

The recent enactment of federal legislation purporting to abrogate state
immunity from suit in cases involving patents,1 copyrights,2 trademarks,3 and
false advertising4 promised briefly to simplify the question of state liability.
The Supreme Court’s subsequent landmark decision in Seminole Tribe of
Florida v. Florida,5 however, has reinvigorated state claims to sovereign
immunity and thereby increased uncertainty over the potential liability of a
state or a state actor for the unauthorized use of intellectual property. Given
the increasingly important role played by intellectual property in the economy,
particularly in the areas of computer software and biotechnology, and given

Any State, any instrumentality of a State, and any officer or employee of a State or
instrumentality of a State acting in his official capacity, shall not be immune, under
the [E]leventh [A]mendment of the Constitution of the United States or under any
other doctrine of sovereign immunity, from suit in Federal court by any person,
including any governmental or non-governmental entity, for infringement of a
patent . . . or for any other violation under this title.

Id.

Any State, any instrumentality of a State, and any officer or employee of a State or
instrumentality of a State acting in his official capacity, shall not be immune, under
the Eleventh Amendment of the Constitution of the United States or under any
other doctrine of sovereign immunity, from suit in Federal [c]ourt by any person . . .
for a violation of any of the exclusive rights of the copyright owner provided by . . .
this title.

Id.

Any State, any instrumentality of a State or any officer or employee of a State or
instrumentality of a State acting in his official capacity, shall not be immune, under
the [E]leventh [A]mendment of the Constitution of the United States or under any
other doctrine of sovereign immunity, from suit in Federal court by any person . . .
for any violation under this chapter.

Id.

4. See id.

Eleventh Amendment immunity under its Article I powers).
the pervasive use of intellectual property by state agencies and universities,\textsuperscript{6} the need for clarity is particularly acute. State and municipal governments desperately need guidance on the precise parameters of their potential liability, especially because courts and commentators have begun to conclude, too hastily in our view, that \textit{Seminole Tribe} nullifies the abrogating statutes.\textsuperscript{7}


In addition, numerous recent cases involve patent and copyright suits brought against states and state universities. \textit{See generally} College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 148 F.3d 1343 (Fed. Cir. 1998) (holding that patent claims against state agency are not barred by Eleventh Amendment), \textit{petition for cert. filed, 67 U.S.L.W. 3259} (U.S. Sept. 28, 1998) (No. 98-531); \textit{Chavez v. Arte Publico Press}, No. 93-2881, 1998 WL 685623 (5th Cir. Oct. 1, 1998) (concluding that copyright and false advertising claims brought against state university press are barred by Eleventh Amendment); Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931 (Fed. Cir. 1993) (concluding that patent suit against state university is not barred by Eleventh Amendment); Jacobs Wind Elec. Co. v. Florida Dep't of Transp., 919 F.2d 726 (Fed. Cir. 1990) (holding that patent suit against state agency is barred by Eleventh Amendment); Chew v. California, 893 F.2d 331 (Fed. Cir. 1990) (concluding that patent suit against state is barred by Eleventh Amendment); Lane v. First Nat'l Bank, 871 F.2d 166 (1st Cir. 1989) (concluding that copyright suit against state is barred by Eleventh Amendment); BV Eng'g v. UCLA, 858 F.2d 1394 (9th Cir. 1988) (finding that copyright suit against state is barred by Eleventh Amendment); Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988) (holding that copyright suit against state university is barred by Eleventh Amendment); Better Gov't Bureau, Inc. v. McGraw, 904 F. Supp. 540 (S.D. W. Va. 1995) (holding that federal unfair competition suit against state agency is not barred by Eleventh Amendment), \textit{aff'd sub nom.} Allen, 106 F.3d 582 (4th Cir. 1997), \textit{cert. denied}, 118 S. Ct. 689 (1998); Unix Sys. Lab., Inc. v. Berkeley Software Design, Inc., 832 F. Supp. 790 (D.N.J. 1993) (concluding that copyright and trademark causes of action against state university are not barred by Eleventh Amendment, but trade secret claim is barred).


In order to construct a liability roadmap for the states, specialists in the substantive law of intellectual property and experts in the field of federal jurisdiction must combine forces. Although the contours of intellectual property protection are continually shifting and the law of federal jurisdiction is notoriously slippery, a convincing picture of much of the law governing the misappropriation of intellectual property by governments and governmental actors can be outlined, and unresolved issues can be identified with some precision.

Part I of this Article addresses relief available to intellectual property owners under the Takings Clause of the Fifth Amendment. Before Congress's express abrogation of state sovereign immunity in 1992, federal, state, and local governments were nonetheless potentially liable for misappropriations of intellectual property that constituted takings without just compensation. This examination of the Supreme Court's Fifth Amendment jurisprudence is also key to answering the critical question of whether federal patent, copyright, and trademark laws establish rights in "property" for the purposes of the Fourteenth Amendment, for only under section 5 of the Fourteenth Amendment may Congress abrogate a state's Eleventh Amendment immunity.

Intellectual property owners, not surprisingly, were dissatisfied with the rather limited restitutionary nature of the states' Fifth Amendment liability. In 1992, these owners convinced Congress to make the broader remedies found in federal intellectual property laws applicable against the states. Part II addresses whether the Court's decision in Seminole Tribe—that Congress cannot abrogate a state's Eleventh Amendment immunity pursuant to any of

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8. See Jacobs Wind Elec. Co. v. Florida Dep't of Transp., 919 F.2d 726, 728 (Fed. Cir. 1990) (stating that patentee "may also assert a 'takings' claim against the state under the Fifth and Fourteenth Amendments"); Lane v. First Nat'l Bank, 871 F.2d 166, 174 (1st Cir. 1989) (stating that if copyright owner "exhausts State remedies and establishes that the Massachusetts legal system affords her no just compensation for the wrongful confiscation of her property, the Takings Clause of the federal Constitution might at that point enable her to pursue a damage remedy in federal court"); cf. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984) (holding that trade secrets are protected by Takings Clause of Fifth Amendment in suit against federal government); James v. Campbell, 104 U.S. 356, 357-58 (1882) (stating that when government grants patent, it confers on patentee exclusive property that cannot be used or appropriated by government itself without just compensation).

9. See U.S. CONST. amend. XI. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Id. This clause has been interpreted to bar federal court suits brought by individuals, foreign governments, or Indian tribes, regardless of their state
its Article I powers—renders the 1992 abrogating legislation unconstitutional. The question is of vital interest to owners of federal intellectual property because unlike the remedy for a takings claim, a valid claim for patent, copyright, trademark infringement, or false advertising carries with it the presumption of injunctive relief and the possibility of monetary damages beyond mere restitution.10

Moreover, litigating under these statutes affords the plaintiff the subtle but potentially decisive advantage of access to a federal forum for his federal claims.11 After analyzing the Court's recent clarifying opinion in City of Boerne v. Flores,12 we conclude that Congress properly exercised its power under section 5 of the Fourteenth Amendment to render states liable in federal court for patent, copyright, and trademark infringement, but probably not for false advertising claims. Even if the Court disagrees and strikes down the abrogating statutes, we conclude that principles of sovereign immunity probably would not prevent the successful pursuit of a remedy for the violation of a federal statute in state court.

In Part III, we discuss how the liability landscape differs when the defendant is a state official or a local government being sued for a statutory or constitutional violation under the federal intellectual property statutes or under 42 U.S.C. § 1983. When a local government has taken property pursuant to an "official policy," the plaintiff may be obliged to pursue an inverse condemnation suit in state court in lieu of, or at least before, bringing a federal suit under § 1983. When an officer acts outside the "official policy" of a local government, a federal § 1983 suit is appropriate, and both damages and prospective relief will often be available.

Because suits over government intrusions on intellectual property rights may be brought under federal statutory and constitutional law and state condemnation law, and in both federal and state courts, the need arises to coordinate the work of the two judicial systems. Part IV identifies and addresses these jurisdictional issues.


I. Intellectual Property and the Takings Clause

Congress did not attempt to abrogate Eleventh Amendment immunity in patent, copyright, and trademark cases until 1992. This is not to say, however, that states and their "arms" had historically been able to misappropriate intellectual property with impunity. The Fifth Amendment provides that the federal government may not take private property for public use without offering just compensation for the deprivation. This clause has long been interpreted as forbidding uncompensated takings of property by states and municipalities as well. Under the Eleventh Amendment, claims of compensation against a state must be brought in state court. The Eleventh Amendment does not, however, divest the Supreme Court of jurisdiction to hear the appeals of disappointed state court takings clause litigants. Therefore, to the extent that intellectual property constitutes "private property" for the purposes of the Fifth Amendment, states have always been potentially liable for some misappropriations.

The Court has defined "property" very broadly in the Fifth Amendment context. Property is not limited to the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead it]... denote[s] the

13. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

14. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

15. See Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) (concluding that private property taken by state without just compensation to owner is "wanting in the due process of law required by the 14th Amendment of the Constitution of the United States"). This was the first provision of the Bill of Rights to be applied to the states. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.4.1, at 504 & n.1 (1997).


17. See McKesson Corp. v. Division of Alcoholic Bev. & Tobacco, 496 U.S. 18, 26 (1990) (rejecting idea that Eleventh Amendment precludes Supreme Court’s exercise of appellate jurisdiction in state court suit against state for monetary relief).
group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess. 18

In concluding that copyrights constitute protectable interests, or property, Professors Dreyfuss and Kwall identify specifically the right to exclude, the right to manage, and the right to derive an economic benefit as legal interests marking something as property. 19 Economists tend to focus on the right to exclude others from unauthorized use as the key component in defining a property right. 20 The right to exclude others is, of course, the hallmark of both federal and state intellectual property systems.

Two Supreme Court decisions suggest strongly that intellectual property shares the constitutional protection afforded by the Fifth Amendment's command that "private property [shall not] be taken for public use, without just compensation." 21 In 1882, the Court in *James v. Campbell* 22 declared that patents were protected by the Takings Clause. 23 A century later, in *Ruckelshaus v. Monsanto Co.*, 24 the Court extended the Fifth Amendment guarantee to trade secrets protected under state law. 25 *Ruckelshaus* is particularly important to the determination of which types of intellectual property are protected. If trade secrets, one of the weakest forms of intellectual property, 26 are protected by the Fifth Amendment, then patents, copyrights, and trademarks must logically be protected as well.

In the intellectual property context, two questions require careful attention. Liability is based on a "taking" of "property." Which common law or statutory rights qualify as "property," thus triggering the protection of the Takings Clause? What kinds of governmental interference amount to a "taking" of that property?

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21. U.S. Const. amend. V. The Fifth Amendment is directed to the national government. It was first applied to the states in 1897. See supra note 15.
26. See infra notes 33-39 and accompanying text (discussing Court's finding in *Ruckelshaus* that government's revealing of trade secret is taking under Fifth Amendment).
A. Is Intellectual Property Fifth Amendment Property?

By limiting the Fifth Amendment guarantee to "property," the framers obliged the Supreme Court to come up with criteria for identifying those interests that qualify as property and for excluding others that would fail the test. The scarce case law on the subject indicates that the Fifth Amendment applies in a fairly broad manner to legal rights in intellectual property. In 1882, the Court in *James v. Campbell* considered a claim that a United States postmaster had infringed the patent for a letter stamping device. The Court held:

That the Government of the United States when it grants letters patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government itself, without just compensation, any more than it can appropriate or use without compensation land.

The Court found that the sovereign retained no right to make use of patented devices. It reasoned that incentives to invent valuable devices such as "explosive shells, rams and submarine batteries" would be curtailed were the government to have the right to infringe a patent without paying just compensation.

Were *Campbell* the only precedent on point, one might legitimately question whether weaker forms of intellectual property, such as copyrights and trademarks, should also be considered property for the purposes of the Fifth Amendment. Copyrights and trademarks, after all, do not confer the same powerful set of exclusive rights as patents, nor do they generally confer the sort of power in the market that a patent does. In 1984, however, in

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27. See supra notes 21-26 and accompanying text.
28. *Campbell*, 104 U.S. at 357.
29. *Id.* at 357-58; see *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945) ("That a patent is property, protected against appropriation both by individuals and by government, has long been settled.").
30. *James v. Campbell*, 104 U.S. 356, 358 (1882). This finding was unlike the practice in the ancient Venetian Republic, which retained prerogative to use freely devices for which it had issued a patent. See Giulio Mandich, *Venetian Patents (1450-1550)*, 30 J. PAT. OFF. SOC'Y 166, 177 (1948) (quoting Venetian statute from 1474).
32. See infra notes 61-65. Many unauthorized uses of copyrighted expression and trademarks are permitted. For example, independent creation and fair use are both defenses to copyright infringement that are unavailable in patent infringement actions. See 17 U.S.C. § 107 (1994) (stating that "the fair use of a copyrighted work . . . is not an infringement of copyright"). Unauthorized uses of trademarks are common (such as comparative advertising) and are not actionable in the absence of consumer confusion as to source or sponsorship. See 15 U.S.C. § 1125 (1994) (stating that person who uses mark is "liable in a civil action" if it "is likely to
Ruckelshaus v. Monsanto Co., the Court held that the weakest and least property-like form of intellectual property, the trade secret, constituted property for the purposes of the Fifth Amendment.\textsuperscript{33}

In Ruckelshaus, the Court considered a claim by Monsanto that confidential information it submitted to the Environmental Protection Agency (EPA) constituted property under Missouri law that was "taken" by the agency when it was disclosed to Monsanto's competitors.\textsuperscript{34} Because valuable information is only legally protectable under trade secret doctrine if it is in fact secret,\textsuperscript{35} disclosure by the EPA disabled Monsanto's legal right to prevent others from misappropriating its information.\textsuperscript{36} The Court held that the federal government would have to compensate Monsanto for the value of trade secrets destroyed without its express or implied consent.\textsuperscript{37} Noting that it had earlier found other intangible rights to constitute "property,"\textsuperscript{38} the Court declared unequivocally that trade secrets were protected by the Fifth Amendment from uncompensated governmental takings.\textsuperscript{39}

To understand the breadth with which Ruckelshaus defines property, one must understand what a weak form of property a trade secret is. A trade secret is "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."\textsuperscript{40} The possessor of the information, however, is only protected from the acquisition of the information through breach of an express or implied promise or through a trespass.\textsuperscript{41} The

cause confusion"). In addition, it is more difficult to see, especially with trademarks, how the national interest in the creation of valuable devices usable by the government is enhanced by the protection of copyrights and trademarks.

34. Id. at 998-99.
35. See \textsc{Restatement (Third) of Unfair Competition} § 39 (1995) (defining trade secrets as information that is both valuable and secret).
37. Id. at 1002-04. The Court also noted that the vehicle for compensation is a claim under the Tucker Act. Id. at 1016.
38. Id. at 1003; see Armstrong v. United States, 364 U.S. 40, 44, 46 (1960) (finding that state law materialman's lien is Fifth Amendment property); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 596-602 (1935) (finding that real estate lien is Fifth Amendment property); Lynch v. United States, 292 U.S. 571, 579 (1934) (stating that valid contracts are Fifth Amendment property).
40. \textsc{Restatement (Third) of Unfair Competition} § 39.
41. \textit{See id.} §§ 40, 43. Section 43 states that "improper" means of acquiring another's trade secret under the rule stated in § 40 include theft, fraud, unauthorized interception of communications, inducement of or knowing participation in a breach of confidence .... " Relevant case law reveals one extraordinarily narrow exception. See E.I. duPont deNemours
owner has no right to prevent someone from discovering the secret through reverse engineering or independent creation or because the owner has not taken reasonable precautions to keep it secret.\textsuperscript{42} In other words, the owner of a trade secret can enforce promises made to keep the information confidential, and it can sue those who acquire the information through independently tortious behavior, such as a physical trespass or fraud.\textsuperscript{43} Obviously, companies whose information does not qualify as a trade secret have a similar capacity to protect it through contract\textsuperscript{44} and the prosecution of trespassers and fraudfeasors.

What does it mean, then, to qualify as the owner of a trade secret? In essence, being able to prove possession of a trade secret means that one is entitled to enhanced remedies for breach of contract and for trespass beyond those that are normally available. A promise not to reveal a trade secret is enforceable through injunctive relief\textsuperscript{45} and potentially punishable by punitive damages,\textsuperscript{46} neither of which is available in a suit to enforce a typical promise.\textsuperscript{47} When the trade secret is obtained through a physical trespass, such as through the breaking of a window and the photographing of secret equipment, compensatory damages are measured by the profits that would be lost if the secret fell into the hands of the owner's competitors or by a reasonable royalty or by an accounting of the infringer's profits.\textsuperscript{48} They are not measured

\& Co. v. Rolfe Christopher, 431 F.2d 1012, 1017 (5th Cir. 1970) (finding that aerial photography of manufacturing plant under construction constituted improper acquisition of trade secrets).

\textsuperscript{42.} See Restatement (Third) of Unfair Competition § 43 (1995) ("Independent discovery and analysis of publicly available products or information are not improper means of acquisition.").

\textsuperscript{43.} See supra notes 40-42 and accompanying text.

\textsuperscript{44.} Shrinkwrap licenses are often attempts to protect nonconfidential information through contract law. Their enforceability outside the trade secret context, however, is controversial. Compare ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (enforcing contract that restricted buyer beyond limits of intellectual property law) with Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 270 (5th Cir. 1988) (finding state statute permitting enforcement of broad shrinkwrap license void under Supremacy Clause).

\textsuperscript{45.} Restatement (Third) of Unfair Competition § 44.

\textsuperscript{46.} Id. § 45 cmt. i; see Clark v. Bunker, 453 F.2d 1006, 1011-12 (9th Cir. 1972) (stating that court has power to award punitive damages in action for misappropriation of trade secret).

\textsuperscript{47.} See E. Allen Farnsworth, Farnsworth on Contracts § 12.4, at 160 (2d ed. 1998) (noting that "usual form of relief at common law was substitutional . . . that the plaintiff recover from the defendant a sum of money"); id. § 12.8, at 192-93 (stating that for breach of contract actions, "a court will not ordinarily award damages that are described as 'punitive'" and "[n]o matter how reprehensible the breach, damages are generally limited to those required to compensate the injured party for lost expectations").

\textsuperscript{48.} See Restatement (Third) of Unfair Competition § 45(1) (1995) (stating that monetary remedy should be greater of owner's actual pecuniary loss or misappropriator's gain);
merely by the cost of replacing the window. In other words, to be the owner of a trade secret means only that one can recover tort-like remedies for a breach of promise and contract or unjust enrichment-like remedies for a tort.\(^4^9\)

This is not to say that trade secrets should not qualify as property for the purposes of the Fifth Amendment. As the Court noted in *Ruckelshaus*, trade secrets bear many attributes traditionally associated with tangible property: they are assignable,\(^5^0\) they can form the res of a trust,\(^5^1\) and a debtor’s interest in a trade secret passes to the trustee in bankruptcy.\(^5^2\) Patents, copyrights, and trademarks\(^5^3\) share all of these attributes with trade secrets.

Trade secrets, however, are a significantly more ephemeral form of property than patents, copyrights, and trademarks. The term of protection is uncertain—the moment the secret becomes known through disclosure, reverse engineering, or independent discovery, legal protection vanishes.\(^5^4\) Due to the lack of a registration system and the nature of the right itself, trade secrets often do not have clearly identifiable exclusive owners.\(^5^5\) Rights and remedies vary from state to state.\(^5^6\) Licensing is difficult due to the lack of a registration system and the practical problems created by the fact that one must reveal a secret in order to market it.\(^5^7\) The central rationale of the Court in *Kewanee Oil Co. v. Bicron Corp.*,\(^5^8\) which held that federal patent law did not preempt state trade secret law, was based on the Court’s finding that the level of protection under trade secret law is significantly inferior to the level of federal patent protection.\(^5^9\) State trade secret law did not directly conflict with the goals and objectives of federal law because the rights afforded trade secret owners were so weak.\(^6^0\)

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51. Id. (citing RESTATEMENT (SECOND) OF TRUSTS § 82 cmt. e (1959)).

52. Id. (citing In re Uniservices, Inc., 517 F.2d 492, 496-97 (7th Cir. 1975)).

53. Trademarks, however, may not be assigned without the goodwill of the business or product that bears the trademark. See 15 U.S.C. § 1051 (1994).


55. Id.

56. Id.

57. Id.


60. See id. at 487 (finding that "the potential rewards of patent protection are so far superior to those accruing to holders of trade secrets").
If trade secrets are property for the purposes of Fifth Amendment Takings Clause analysis, then copyrights and trademarks certainly are as well. If trade secrets are property for the purposes of Fifth Amendment Takings Clause analysis, then copyrights and trademarks certainly are as well. In fact, the federal government exercises its eminent domain power over copyrights just as it does over real property. Although neither copyright nor trademark law provides the near-absolute exclusivity that patent protection does, they are both far more stable, certain, and property-like than trade secret law. An owner of a copyright presumptively is entitled to injunctive relief when someone makes an unauthorized reproduction of her work. A trademark owner presumptively is entitled to injunctive relief when someone uses her mark in a confusing manner. The owner of a trade secret, however, has no presumptive right to prevent a person from making use of her confidential information because information, in and of itself, has no

61. See Lane v. First Nat'l Bank, 871 F.2d 166, 174 (1st Cir. 1989) (finding that when copyright "is taken for public use, a constitutional right to just compensation attaches"); Roth v. Pritikin, 710 F.2d 934, 939 (2d Cir. 1983) ("An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution."); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2, at 590-91 & n.11 (2d ed. 1988) (endorsing broad reading of Ruckelshaus).

62. See Zapruder's JFK Assassination Film in the Public Domain, PUB. DOMAIN REP., Feb. 1998, at 1 [hereinafter Zapruder's Film] (reporting that federal government has recently condemned Zapruder's famous film and paid compensation to his surviving heirs); see also 28 U.S.C. § 1498(b) (1994) (providing compensation for copyright owners whose works are infringed by federal government). Numerous cases note that the rationale behind a § 1498 recovery is eminent domain. See Motorola, Inc. v. United States, 729 F.2d 765, 768 (Fed. Cir. 1984); Tektronix, Inc. v. United States, 552 F.2d 343, 346 (Ct. Cl. 1977); Decca Ltd. v. United States, 544 F.2d 1070, 1082 (Ct. Cl. 1976).

63. Compare 15 U.S.C. § 1125 (1994) ("Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which — (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."); and 17 U.S.C. § 106 (1994) (stating that "subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize" reproduction of, preparation of derivative works of, performance of, and display of copyrighted work), with 35 U.S.C. § 271(a) (Supp. II 1996) ("W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

64. See 17 U.S.C. § 502 (1994) (stating that court may grant temporary and final injunctions "to prevent or restrain infringement of a copyright").

65. See 15 U.S.C. § 1116 (1994) (stating that court may grant injunction "to prevent the violation of any right of the registrant of a mark").
One can register one's ownership of a patent, copyright, or trademark in Washington, D.C. There is no similar registry of trade secret ownership nor could one exist. As noted above, the possessor of confidential information must prove that the information was secret and was improperly obtained by the user, almost always through the breach of a contract or trespass.

Another type of intellectual property, the publicity right, should also qualify as property for purposes of the Fifth Amendment. The right of an individual to exploit commercially her persona is not protected under federal law, but as with trade secrets, some states provide substantial legal protection. The Restatement (Third) of Unfair Competition, discussing the right of publicity immediately following its section on trade secrets, describes the parameters of such protection: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability ...." Although protection of the right to publicity falls exclusively under state law, the Supreme Court has analogized the rationale behind the right of publicity to the purposes underlying federal patent and copyright law.

In Zacchini v. Scripps-Howard Broadcasting Co., a case involving publicity rights under Ohio law, the Court explained why federal law grants property rights to inventors and authors: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in 'Science and the useful Arts.'" The patent and copyright laws were "in-

67. See supra notes 40-44 and accompanying text.
68. See Roberta Rosenthal Kwall, Fame, 73 IND. L.J. 1, 35-47 (1997) [hereinafter Kwall, Fame] (concluding that publicity rights should be treated as property after exhaustive discussion of economics, natural law, Hegelian property theory, and analogies to other kinds of property).
69. See DREYFUSS & KWALL, supra note 19, at 547 (stating that about half of states have recognized right of publicity and that in at least fifteen of those states, legislation exists regarding this right).
70. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).
tended definitely to grant valuable, enforceable rights."\textsuperscript{74} In determining that the First Amendment did not privilege a television station's unauthorized broadcast of a human cannonball act, the Court in Zacchini found that "[t]he Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work."\textsuperscript{75} The Court considered publicity rights analogous in policy terms and in function to patents and copyrights, indicating that it also might be willing to treat them as property for purposes of the Fifth Amendment.\textsuperscript{76}

A brief trip to the local mall or a few minutes of viewing a television commercial provides ample evidence that merchants recognize the inherent value of the celebrity persona.\textsuperscript{77} Not surprisingly, publicity rights may be assigned and licensed,\textsuperscript{78} and in most jurisdictions they may be inherited.\textsuperscript{79} The protection provided to publicity rights by the law parallels that afforded to copyright owners. For example, injunctive relief is typically available to prevent an unauthorized use.\textsuperscript{80} As with copyright law, First Amendment considerations provide the most significant limit on the exclusivity of the owner's rights.\textsuperscript{81} Although no cases discuss the question, the right to exploit commercially one's persona would seem to be the sort of property that could be taken by a state under the Fifth Amendment.

Finally, because the abrogation provisions of the Lanham Act raise the issue, we must enquire whether the legal shield against false advertising may be considered a species of "property." Federal law affords protection to merchants from materially false statements made about their products, and

\textsuperscript{74} Id. at 577 (quoting Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 36 (1939)).
\textsuperscript{75} Id.
\textsuperscript{76} See id. at 575-77 (noting that rationale for protecting publicity rights involves performer's economic incentive to perform, and economic considerations also underlay patent and copyright laws); see also Kwall, Right of Publicity, supra note 71, at 198 (discussing Zacchini).
\textsuperscript{77} For a comprehensive discussion of the value of the celebrity persona, see Kwall, Fame, supra note 68.
\textsuperscript{78} See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995).
\textsuperscript{79} See id. § 46 cmt. h.
\textsuperscript{80} Id. § 48.
\textsuperscript{81} See id. § 47 (stating that "the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses" is not protected); 17 U.S.C. § 107 (1994) (stating that fair use of copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright"). See generally Roberta Rosenthal Kwall, The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis, 70 IND. L.J. 47 (1994) (discussing conflict between protecting right of publicity and First Amendment limitations on that protection).
from materially false statements made by competitors about the competitors' own products. A recent Third Circuit case found that the right to complain about a competitor's false claim about its products "is not an intangible property right protected under the Fourteenth Amendment," but reserved the question of whether the right to be free from false statements made about one's own products might be properly characterized as protecting a type of business interest.

We believe the distinction suggested by the Third Circuit to be logical, although not because we think business reputation or good will are outside a plausible definition of property. Measurable damage to a company's good will looks much like damage to a property interest. An illustration might help. A state might falsely assert that McDonald's provides the hamburgers served in its school lunch program. This would constitute a public use of McDonald's good will for the state's benefit and under our analysis constitute a confiscation of McDonald's property. The diminishment of that same good will, however, by false statements made by the state attorney general about the quality of McDonald's products would not seem to be an appropriation of its property for public use.

B. When Is Infringement of Intellectual Property a Fifth Amendment "Taking?"

Governments interfere with our property every day in innumerable ways. Some of these intrusions are compensable " takings," but the vast majority are not. Just because one's property is adversely affected does not mean a compensable taking has occurred. One must not only prove that one has affected property, but that the governmental conduct constituted a compensable condemnation. In the intellectual property area, the Supreme Court has provided two guideposts, James v. Campbell and Ruckelshaus v. Monsanto Co., which hold respectively that the unauthorized use by the post office of a patented device and the improper disclosure by the EPA of a trade

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82. See 15 U.S.C. § 1125 (1994) (affording protection from those who "in commercial advertising or promotion, misrepresent[] the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities").


84. See id. at 362 (expressing "no opinion" about whether property rights protect one from misrepresentations made about one's goods by competitor).

85. See infra notes 99-101 and accompanying text.

secret can constitute takings. In order to understand these cases and their implications for other government encroachments on intellectual property, it will be helpful to place them in the broader context of takings law.

The Supreme Court has divided the universe of takings cases into roughly two categories: possessory takings and regulatory takings. A government confiscation of property or a physical occupation of property is a "possessory" taking and constitutes the strongest sort of claim for compensation. The Court has articulated a per se rule requiring governmental entities to compensate the victims of confiscatory takings of real property, no matter how little damage was done. For example, the nonconsensual occupation of just over one cubic foot of real property constitutes a taking. The governmental appropriation of interest accruing in an interpleader account also constitutes a taking.

On the other hand, the law regarding regulatory takings is notoriously tortured. A "regulatory" taking occurs when a law, regulation, or ordinance "denies all economically viable use of property in a manner that interferes with reasonable expectations for use." For example, in Lucas v. South Carolina Coastal Council the Court found that a zoning ordinance restricting all viable use of valuable beachfront property constituted a taking. The land, which was worth almost one million dollars before the ordinance, had been rendered worthless due to building restrictions on the site. Few cases, however, present such extreme facts, and few regulations effect compensable takings. Because virtually everything a government does affects the value of somebody's property, the difficult question in cases of regulation has been: When has the regulation gone too far?

88. See CHEMERINSKY, supra note 15, §§ 8.4.2.1-8.4.2.2, at 506-19 (discussing possessory takings and regulatory takings in two separate sections).
89. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (affirming rule that "a permanent physical occupation is a taking" and property owners have expectation of compensation).
90. See id. at 438 n.16 (noting that size of displaced property is not important to determining whether taking occurred).
92. See CHEMERINSKY, supra note 15, § 8.4.2.2, at 511 (noting that problem of when regulation becomes taking has "confounded courts and commentators").
93. Id. § 8.4.2.2, at 513.
96. See id. at 1006-09 (stating that Lucas had purchased land for $975,000 and was prohibited from developing it by South Carolina Beachfront Management Act).
Obviously, the classification of a given encroachment as "possessory" or "regulatory" has important implications for the outcome of a lawsuit, both in general and in the particular context of intellectual property. In general, courts apply the possessory rationale most consistently to situations in which the government wishes to make use of the owner's property, such as the temporary exploitation of an owner's business facilities, whereas courts apply the regulatory rationale most frequently when a statute, rule, or administrative action incidentally has negative effects on the owner's property.

The distinction between the two classes of cases is critical because in the regulatory context "the Court has not found a taking so long as the governmental regulation met a rational basis test and so long as the regulation did not prevent almost all economically viable use of the property." In the possessory or confiscatory context, however, even a small intrusion will constitute a taking. Also, the value of the property at issue need not be destroyed — mere diminishment of value is enough. As a result, if a city confiscates a dump truck for one day to haul rocks to a government work site, compensation must be paid. If, instead, the city passes a reasonable air pollution ordinance that costs the truck owner thousands in repairs, no compensation need be paid. Similarly, in the private intellectual property context, when unauthorized copies of registered blueprints for a new school are made and used by a city, compensation must be paid under the confiscatory rationale. On the other hand, under the regulatory rationale, a city tax on photocopying that raises an architect's cost of making copies of and distributing his work would fail to constitute a taking.

The question is identifying which principle is applicable to government intrusions on intellectual property. Because intellectual property is intangible, it cannot, strictly speaking, be "possessed." At the same time,


98. See CHEMERINSKY, supra note 15, § 8.4.2.2, at 519.

99. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that "a minor but permanent physical occupation of an owner's property" is taking). In Loretto, the Court noted that although the appropriation in question displaced only one and one-half cubic feet, the size of the appropriation was not a factor in determining whether it constituted a taking. Id. at 438 n.16.

100. See supra notes 89-92 and accompanying text.

101. See supra notes 93-100 and accompanying text.

102. See Kwall, The Sovereign's Prerogative, supra note 6, at 734-41 (discussing notion that governmental uses of copyrighted property can constitute physical invasions, prohibitive regulatory measures, or regulations that interfere with property owner's ability to use his property as he pleases).
not all encroachments on intellectual property are adequately conceived as "regulations." The Court's conventional categories are not altogether satisfactory for classifying government intrusions on intellectual property. We think that, rather than trying to shoehorn intellectual property as a whole into one category or the other, a better approach is to examine the circumstances of particular cases. Sometimes the policies of takings law will be better served by using principles developed in the possessory context; sometimes a regulatory focus will be appropriate.

Analogizing to the confiscation analysis better serves the aims of takings law in cases in which the government has appropriated the property to its own use, such as when a state official makes unauthorized copies of computer software rather than buying it or uses patented biotechnology without obtaining permission. Other variations of government conduct may look more like regulations. For example, governmental regulations do limit intellectual property rights in a variety of ways, such as by imposing limits on the exclusive use of trademarks, permitting "fair use" of copyrighted works, or by applying the antitrust laws to intellectual property. We do not dispute that a regulatory analysis is appropriate in a case in which a party challenges such rules, nor do we dispute that most of these regulations are valid.

Other cases raise more difficult problems. In Ruckelshaus, where the government revealed Monsanto's trade secret, the Court clearly found a taking. In doing so, it relied on cases typically classified as possessory takings cases, but it applied a test derived from regulatory takings cases, focusing on whether Monsanto had a "reasonable investment-backed expecta-

107. See id. at 1005 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979)) (stating that public access to private navigable waterway constituted taking); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (stating that public access to private shopping center did not constitute taking). Chemerinsky describes both as possessory takings cases. See CHEMERINSKY, supra note 15, § 8.4.2.1, at 506-09.
108. See Ruckelshaus, 467 U.S. at 1005 (identifying factors that should be taken into account when courts decide whether taking has occurred); see also Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986) (evaluating whether regulatory taking has occurred by weighing: "(1) 'the economic impact of the regulation on the claimant;' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations;' and (3) 'the character of the governmental action'" (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978))).
tion[ ]" that the EPA would keep its information secret.109 The regulatory focus was probably driven by the fact that the EPA made the damaging disclosure pursuant to amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Court seemed to view the suit as a challenge to the regulatory interpretation of those amendments, rather than as an improper act by an agency employee. It concluded that Monsanto had a property interest in its trade secret, and that the business advantage protectable under trade secrecy law was destroyed by the EPA’s disclosure.110

One could quarrel with the regulatory analogy. Although Monsanto’s secret in Ruckelshaus was revealed, the EPA’s disclosure of Monsanto’s information did not prevent Monsanto from continuing to use the information in its business. The destruction of secrecy only rendered Monsanto unable to claim the additional remedies that it would have been able to assert under trade secret law. Monsanto became less able to protect its information, and the information became significantly less valuable once it was discovered by competitors. Of course, we have noted above that trade secret laws do not protect information itself, but rather merely augment pre-existing contract and tort remedies. Obviously, the disclosure did render the augmented remedies unavailable. Monsanto, however, characterized its damages as caused by the loss of its competitive edge. In any event, the EPA did not so much regulate Monsanto as confiscate its property and constructively dedicate it to the public domain.

Consider the consequences of a regulatory analysis in the use-of-intellectual-property context. Under a regulatory taking analysis, an appropriation of intellectual property would rarely amount to a taking because the owner will rarely lose all beneficial use of the property. Intellectual property is intangible, and therefore it is incapable of being physically possessed or taken away.111 Although the government can condemn a piece of intellectual property and take title to it or cast it into the public domain,112 the typical infringement does not divest the property owner of the use of his property.113

109. Ruckelshaus, 467 U.S. at 1005.
110. See id. at 1012 ("The economic value of [Monsanto’s] property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.").
111. Although the federal copyright and patent laws provide for registration, registration documents are not certificates of title. Ownership does not arise from mere possession of a registration certificate.
112. See supra note 62 (discussing government’s taking of Zapruder’s film and placing it into public domain).
113. See Kwall, The Sovereign’s Prerogative, supra note 6, at 735-37 (noting that government takings can result in personal and professional harm to copyright proprietor, but often preserve owner’s overall use).
Even if a government is infringing a patent, copyright, or trademark, the owner may continue to exercise her rights against other infringers. In *Campbell*, for example, the post office's use of the patented stamping device did not prevent the patent owner from practicing the patent or suing other infringers. Regulatory takings doctrine provides little solace to owners of intellectual property, *Ruckelshaus* notwithstanding.

Whatever the merit of characterizing *Ruckelshaus* as a regulatory taking, it is both unwise and unnecessary to read *Ruckelshaus* as standing for a broad rule that government interference with intellectual property should always be evaluated under regulatory taking principles. The characterization made no difference in *Ruckelshaus*, because a taking could have been found under either a confiscatory or regulatory rationale. Moreover, the Court apparently did not consider this an important issue under the circumstances of the case. The opinion simply treats the government's actions as a regulatory taking without explicitly considering whether the confiscatory analysis would have been more appropriate. For these reasons, *Ruckelshaus* provides dubious authority for the proposition that government use of intellectual property should generally be scrutinized under regulatory taking principles.

Moreover, *Ruckelshaus* does not expressly tell us how to treat cases in which governments actually use someone's intellectual property. In this situation, the principles developed in the context of confiscatory takings seem most relevant. In *Campbell*, which was decided in the era before the development of the regulatory takings doctrine, the Court analogized a case of federal patent infringement to the physical possession of real property, the paradigm confiscatory takings context. It had no difficulty finding that the post office's infringement of the owner's patented letter-stamping device constituted a taking. Because the taking was confiscatory, the fact that the patent was still economically viable did not defeat the claim, as it would...
in the regulatory context. 121

But the argument for applying the confiscatory standard to cases of governmental use does not rest solely, or even primarily, on the authority of Campbell. The premise behind the restrictive rules of regulatory takings doctrine is not applicable to most invasions of intellectual property. The reason it is hard to win a regulatory takings case is that the government's regulation typically has a legitimate aim independent of its impact on the value of the property, an aim the government is ordinarily free to pursue under the police power.122 These aims may be as diverse as environmental protection, preserving historic landmarks, and promoting general welfare.123 The resulting vulnerability to government intrusion is a regrettable but necessary implication of the exercise of government prerogatives. Courts quite properly hesitate before requiring the state to compensate the property owner just because achieving a valid regulatory aim has an effect on the use of his property. It is critical, therefore, to note that in most intellectual property cases the complained-of government action is not the exercise of the police power by the passage of a statute, regulation, or ordinance, nor the action of a zoning board; it is typically the appropriation of patented or copyrighted materials by bureaucrats or university professors for the state's own use.124

Unlike the typical regulation, there is no good reason for the intrusion, other than a desire to exploit the property cheaply. When a biochemistry professor infringes a patent, or a secretary in a governmental agency makes an unauthorized copy of registered software, the government has exploited the property for its own purposes just as if it had temporarily borrowed a private car for public use. These actions do not look like regulatory takings, nor would allowing them to go forward advance the legislative prerogative underlying the narrow nature of the regulatory takings doctrine.

Finally, the central aim of takings law is to limit the government's power to isolate particular individuals for sacrifice to the general

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121. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) (stating that Fifth Amendment is violated when regulation "denies an owner economically viable use of his land" (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))).


123. See supra note 122 (citing cases regarding varied aims of government takings).

124. See cases cited supra note 6.
That goal is directly and powerfully implicated in a case in which the government, without obtaining permission, makes use of intangible property that belongs to someone else. The intellectual property owner can be singled out by the state to bear a burden not shared by his fellow citizens. Unlike evenhanded regulation, which is presumptively valid, an appropriation looks more like a prohibited attempt to "force[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The fact that the target of the taking is intangible should not prevent it from being partially confiscated within the meaning of the takings doctrine. In fact, Congress seems to think that infringement of copyrights and patents constitutes a confiscation, and it has provided compensation for owners under 28 U.S.C. § 1498. Courts explaining the purpose behind § 1498 state that infringement constitutes "an eminent domain taking."

C. Remedial Aspects of the Fifth Amendment

The applicability of the Fifth Amendment means that just compensation will always be available for government appropriations of intellectual property that constitute takings, because that provision carves out an exception to otherwise applicable rules of sovereign immunity. Whatever may be true

125. TRIBE, supra note 61, § 9-6, at 605. For a discussion of the considerations of utility and fairness underlying this proposition, see Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1214-24 (1968).

126. See Kwall, The Sovereign's Prerogative, supra note 6, at 694, 728 (noting that government has right to copy protected works, but must pay compensation). There is at least one case to the contrary. See Porter v. United States, 473 F.2d 1329, 1338 (5th Cir. 1973) (finding that copyright infringement by government not compensable taking under Tucker Act). In our view, Porter cannot survive Ruckelshaus. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1020 (1984) (finding that government disclosure of trade secret constitutes compensable taking under Tucker Act).


128. Note that in other contexts the intangibility of property rights does not impede their legal protection. Thus, for example, the Uniform Commercial Code categorizes patents, copyrights, and trademarks as "general intangibles," a long recognized category of personal property that can be bought and sold, and used as collateral under Article 9. See U.C.C. § 9-106 cmt. (1995) (listing property that can be used as commercial security). Moreover, the Supreme Court has extended constitutional protection to intangible personal property. See, e.g., Armstrong, 364 U.S. at 49 (stating that Fifth Amendment protects materialman's lien); Lynch v. United States, 292 U.S. 571, 579 (1934) (stating that contract rights are property protected by Fifth Amendment).

129. See Teletronix v. United States, 552 F.2d 343, 346 (Ct. Cl. 1977); Decca Ltd. v. United States, 544 F.2d 1070, 1082 (Ct. Cl. 1976).

130. See generally Kwall, The Sovereign's Prerogative, supra note 6.
of violations of other constitutional and statutory directives, the Supreme Court declared in *First English Evangelical Lutheran Church v. County of Los Angeles*\(^1\) that "in the event of a taking, the compensation remedy is required by the Constitution."\(^2\) Notwithstanding principles of sovereign immunity, the state and federal governments *must* provide remedies for takings of property.\(^3\)

In ordinary situations, governments themselves typically institute condemnation proceedings. This procedure has been used for appropriations of intellectual property as well.\(^4\) The difficult issues arise in situations in which a government simply uses or damages someone's property, without undertaking to condemn it first. In such circumstances, *First English* requires that the government submit to an inverse condemnation suit brought by the property owner to determine whether a taking occurred and the value of the property taken.\(^5\) It bears emphasizing that the sole remedy available in such a suit is the value of the property. A property owner normally cannot obtain injunctive relief as a matter of constitutional right.\(^6\)

Governments have the privilege of litigating these suits in their own courts. When the federal government is the target, the case may be brought in federal court under the Tucker Act\(^7\) or 28 U.S.C. § 1498. State governments must allow such suits to be brought against themselves and against local

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4. *See Zapruder's Film, supra* note 62, at 1 (reporting that federal government has condemned Zapruder's famous film and paid compensation to his surviving heirs).
5. *See First English*, 482 U.S. at 315 (discussing right of landowner to bring inverse condemnation suit).
6. *See id.* at 321 (noting that compensation consists of value of property for period during which taking was effective).
governments in their own courts.\textsuperscript{138} Otherwise, a federal suit under 42 U.S.C. § 1983 for deprivation of property without due process of law will be available against the local government or state officers responsible for the injury.\textsuperscript{139} Such suits are also available against officers who take property without authorization of the government for which they work. In a § 1983 suit, the remedies may be far broader than "just compensation."\textsuperscript{140}

\textit{II. Protection Beyond the Takings Clause: Legislation Abrogating Eleventh Amendment Immunity, Seminole Tribe, and City of Boerne}

In the eyes of intellectual property owners, the Takings Clause provides some, but hardly adequate, protection against government encroachments. Although compensation must be paid even when the damage done is min-

\textsuperscript{138} See First English Evangelical Luth. Church v. County of L.A., 482 U.S. 304, 315-16 n.9 (1987) (discussing landowners' right to bring inverse condemnation actions); cf. Hart & Wechsler, supra note 133, at 1054 (discussing argument over whether unconsenting states can be held liable in federal courts).

Professor Kwall suggests that 28 U.S.C. § 1338(a) would preclude state court jurisdiction over takings claims that involve copyrights. See Kwall, The Sovereign's Prerogative, supra note 6, at 764. We respectfully disagree. Section 1338(a) grants federal courts exclusive jurisdiction over suits "arising under" federal copyright law. 28 U.S.C. § 1338(a) (1994). A takings claim does not "arise under" federal copyright law, but rather is grounded in the Fifth Amendment itself.

Professor Kwall also argues that 17 U.S.C. § 301, which preempts state laws that provide protection "equivalent" to federal copyright law, preempts the application of state remedies for takings of copyrighted property. See Kwall, The Sovereign's Prerogative, supra note 6, at 764-65. Because a state is obligated by the Fourteenth Amendment to provide just compensation to property owners, we fail to see how Congress could relieve states of that obligation by statute. Section 301 preemption in this context appears to be unconstitutional. Congress could, because it has the power to create and define copyright protection, declare prospectively that copyrighted material can be used freely by the states. It has, however, done just the opposite. See supra notes 1-3.


imal,\textsuperscript{141} or the deprivation is temporary,\textsuperscript{142} the measure of compensation is primarily restitutional. In the intellectual property context, no more than a reasonable royalty is probably due the owner under the Fifth Amendment.\textsuperscript{143} This result is suggested by \textit{Kimball Laundry Co. v. United States}\textsuperscript{144} in which the Court held that proper compensation for the temporary taking of a laundry business for military purposes was its rental value during the time of the taking, not the difference between the market value of the business before and after the taking.\textsuperscript{145}

The likely limitation of damages to a reasonable royalty helps explain why copyright and patent owners were not satisfied with the remedies available to them under the Fifth Amendment and fought to convince Congress that a direct action for infringement should be available against the states. In addition, under takings law, a prevailing plaintiff is not entitled to an injunction, nor can the plaintiff recover certain types of compensatory damages\textsuperscript{146} or trebled or punitive damages.\textsuperscript{147} By contrast, under federal patent, copyright, trademark, and false advertising law, an injunction is presumptively available,\textsuperscript{148} as are other sorts of enhanced remedies.\textsuperscript{149} Injunctions are also

\begin{itemize}
\item \textsuperscript{141} See \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 441 (1982) (requiring just compensation for unobtrusive television cable installation in apartment building).
\item \textsuperscript{142} See \textit{First English Evangelical Luth. Church v. County of L.A.}, 482 U.S. 304, 318 (1987) (stating that compensation must be paid, even when taking is temporary).
\item \textsuperscript{143} See \textit{Hughes Aircraft v. United States}, 86 F.3d 1566, 1572 (Fed. Cir. 1996) (finding that reasonable royalty, not lost profits, is preferred measure of recovery in patent infringement suits against United States), \textit{vacated on other grounds}, 117 S. Ct. 1466 (1997).
\item \textsuperscript{144} 338 U.S. 1 (1949).
\item \textsuperscript{145} \textit{Kimball Laundry Co. v. United States}, 338 U.S. 1, 6-7 (1949).
\item \textsuperscript{146} \textit{See id.} (denying recovery in takings case for difference between market value of laundry business before and after taking); United States v. General Motors Corp., 323 U.S. 373, 379 (1945) (denying recovery for "future loss of profits, ... the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign").
\item \textsuperscript{147} At any rate, we have found no authority for such a recovery, and the logic of takings law suggests that the property owner is entitled to compensation and nothing more. \textit{Cf} City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) ("[C]onsiderations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials.").
\item \textsuperscript{149} \textit{See} 15 U.S.C. § 1117(a) (1994) (court may award treble damages for trademark infringement); 17 U.S.C. § 504(c) (1994) (court may award statutory damages from $20,000 to $100,000); 35 U.S.C. § 284 (1994) (court may award treble damages for patent infringement).
\end{itemize}
available to plaintiffs under state trade secret and publicity rights law,\(^{150}\) and such plaintiffs can also recover punitive damages.\(^{151}\) An owner is substantially better off as the prevailing party in an infringement action than in a takings claim.\(^{152}\)

Another reason why plaintiffs would prefer to file suit under the federal intellectual property statutes is that although takings actions against state and local governments must be brought in state courts, federal court is available for patent, copyright, and trademark actions. For a variety of reasons, federal judges are likely to be more sympathetic than state courts to claims based on federal law. Federal judges enjoy life tenure and undiminishing salary, while many state judges must stand for election and generally depend upon state legislatures for their salaries.\(^{153}\) Federal courts maintain a strong tradition of vigilance in defense of federal rights.\(^{154}\) Talent probably plays a larger role in the selection of federal judges than in the selection of state judges.\(^{155}\) For all these reasons, the disparity between federal and state courts may make the difference between winning and losing in close cases on the facts or the law.\(^{156}\) Given that state court remedies were already available under the Takings Clause,\(^{157}\) this "substantive" theme may well have influenced Congress when it enacted the abrogating legislation.\(^{158}\)

\(^{150}\) Restatement (Third) of Unfair Competition §§ 44, 48 (1995) (stating that injunctive relief may be awarded for misappropriation of trade secrets and publicity rights).

\(^{151}\) See Clark v. Bunker, 453 F.2d 1006, 1011-12 (9th Cir. 1972) (allowing punitive damage award for misappropriation of trade secrets); Restatement (Third) of Unfair Competition § 45 cmt. i (stating that successful plaintiff in action for appropriation of trade secret may recover punitive damages); see also Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1104-06 (9th Cir. 1992) (allowing punitive damage award for voice misappropriation); Restatement (Third) of Unfair Competition § 49 cmt. e (stating that punitive damages are available to plaintiffs in right of publicity actions).

\(^{152}\) See supra notes 146-51 and accompanying text.

\(^{153}\) See Neuborne, supra note 11, at 1127-28 (noting that federal district judges are appointed for life and state court judges are more vulnerable to political pressure).

\(^{154}\) See id. at 1124-25 (discussing psychological and attitudinal characteristics of state and federal judges).

\(^{155}\) See id. at 1121-24 (discussing technical competence of state and federal judges); see also Burt Neuborne, Parity Revisited: The Uses of a Judicial Forum of Excellence, 44 DePaul L. Rev. 797, 799-800 (1995) (discussing performance of state and federal trial judges).


\(^{157}\) See supra Part I (addressing relief available to intellectual property owners under Takings Clause).

\(^{158}\) Cf. Michael Wells, Congress's Paramount Role in Setting the Scope of Federal Jurisdiction, 85 NW. U. L. Rev. 465, 472-74 (1991) (stating that it is appropriate for Congress to consider such factors in allocating jurisdiction between federal and state courts).
Champions of intellectual property rights succeeded in securing enactment of abrogating legislation in the early 1990s, and the federal intellectual property statutes accorded them the sweeping remedies previously noted. Before the Supreme Court’s ruling in Seminole Tribe, owners of intellectual property felt confident that the abrogating legislation was constitutional because the Court in Pennsylvania v. Union Gas Co. had broadly authorized Congressional abrogation of state immunity, so long as Congress clearly stated its intent. Seminole Tribe cast doubt on the legislation, for it substantially restricts Congress’s abrogating power. At the same time, however, Seminole Tribe did not necessarily undercut the remedial scheme enacted in the early 1990s. Seminole Tribe held that Congress may not abrogate state Eleventh Amendment immunity when acting solely under its Article I powers, such as the power to regulate commerce among the states or the power to grant patents and copyrights. The Court, however, reaffirmed earlier cases ruling that Congress may abrogate immunity when acting under section 5 of the Fourteenth Amendment, which authorizes Congress to enforce the constitutional rights protected by that amendment. In 1997, the Supreme Court in City of Boerne v. Flores addressed the scope of congressional power under section 5 of the Fourteenth Amendment. This Part examines the impact of Seminole Tribe and City of Boerne on the abrogating legislation that purported to make state governments fully responsible for their appropriations of intellectual property. We argue that the abrogating legislation can largely, and perhaps entirely, survive the restrictive rule of Seminole Tribe.

159. See supra notes 1-4.
164. Id. at 59-62.
165. 117 S. Ct. 2157 (1997).
166. Our emphasis is on problems raised by Congress’s effort to abrogate the states’ sovereign immunity. This objection to the abrogation legislation should be distinguished from an objection based on the states’ Tenth Amendment right to be free of certain types of substantive regulation. See, e.g., Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (finding that Congress may not obligate local sheriffs to perform background checks on gun permit applicants); New York v. United States, 505 U.S. 144, 188 (1992) (finding that Congress may not obligate states either to create toxic waste dump sites or take title to waste).
A Tenth Amendment attack on the abrogating legislation is bound to fail because that
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A. What Is a "State?"

Before considering the impact of Seminole Tribe on intellectual property rights, it is useful to delineate as precisely as possible the potential scope of sovereign immunity. To say that the "states" may assert sovereign immunity raises an important issue: What is a "state?" The Eleventh Amendment presumptively divests a federal court of its power to hear the case not only when a state itself is named as a defendant, but also when any "arm of the state" is named as such. Accordingly, given the relevance of the question whether state universities, which are frequent defendants in intellectual property litigation, should be considered arms of the state, an appropriate starting point for our inquiry into sovereign immunity is to define what is meant by a "state" for the purposes of the doctrine of Eleventh Amendment immunity.

A suit brought against the "State of Georgia" is, of course, a suit against a state for the purposes of the Eleventh Amendment. A suit brought against a statewide agency is also considered to be a suit against the state itself. A suit against a county or city, however, is not considered to be a suit against the state. Nor is a suit against a multistate regional agency considered to be a suit against the state, when the states involved are not responsible for the agency's debts. In general, the Court has indicated that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit."

In its most recent decision on the issue, Regents of the University of California v. Doe, the Court noted that determining whether an entity is an
arm of the state involves an examination of the "relationship between the State and the entity in question." The Court looked at "the essential nature and effect of the proceeding" and the "nature of the entity created by state law." In practice, this overall inquiry seems to focus primarily on whether the state would be obligated to satisfy a judgment rendered against the defendant entity. In *Regents v. Doe*, the Court considered a Ninth Circuit ruling that the Lawrence Livermore National Laboratory, operated by the Board of Regents of the California university system, was not entitled to Eleventh Amendment immunity from suit in federal court because the Department of Energy was contractually obligated to indemnify the laboratory if it were to lose a lawsuit. Because money was unlikely to flow from the state's coffers into the pocket of the defendant, the Ninth Circuit allowed the suit against the lab to proceed.

The Supreme Court reversed, holding that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." Declining to address the ultimate issue of whether the laboratory was an arm of the state, the Court reversed on other grounds. Given the Ninth Circuit's prior acceptance of the position that the University of California system is generally an arm of the state, one would expect the cause of action against the laboratory to be dismissed.

173. Id. (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945)).
175. See id. at 430 ("[T]he question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued.").
176. See id. at 426-28 (describing Ninth Circuit ruling and question for Supreme Court review); see also Doe v. Lawrence Livermore Nat'l Lab., 65 F.3d 771, 776 (9th Cir. 1995), rev'd sub nom. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997).
177. See Lawrence Livermore, 65 F.3d at 774.
178. Regents, 519 U.S. at 431.
179. Id. at 431-32.
180. See BV Eng'g v. UCLA, 858 F.2d 1394, 1395 (9th Cir. 1988) (stating that University of California system is instrumentality of state). The Ninth Circuit applies a five-factor test to determine whether an entity is an arm of the state. The five factors are as follows:

(1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has power to take property in its own name or only the name of the state, and (5) the corporate status of the entity.

*Lawrence Livermore*, 65 F.3d at 774-75.
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The question of whether state universities are arms of the state for the purpose of establishing their Eleventh Amendment immunity from suit in federal court is especially important in the intellectual property context. A substantial portion of the nation's research and development in the fields of medicine, biotechnology, computer science, and engineering is conducted under the auspices of large public universities. In addition, universities typically photocopy large amounts of copyrighted materials in the everyday course of their business. They are likely defendants in any number of misappropriation suits. Although the Court has not answered this question definitively, the majority of lower courts that have addressed the question have assumed state universities to be arms of the state for the purpose of asserting Eleventh Amendment immunity. Putting aside until later the case of state officials sued in their official capacities, an entity that successfully proves it is an arm of the state presumptively is entitled to absolute immunity from suit in federal court, irrespective of the nature of the cause of action pleaded against it.

B. Seminole Tribe and the Revival of State Sovereign Immunity

Let us assume, then, that the defendant agency is indeed the "state." In 1992, Congress plainly and expressly abrogated state Eleventh Amendment immunity in cases of violations of federal patent, copyright, trademark, and false advertising law. Federal law is silent as to trade secrets and publicity.


183. See supra note 6.


185. The Court will never imply abrogation. Congress must be absolutely clear when it intends to override the Eleventh Amendment. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985) (requiring "unmistakable language in the statute itself"). There is little doubt that Congress has spoken clearly as to patent, copyrights, and trademarks. See supra notes 1-3 (providing statutory language). All courts that have considered the question agree. See generally College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353 (3d...
rights claims; therefore, a plaintiff must still bring those causes of action against a state exclusively in state court, if at all.\textsuperscript{186}

Our inquiry will focus on the validity of Congress's abrogation of Eleventh Amendment immunity for patent, trademark, copyright, and false advertising claims. Some courts and commentators maintain that \textit{Seminole Tribe} renders these statutes unconstitutional.\textsuperscript{187} To the contrary, we contend that under section 5 of the Fourteenth Amendment, Congress has the power to bring states within the jurisdiction of the federal courts in most cases involving appropriations of federally protected intellectual property.

In \textit{Seminole Tribe}, the Supreme Court severely restricted Congress's power to abrogate state immunity from federal court suit. The issue in \textit{Seminole Tribe} was whether Congress had acted constitutionally in depriving the states of immunity in certain actions brought under the Indian Gaming Regulatory Act.\textsuperscript{188} Striking down the legislation by a five-to-four vote, the Court overruled its previous holding in \textit{Pennsylvania v. Union Gas Co.} that Congress could force states into federal court to comply with regulations it had

\begin{itemize}
  \item \textit{Chavez}, 59 F.3d 539 (determining that copyright and false advertising claims brought against state university press are not barred by Eleventh Amendment);
  \item \textit{Genentech}, 998 F.2d 931 (determining that patent suit against state university not barred by Eleventh Amendment);
  \item Unix Sys. Lab., Inc. v. Berkeley Software Design, Inc., 832 F. Supp. 700 (D.N.J. 1993) (concluding that copyright and trademark causes of action against state university are not barred by Eleventh Amendment, but trade secret claim is barred).
\end{itemize}

\textsuperscript{186} \textit{Cf. Chavez}, 59 F.3d at 547 (noting that plaintiff conceded that abrogation of immunity in copyright and trademark cases did not extend to publicity rights claim).

\textsuperscript{187} \textit{See} Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) (stating that majority decision "prevents Congress from providing a federal forum for a broad range of actions against States, [including] those sounding in copyright and patent law"); \textit{Chavez} v. Arte Publico Press, No. 93-2881, 1998 WL 685623, at *3 (5th Cir. Oct. 1, 1998) (holding legislation abrogating state sovereign immunity in copyright cases to be unconstitutional under \textit{Seminole Tribe}); Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 954 n.6 (S.D. Cal. 1996) ("If the issue were whether the patent code abrogates the state's immunity, then \textit{Seminole Tribe} would apply, and would probably compel the conclusion that the patent code cannot abrogate a state's Eleventh Amendment immunity."); Cross, \textit{supra} note 7, at 523 (concluding that abrogating legislation "cannot be justified as exercises of Congress's Fourteenth Amendment power"); Williamson, \textit{supra} note 7, at 1752 ("It's highly unlikely that Congress could remove the Copyright and Patent Acts from \textit{Seminole}'s reach . . . . insofar as they abrogate the sovereign immunity of states and state agencies, both Acts' sovereign immunity provisions are unconstitutional after \textit{Seminole} . . . .").

passed under its Commerce Clause powers. In fact, the Court went so far as to find that Congress lacked the power to abrogate state Eleventh Amendment immunity under any of its Article I powers, holding in particular that the Indian Commerce Clause could not be invoked by Congress. At the same time, the Court reaffirmed a twenty-year-old rule that state immunity from suit in federal court can be overridden when Congress acts pursuant to its powers under section 5 of the Fourteenth Amendment.

Seminole Tribe, with its distinction between legislation enacted pursuant to Article I powers and section 5 legislation, turns on the Court’s understanding of sovereign immunity. A narrow majority of the justices take the view that the immunity pre-dates the Eleventh Amendment. Relying on Hans v. Louisiana, they maintain that the immunity is of constitutional dimension and entered the Constitution when the document was ratified in 1788, at the same time as the Article I powers. The Eleventh Amendment itself is merely a surgical correction of a 1793 case, Chisholm v. Georgia, that erroneously denied a state’s immunity claim against an out-of-state plaintiff. The constitutional status of the immunity shields the states from suits in federal court based on causes of action grounded in Article I legislation. Section 5 cases are different because the Fourteenth Amendment was not enacted until 1868 and represents a deliberate decision to restrict state prerogatives in ways that were not contemplated in 1788. In contrast to Congress’s Article I powers, section 5 of the Fourteenth Amendment, which grants Congress the power to enforce the amendment’s proscriptions "by appropriate legislation," does authorize Congress to abrogate state immunity. The Fourteenth Amendment was meant to "fundamentally alter[ ] the balance of

190. *Id.* at 72-73.
191. *See U.S. Const. art. I, § 8, cl. 3* (stating that Congress has power to regulate commerce "with the Indian Tribes").
192. *Seminole Tribe*, 517 U.S. at 47.
193. *Id.* at 59-60; *see U.S. Const. amend. XIV, § 1* (stating that state may not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); *id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
194. 134 U.S. 1 (1890).
196. 2 U.S. (2 Dall.) 419 (1793).
197. *See Hart & Wechsler, supra note 133, at 1047 (discussing Chisholm)*. In the view reflected in *Hans* and *Seminole Tribe*, this circumstance explains the narrow wording of the Eleventh Amendment, which by its terms only protects states against suits by "Citizens of another State, or by Citizens or Subjects of any Foreign State." *U.S. Const. amend. XI.*
198. *U.S. Const. amend. XIV, § 5.*
state and federal power struck by the Constitution and therefore overrides the Eleventh Amendment.

Of course, not everyone agrees with this account of sovereign immunity and the Eleventh Amendment. Contrary views that recognize broader Congressional power have won strong support with the Supreme Court and in the academic literature. Four justices dissented in Seminole Tribe. Just seven years earlier, the Court in Union Gas held, again by a five-to-four margin, that Congress may abrogate state sovereign immunity when acting under Article I powers. The weight of scholarly opinion, for whatever it may be worth, is on the side of the Seminole Tribe dissenters. Our project, however, is to examine the current state of the law as it relates to intellectual property, not to enter into the debate over the accuracy of Seminole Tribe. We take the decision as a given while noting that it may not be the last word in the area. In addition, as we conclude that the legislation abrogating state sovereign immunity in patent, copyright, and trademark cases is authorized by the Fourteenth Amendment, the somewhat shaky foundation of Seminole Tribe does not threaten the constitutionality of that legislation. The holding of Seminole Tribe is clear: Congress may only abrogate states' Eleventh Amendment immunity when it properly enforces rights guaranteed by the Fourteenth Amendment. It follows that the scope of Congressional power under section 5 of the Fourteenth Amendment is a key to determining whether Congress acted constitutionally in abrogating Eleventh Amendment immunity in patent, copyright, and trademark cases.

C. City of Boerne and the Abrogation Statutes: The Scope of Congressional Authority Under Section 5 of the Fourteenth Amendment

The Supreme Court has recently cleared up much of the confusion surrounding the meaning of the section 5 enforcement provision of the Fourteenth Amendment. It held in City of Boerne v. Flores that section 5 was

200. See id. at 76, 100 (identifying dissenting justices).
202. See Meltzer, supra note 160, at 7-13 (discussing scholarly debate over Eleventh Amendment and state sovereign immunity).
203. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996); see U.S. CONST. amend. XIV, § 1 (stating that state may not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); id. § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
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a purely remedial provision. In other words, Congress can combat pre-existing constitutional violations under section 5, but may not expand the substantive protections provided by a particular provision of the Bill of Rights, as interpreted by the Supreme Court.

In City of Boerne, the Court considered the constitutionality of the Religious Freedom Restoration Act (RFRA), legislation specifically passed to overturn the Court's opinion in Employment Division v. Smith. Smith held that the First Amendment right to free exercise of religion was not violated by "generally applicable prohibitions of socially harmful conduct." Although neutral laws passed with an antireligion motivation may still be declared unconstitutional, the decision made it impossible to challenge a neutral, generally applicable law on the grounds that it merely burdened the free exercise of religion. In response, Congress passed RFRA, mandating the application of a balancing test in cases involving challenges to state laws that burden religion. Under RFRA, governments at all levels were forbidden from placing "substantial[] burden[s]" on a person's exercise of religion, even if the burden resulted from a rule of general applicability, unless the government could demonstrate both a "compelling governmental interest" in its law and that the regulation was the "least restrictive means of furthering that compelling governmental interest."

A powerful attack on RFRA was mounted by the city of Boerne, Texas, in defense of its historic preservation ordinance after the city had denied the application of a local historic church to expand its facilities. When the city refused the permit, the church sued, arguing that under RFRA it did not have to comply with the ordinance. The church's claim under the RFRA balancing test was quite strong. Without the needed renovations, some forty to sixty parishioners were being turned away from some Sunday masses. To justify

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205. Id. at 2172.
209. In framing RFRA, Congress was influenced by Sherbert v. Verner, an earlier Supreme Court case. See Sherbert v. Verner, 374 U.S. 398, 409-10 (1963) (holding that in absence of compelling governmental interest, state may not punish individual who does not obey law that substantially burdens his free exercise rights).
212. Id.
213. Id.
this clear burden on religion, the city could not have asserted a public health or safety rationale, but rather would have been forced to argue that its aesthetic interests were compelling. Not surprisingly, it argued primarily that the power to enact RFRA itself was beyond the powers delegated to Congress by the Constitution.\textsuperscript{214}

The church, supported by the Solicitor General's office, sought to justify RFRA as a proper exercise of Congress's powers under section 5 of the Fourteenth Amendment.\textsuperscript{215} The Court agreed that Congress can properly legislate against practices that violate rights protected by the First Amendment.\textsuperscript{216} It reaffirmed that under \textit{Smith}, however, the enforcement of a generally applicable historic preservation ordinance against a church almost certainly did not violate the First Amendment.\textsuperscript{217} The Court reserved for itself the ultimate right to define what constituted a violation of a constitutional right.\textsuperscript{218} Congress could not overrule \textit{Smith} by statute.

The Court grounded its holding, in part, in the legislative history of the Fourteenth Amendment.\textsuperscript{219} The framers of the Fourteenth Amendment had deliberately rejected an alternative formulation of the amendment, drafted by Congressman Bingham, that would have given Congress the power to define constitutional protections.\textsuperscript{220} The framers rejected it because it "would [have] give[n] Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution."\textsuperscript{221} Accordingly, a new draft was prepared, under which "Congress'[s] power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective."\textsuperscript{222} In this form, the amendment was ratified.

\begin{itemize}
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.} at 2162-63.
\item \textsuperscript{216} \textit{Id.} at 2163-64.
\item \textsuperscript{217} \textit{Id.} at 2161.
\item \textsuperscript{218} \textit{Id.} ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what it is.").
\item \textsuperscript{219} \textit{Id.} at 2164-66.
\item \textsuperscript{220} \textit{See id.} at 2164. That version stated:
\begin{quote}
The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.
\end{quote}
\textit{Id.} (citing \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1034 (1866)).
\item \textsuperscript{221} \textit{Id.}
\item \textsuperscript{222} \textit{Id.} at 2165.
\end{itemize}
Apart from this federalism argument, the Court in *City of Boerne* noted that opponents of the Bingham draft invoked another structural principle of constitutional government: the separation of powers among the branches of the national government. The Court recognized that "[t]he first eight amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions."\(^{223}\) A problem with the initial draft was that it "departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation."\(^{224}\) In the later, successful draft, "the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. The power to interpret the constitution in a case or controversy remains in the judiciary."\(^{225}\)

The distinction between the "remedial and preventive" legislation authorized by section 5 and legislation that defines constitutional rights, which is forbidden,\(^ {226}\) will sometimes be hard to apply. The Court in *City of Boerne* devoted several pages to distinguishing RFRA from 1960s voting rights legislation that forbids certain practices, such as literacy tests, that the Court had earlier found constitutional.\(^ {227}\) "Preventive rules" like those found in the voting rights legislation, are "appropriate remedial measures" under section 5 only when there is "a congruence between the means used and the ends to be achieved."\(^ {228}\) The Court recognized that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one."\(^ {229}\) In the voting rights context, the legislation addressed "widespread and persisting deprivation of constitutional rights resulting from this country’s history of racial discrimination."\(^ {230}\) By contrast, "RFRA’s legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry."\(^ {231}\)

Although the *City of Boerne* distinction between remedial and definitional legislation may sometimes be hard to draw, its application to the recent

\(^{223}\) Id. at 2166.

\(^{224}\) Id.

\(^{225}\) Id.

\(^{226}\) See id. (discussing "remedial and preventive" nature of Congress’s enforcement power, which is constitutional, and legislation "generally upon" life, liberty, and property, which is unconstitutional).

\(^{227}\) Id. at 2166-71.

\(^{228}\) Id. at 2169.

\(^{229}\) Id.

\(^{230}\) Id. at 2167.

\(^{231}\) Id. at 2169.
statutes abrogating immunity for copyright, patent, and trademark infringements is straightforward. Unlike RFRA, the abrogating statutes do not define rights. These statutes merely provide effective remedies for violations of the intellectual property statutes by removing a barrier that may otherwise stand in the way of relief. Like the abrogation of state immunity from federal sex discrimination suits upheld by the Supreme Court in *Fitzpatrick v. Bitzer,* Congress's abrogation in the intellectual property context has merely provided remedies against the states for pre-existing wrongs of constitutional dimension.

*Seminole Tribe,* of course, requires that the wrong remedied by Congress be a violation of the Fourteenth Amendment. We have provided the main reason why the abrogating legislation is designed to remedy a Fourteenth Amendment wrong: Virtually all state infringements of patents, copyrights, and trademarks without payment of just compensation are violations of the Takings Clause of the Fifth Amendment. The Fifth Amendment was the first section of the Bill of Rights to be incorporated into the Fourteenth Amendment. In other words, to the extent that Congress provides a remedy for an uncompensated taking of property by a state, it addresses a violation of the Fourteenth Amendment, a response that is presumptively authorized by section 5 and *City of Boerne.* We have shown in Part I that the interests delineated by the intellectual property statutes are constitutionally protected property. Insofar as the question of the availability of suit under the copyright, patent, and trademark statutes is whether Congressional power is exercised under section 5 of the Fourteenth Amendment, we are confident that the abrogating legislation passes muster.

As we discussed in Part I, acts of infringement by a state government are best analogized to partial confiscations of property. Confiscation by the state is a per se taking of property under the Fifth and Fourteenth Amendments. The abrogating legislation is only directed at acts of infringement committed

233. See supra Part I.
234. See supra note 15.
235. See supra Part I. The congruence between violations of the intellectual property statutes and violations of property rights may not be complete. On the facts of a given case, a particular infringement may not rise to the level of an unconstitutional interference with property rights. See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 359-60 (3d Cir. 1997) (stating that abrogation of state immunity in some types of false advertising suits does not remedy constitutional deprivation of property, and therefore is not valid), petition for cert. filed, 67 U.S.L.W. 3084 (U.S. July 17, 1998) (No. 98-149). Such a case would present the question of whether allowing the suit to proceed would nevertheless serve the goal of effectively remedying constitutional violations. As *City of Boerne*'s distinction between RFRA and voting rights legislation indicates, the answer may turn on the facts of particular cases.
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by states. It does not render states generally liable if they pass statutes and regulations that may negatively affect the value of intellectual property. Such regulations would seldom constitute a taking. In other words, the fit between the remedy (abrogation) and the constitutional wrong (taking by infringement) is close enough to satisfy the City of Boerne test.

Two further aspects of the section 5 issue need to be addressed. The abrogating statutes permit injunctive relief against state governments, as well as extra-compensatory damages. Neither of these forms of relief may be obtained as a matter of constitutional right in a suit for a "taking" of property. Assuming that Congress may grant federal courts jurisdiction over claims that state governments have unlawfully intruded on interests in intellectual property, does it follow that Congress may authorize, consistent with the limits on its section 5 power, remedies that are not available in the state courts?

We believe the provisions for injunctions and extra-compensatory damages are well within Congress's section 5 authority. City of Boerne distinguishes between legislation that defines the scope of constitutional protection and legislation that provides remedies for violations of rights recognized by the courts. The abrogating statutes do not define constitutionally protected "property," but only provide remedies deemed by Congress to be necessary to the effective enforcement of intellectual property rights. In fact, the remedies for injunctive relief available under federal intellectual property laws may not typically go beyond the remedies available to the victims of violations of the Takings Clause. Case law seems to provide for a grant of injunctive relief to the victim whose property is taken by a state official in the course of her duties who is not authorized under state law to condemn the property. In other words, when the official confiscating the property is a professor or bureaucrat, injunctive relief is probably already available. We assume, of course, that the proper state authority could later ratify the rogue official's action and offer to pay just compensation for any future use of the property. Nothing in the abrogating legislation of the intellectual property law should be interpreted as ultimately preventing a state from properly exercising its constitutional power to take property for public use.

236. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 698-99 & n.21 (1949). The court stated that

specific relief in connection with property held or injured by officers of the sovereign acting in the name of the sovereign has been granted only where there was a claim that the taking of property or the injury to it was not the action of the sovereign because unconstitutional or beyond the officers statutory powers . . .

Id.; cf. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign for the taking.") (emphasis added).

237. We doubt, however, that a state could entirely condemn a copyright, patent, or
The Court in *City of Boerne* stressed that the courts have, ever since *Marbury v. Madison*, had the final say in determining the content of constitutional rights. An equally time-honored tradition is Congress’s role in authorizing remedies for constitutional violations. Although the courts should participate in this effort as well, the Supreme Court has recognized that the primary responsibility for making constitutional remedies belongs to Congress. We know of no case in which the Court has invalidated a Congressional remedy for constitutional violations on the ground that Congress accorded greater protection than the Constitution requires.

Finally, an objection might be raised that the abrogating statutes authorize a suit against the state before a constitutional violation has occurred because a violation of the Takings Clause is typically not complete until the state refuses to pay compensation. In other words, the statute might be seen as sanctioning primarily constitutional conduct, in violation of the principle stated in *City of Boerne*, insofar as it does not require plaintiffs to exhaust their state remedies first. In response, we note, as we did above, that the vast majority of the infringements we describe are perpetrated by state officials who lack statutory authority to exercise their state’s power of eminent domain. In those situations, case law indicates that the cause of action for relief arises immediately. In other words, we believe the "fit" required by *City of Boerne* is still quite tight if we are right that the typical infringement resembles an inverse condemnation of property by an official without eminent domain authority, as opposed to a proper exercise of the state’s constitutional right to offer reasonable compensation for the public use of a private citizen’s property.

*D. Two Post-Seminole Tribe Decisions*

The only two courts to have considered the constitutionality of legislation abrogating state sovereign immunity in cases involving federal intellectual property have come to opposite conclusions.

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238. 5 U.S. (1 Cranch) 137 (1803).
241. See First English Evangelical Luth. Church v. County of L.A., 482 U.S. 304, 316 (1987); *supra* text accompanying notes 134-36. Of course, the case may not yet be ripe for adjudication in federal court. See Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (stating that due process claim based on illegal taking theory not ripe until inverse condemnation action brought by victim against state). The abrogation statute can be seen as bypassing any ripeness objection, something Congress can do as long as the state remedy exhaustion requirement is not of constitutional dimension. For a discussion of why it is not, see *infra* text accompanying notes 373-78.
In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Federal Circuit found that "[i]n subjecting the states to suit in federal court for patent infringement, Congress sought to prevent states from depriving patent owners of their property without due process through infringing acts." After discussing *Seminole Tribe and City of Boerne*, it concluded that abrogation "comport [ed] with the text and judicial interpretations of the Fourteenth Amendment." Although its treatment of the jurisdictional precedent is convincing, the court did little to prove its conclusion that the state’s action constituted a taking of property apart from citing older case law that characterizes a patent as "property." In other words, it did not engage in any detailed analysis of whether an infringement constitutes an unconstitutional taking of that property, which, as we have seen, is the more difficult question.

In *Chavez v. Arte Publico Press*, the Fifth Circuit took a different approach and held in a confusing opinion that a claim for copyright infringement could not constitutionally be brought against a state after *Seminole Tribe*. The opinion does not seem to deny that a copyright is "property," citing *Ruckelshaus* and finding that "[b]y analogy, copyrights constitute intangible property that, for some purposes at least, receives constitutional protection." The court did not, however, proceed to decide the question of whether the state’s conduct effects a confiscatory or regulatory taking. Instead, it noted that in addition to allegedly infringing the plaintiff’s copyright, the state also breached its contract with the plaintiff, suggesting erroneously that the existence of a breach of contract claim somehow bars the bringing of the copyright claim. Because a breach of contract does not constitute a violation of due process, according to the court, no constitutional violation existed and the abrogating statute must be seen as expanding the substantive rights of copyright owners rather than merely providing a remedy for a pre-existing constitutional violation. This doomed the statute under the "logic of *City of Boerne*," according to the court.

242. 148 F.3d 1343 (Fed. Cir. 1998).
243. 139 F.3d 504 (5th Cir. 1998).
245. Id.
247. Id. This claim is especially bizarre given that the state law claim may well be preempted by federal copyright law. See *National Car Rental Sys., Inc. v Computer Assoc. Int'l*, Inc., 991 F.2d 426, 428 (8th Cir. 1993).
The *Chavez* court's claim that the occasional existence of a breach of contract claim against a state dooms the abrogation legislation was not persuasive. The existence of a parallel state remedy does not mean that the constitutional violation is somehow nullified. Take for example the Supreme Court's holding in *Fitzpatrick v. Bitzer*, reaffirmed in *Seminole Tribe*, that Congress properly abrogated state sovereign immunity in Title VII sex discrimination cases brought against the states. In many cases of sex discrimination in employment, the state has not only violated the employee's right to equal protection under the Fourteenth Amendment, but also the plaintiff's private contractual rights (for example, the implied covenant of good faith and fair dealing) and local antidiscrimination regulations. The existence of potential state remedies does not render the abrogation legislation blessed in *Fitzpatrick* somehow suspect. To the extent that the facts underlying many, if not most, constitutional violations provide a basis for bringing a state law cause of action, the Fifth Circuit's position means that Congress can seldom, if ever, abrogate state sovereign immunity after *Seminole Tribe* and *City of Boerne*. Although some states' rights advocates may prefer such an outcome, it runs directly contrary to the express holding of *Fitzpatrick* and *Seminole Tribe* itself.

One final argument raised by the Fifth Circuit merits consideration. The court worried that upholding the plaintiff's claim would allow Congress to make an end run around *Seminole Tribe* by declaring something to be "property" under its Article I powers and then declaring it protected against state encroachment under section 5 of the Fourteenth Amendment. It asserts that "Congress could easily legislate 'property' interests and then attempt to subject states to suit in federal court for the violation of such interests." This argument, if persuasive, would reduce the significance of *Ruckelshaus*, given that the property right protected in that case was created by a state and not by Congress.

The most powerful response we can offer is that under *City of Boerne*, Congress does not have the power to define what constitutes a violation of an individual's constitutional rights. The Supreme Court made clear that Congress does not have the power to declare something a constitutional violation and willy-nilly provide a remedy. It is up to the courts to decide whether a state law or an act of Congress establishes a right that may be characterized as property under the Fifth and Fourteenth Amendments and whether that right has been unconstitutionally burdened. The Court has frequently denied

249. See Home Tel. & Tel. Co. v. City of L.A., 227 U.S. 278, 287-88 (1913) (explaining that existence of constitutional violation does not turn on whether state remedies are available).
251. *Id.* at 511.
plaintiffs' claims that a law establishes a right that is constitutionally protected. The fact that sometimes Congress has the power to create something that looks like property (for example, a copyright or a patent) does not mean that it has plenary power to declare all interferences with property rights to be a violation of the Fourteenth Amendment.

E. Does the Subjective Intent of Congress Matter?

The Curious Case of Bankruptcy

Although College Savings Bank and Chavez are the only cases to squarely address the question of the propriety of Congress's abrogation of Eleventh Amendment immunity in patent, copyright, and trademark cases, several federal appellate courts have examined a similar amendment to the Bankruptcy Act. Both the Fourth and Fifth Circuits have held that Congress's abrogation of state Eleventh Amendment immunity in bankruptcy cases was ineffective. These cases are relevant because, as Justice Stevens recognized in his dissent in Seminole Tribe, abrogation in the intellectual property and bankruptcy contexts probably raises similar issues.

At first glance, the bankruptcy decisions in the Fourth and Fifth Circuits may seem odd. After all, much of bankruptcy law is concerned with protecting the property interests of creditors. In situations in which a state has unconstitutionally taken property from a creditor without paying just compensation or has deprived a creditor of its property without due process of law, Congress should have the power under section 5 of the Fourteenth Amendment to enact legislation to protect the creditor. Imagine a situation in which a creditor properly perfects a security interest in the debtor's farm equipment in State A, but just before the debtor declares bankruptcy, State A's tax bureau seizes the farm equipment pursuant to a subsequently filed tax lien. Under both state and federal law, the creditor has the superior interest in the property. In other words, the state's seizure of the property is wrongful and is

252. See 11 U.S.C. § 106(a)(1994) ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following [sections]."); id. § 106(a)(3) ("The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages.").

253. See generally In re Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997); In re Creative Goldsmiths of Wash., D.C., Inc., 119 F.3d 1140 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998).

254. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 77 n.2 (1996) (Stevens, J., dissenting) (stating that majority decision "suggests that persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy").

255. See U.C.C. § 9-301(1)(b) (1995) (stating that security interest takes priority over
properly characterized as a deprivation of property without due process of law. 256 Under City of Boerne, Congress would have the power under section 5 of the Fourteenth Amendment to provide such a creditor with an appropriate remedy in federal court.

Neither the Fourth nor the Fifth Circuits considered the possibility that the abrogation of immunity in § 106 of the Bankruptcy Act remedies unconstitutional deprivations of property. Rather, in a bizarre analytical turn, both courts focused on Congress's subjective intent in passing § 106. Although the Bankruptcy Reform Act was passed in 1994, in the era before Seminole Tribe when Congress naturally presumed it could rely on the Commerce Clause or the Bankruptcy Clause to abrogate state sovereign immunity, 257 the Fourth Circuit in In re Creative Goldsmiths of Washington, D.C., Inc., 258 seemed surprised that "there is no evidence to indicate that in enacting the Bankruptcy Reform Act of 1994, Congress acted under section 5 of the Fourteenth Amendment." 259 It found that Congress acted under its Article I powers and rejected the plaintiff's "reliance on [section] 5 of the Fourteenth Amendment as a post hoc justification for Congress's attempted abrogation in 11 U.S.C. § 106." 260 The court refused to "presume that Congress intended to enact a law under a general Fourteenth Amendment power to remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law." 261 We note here that Congress referenced section 5 of the Fourteenth Amendment in the legislative history behind the statute abrogating state sovereign immunity in patent and trademark cases, but not in copyright cases. 262

Similarly, the Fifth Circuit did not consider the extent to which § 106 might remedy unconstitutional deprivations of property by the states. The

person who becomes lien creditor after interest is perfected). A state, of course, could change this priority rule. See 11 U.S.C. § 547 (1994) (stating that trustee may avoid transfers made on account of antecedent debt owed by debtor during ninety-day period before bankruptcy is filed).


258. 119 F.3d 1140 (4th Cir. 1997).


260. Id.

261. Id.

262. See Cross, supra note 7, at 544-55 & n.199.
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decision in In re Estate of Fernandez\textsuperscript{263} is driven by the conclusion that "[t]here is no evidence that the 1994 Act was passed pursuant to the Fourteenth Amendment."\textsuperscript{264} What neither court realized is that the Supreme Court has "never require[d] a legislature to articulate its reasons for enacting a statute."\textsuperscript{265} The validity of a statute does not rise or fall on the existence of a House or Senate committee report that suggests congressional reliance on a particular section of the Constitution. Every Supreme Court opinion that has addressed the subject\textsuperscript{266} makes it clear that the constitutionality of a statute does not depend on whether Congress used the magic words "Fourteenth Amendment" in the legislative history.\textsuperscript{267} Recent appellate court cases agree.\textsuperscript{268}

The inquiry into the constitutionality of legislation is properly focused on one question: Does the Constitution authorize the legislation at issue? McCulloch v. Maryland\textsuperscript{269} provides the enduring paradigm of how the Court approached the question of whether Congress has the power to enact a particular piece of legislation. The focus is on the Constitution and whether its ratifiers intended Congress to have the power to act. We know of no Supreme Court case that suggests that an otherwise properly authorized act of Congress is invalid because Congress invoked an inappropriate section of the Constitution or none at all.

263. 123 F.3d 241 (5th Cir. 1997).

264. In re Estate of Fernandez, 123 F.3d 241, 245 (5th Cir. 1997).

265. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993); see Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 698 (1st Cir. 1983) ("The omission of any ritualistic incantation of powers by the Congress is not determinative, for there is no requirement that the statute incorporate buzz words such as ‘Fourteenth Amendment’ or ‘section 5.’").

266. See Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) ("[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").


268. See Ussery v. Louisiana, 150 F.3d 431, 436 (5th Cir. 1998) ("Seminole Tribe ‘requires us to make an objective inquiry, namely whether Congress could have enacted the legislation at issue . . . ." (quoting Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997))); Wheeling & Lake Erie Ry. Co. v. Public Util. Comm'n of Pa., 141 F.3d 88, 92 (3d Cir. 1998) ("[W]hen determining the sources of Congress’s authority to legislate, we may look beyond the expressed constitutional basis in a statute's preamble or legislative history.").

269. 17 U.S. (4 Wheat.) 316 (1819) (finding that Congress has implied Article I power to establish Bank of the United States).
Nonetheless, the end result reached by the Fourth and Fifth Circuits on the abrogation issue in the bankruptcy context is probably correct. Although § 106 provides a federal forum for some unconstitutional deprivations of property, as in the hypothetical posed above, it casts its net far too broadly, making states amenable to federal jurisdiction in a wide variety of contexts in which a state's behavior is constitutional. Under *City of Boerne*, Congress can only legislate pursuant to section 5 of the Fourteenth Amendment in order to remedy a preexisting violation of the rights secured by section 1 of the Fourteenth Amendment. Although the Court will tolerate a remedy that is slightly overbroad, the opinion in *City of Boerne* requires a "congruence" between the unconstitutional wrong targeted by Congress and the means chosen. The Court therefore held that the Religious Freedom Restoration Act was unconstitutional because most of the conduct it prohibited was constitutional.

Section 106 of the Bankruptcy Amendments of 1994 is similarly defective. One can imagine numerous scenarios in which § 106 forces states that have not committed any violations of the Fourteenth Amendment into federal court. For example, § 106 expressly abrogates state sovereign immunity as to 11 U.S.C. § 362, which provides for an automatic stay against creditors of the debtor at the moment the debtor files his bankruptcy petition. Case law holds that sending a letter to the debtor demanding payment constitutes a violation of the stay. Therefore, under §§ 106 and 362, a state agency that sends such a letter to the debtor could theoretically be dragged into federal court, although it is clear that such letter writing is not a violation of the Fourteenth Amendment.

Consider a further illustration. In *In re Creative Goldsmiths*, the trustee in bankruptcy sought to recover a payment of $4382 in income taxes paid to the Maryland Comptroller of Currency during the ninety-day preference period before the debtor filed for bankruptcy. Again, this scenario does not present unconstitutional behavior on the part of the State of Maryland; all Maryland did was accept money that it was legally owed. We cannot find a decision suggesting that a state's failure to return money rightfully owed to it constitutes a violation of the Fourteenth Amendment. Although § 106 may sometimes afford a remedy for an unconstitutional deprivation of property by

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270. See supra notes 216-18 and accompanying text.
271. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2167 (1997) (noting that ban on literacy tests by Voting Rights Act prohibited some constitutional uses of tests, but evidence showed primary use of tests was discriminatory).
272. Id. at 2171-72.
a state, most of the time a state would find itself subject to federal jurisdiction without having committed a constitutional wrong.

In the final analysis, the fit between means and end in § 106 is unconstitutionally disproportionate under City of Boerne. We have already suggested that the congruence between remedy and wrong in the context of the abrogations of Eleventh Amendment immunity in federal patent, copyright, trademark law is constitutionally snug. The vast majority of state infringements of federal intellectual property constitute violations of the Takings Clause. And that is what matters – not the existence of the proper invocation of section 5 in the respective legislative histories.

F. Can State Immunity Be Avoided by Suing in State Court?

Suppose we are wrong in concluding that the intellectual property abrogating legislation is a valid exercise of section 5 power. Does it follow that plaintiffs must resort to a state law cause of action for inverse condemnation, as discussed in Part I, or can plaintiffs avoid the Eleventh Amendment by bringing suits under the patent, copyright, and trademark statutes in state court? The issue is worthy of attention not only because of its relevance to the intellectual property context, but also because Congress has purported to abrogate immunity in a range of contexts, and the section 5 argument we have advanced may not work in some of them. Professor Daniel J. Meltzer points out that Congress has recently passed numerous statutes that impose liability for retrospective relief on the states, listing "copyright, trademark, and patent laws; the Individuals with Disabilities Education Act; the Fair Labor Standards Act; the bankruptcy laws; the Veteran's Reemployment Rights Act; and provisions barring discrimination on the basis of race, sex, age, and disability."

We believe the Supreme Court will hold that a state does have an obligation to open its courts to suits brought by individuals seeking to enforce federal laws against that state. To begin with, there is recent precedent

275. See supra notes 232-35 and accompanying text.
276. For the sake of exploring this issue, we put aside 28 U.S.C. § 1338, which provides for exclusive federal jurisdiction over patent and copyright cases. 28 U.S.C. § 1338 (1994). If an otherwise compelling case could be made in favor of giving effect to the recent abrogating legislation by allowing state court suits, then an equally compelling argument may be advanced in favor of reading the abrogating legislation as carving out an implicit exception to exclusive federal jurisdiction.
279. Others holding this position include Nicole A. Gordon & Douglas Gross, Justicia-
favoring access to state courts. The clearest example is found in *Hilton v. South Carolina Public Railways Commission*. In *Hilton*, an injured employee of a state-owned railroad brought suit against South Carolina under the Federal Employers' Liability Act (FELA) in federal court. While his damages action was pending, the Court rendered its decision in *Welch v. Texas Department of Highways and Public Transportation*, which held that the Jones Act did not properly abrogate the states' Eleventh Amendment immunity. Because the Jones Act, which provides remedies for injured seamen, and FELA, which provides remedies for injured railway workers, establish parallel statutory schemes, Hilton logically assumed that the Eleventh Amendment doomed his federal court suit, had it voluntarily dismissed, and refiled his FELA claim in South Carolina state court.

In its own courts, South Carolina successfully resisted Hilton's refiled claim, arguing that FELA did not authorize an action for money damages against an unconsenting state. Reversing the South Carolina courts, the Supreme Court emphatically rejected the argument that the Eleventh Amendment provided South Carolina with immunity from suit in its own courts, noting "as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'" Although the Eleventh Amendment barred Hilton's suit in federal court, Congress retained the power to provide a remedy in state court for the violation of a federal right. The Court stated that when "a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."

Nor does Hilton stand alone. *Nevada v. Hall* held that when a state is sued in the courts of another state, the forum court is not constitutionally compelled to respect the state's assertion of substantive immunity. In order

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285. *Id.* at 200-01.
286. *Id.* at 204-05 (quoting Will v. Michigan Dept. of State Police, 491 U.S. 58, 63-64 (1989)).
287. *Id.* at 207.
to uphold state immunity against a federal cause of action in the state's own courts, the Court would need either to abandon *Hall* or else explain why it should matter whether suit is brought in one state court rather than another.

An advocate of broad immunity may argue that, by according state immunity a constitutional pedigree, *Seminole Tribe* undercuts the authority of *Hilton* and *Hall*. If state immunity is of constitutional dimension, then a mere statute may be ineffective to annul it. But *Seminole Tribe* itself never mentions *Hilton* and *Hall*, much less overrules them. The opinion addresses only the states' immunity from federal suit, and the Court held only that immunity from federal suit has constitutional status. *Seminole Tribe* contains only a passing reference, buried in a footnote, to state court suits. Writing for the Court, Chief Justice Rehnquist, who had dissented in *Hall*, observed that "this Court is empowered to review a question of federal law arising from a state-court decision *where a State has consented to suit.*" The negative implication of this truism may be that the Court would recognize a state’s assertion of immunity in its own courts from suits to enforce federal laws. On the other hand, neither *Hans v. Louisiana* nor *Seminole Tribe* involved suits brought in state court, and the dicta hardly squares with cases in which, for example, a tax refund was required of a recalcitrant state.292

While *Seminole Tribe*'s dictum may unsettle the authority of *Hilton* and *Hall*, we doubt, for a variety of reasons, that the Court is ready to overrule the earlier cases. In the first place, a strong pragmatic argument can be advanced in favor of requiring state courts to hear such suits. In the absence of access to state court for suits brought by individuals against state governments, the enforcement mechanisms of these laws would be extremely limited. The United States could bring an enforcement action, of course, as the states’ immunity is unavailable in such a suit.293 So far as individual plaintiffs are concerned, the primary enforcement mechanism would be suits against individual government officials in their personal capacities. This approach would have numerous defects:

The responsible officials may be hard to identify, have left the jurisdiction, or be judgment-proof. When the scope of substantive duties is uncertain, personal liability may impair effective government decision making and unfairly penalize individuals . . .

... [I]n today's world of high litigation costs, massively complex federal requirements, and erratic but sometimes punishing jury verdicts,
such an approach seems neither very practical, politically feasible, nor likely to contribute to harmonious federalism.\textsuperscript{294} In situations in which Congress may constitutionally regulate state activity, limiting the vehicles for enforcement in this way looks unwieldy, if not perverse.

The case for access to state court does not rest solely upon practical considerations. A powerful argument based on constitutional structure also favors less-than-absolute immunity. Under the Supremacy Clause, federal law trumps state law; therefore, any state law standing in the way of the full enforcement of the federal mandate should be preempted.\textsuperscript{295} Although the Eleventh Amendment carves out a jurisdictional exception to this principle, imposing a requirement on state courts to hear these suits affirms the substantive supremacy of federal law. Indeed, Congress recognizes the possible dual nature of state immunity when it makes states substantively liable in one part of a statute while abrogating their immunity from suit in federal court in another separate part.\textsuperscript{296} The point of this distinction between federal legislative and federal judicial power is that the states are well-equipped to defend their interests in Congress, whose members are elected from the states and who are politically accountable to their electorates.\textsuperscript{297} By contrast, there are no similar structural restraints on Article III judges. Accordingly, it is appropriate to curb federal judicial power, as the Court did in \textit{Seminole Tribe}, while recognizing broad Congressional power to subject states to suit in their own courts.\textsuperscript{298}

This view is grounded in both logic and precedent. We note that in recent cases the Court has consistently resorted to the Tenth Amendment and principles of federalism to adjudicate complaints that Congress cannot force the states to comply with federal law. The Court has not yet used the Eleventh Amendment as its vehicle for crafting rules of substantive immunity. For example, after discussing Congress's power to force states to comply with federal overtime and minimum wage legislation in \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{299} the Court held that state and local govern-

\begin{itemize}
\item \textsuperscript{294} Meltzer, \textit{supra} note 160, at 48.
\item \textsuperscript{295} \textit{Id.} at 57.
\item \textsuperscript{296} \textit{Id.}
\item \textsuperscript{297} \textit{See generally} Herbert Wechsler, \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government}, 54 \textit{COLUM. L. REV.} 543 (1954).
\item \textsuperscript{298} \textit{Cf.} Laurence H. Tribe, \textit{Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism}, 89 \textit{HARV. L. REV.} 682, 712-13 (1976) (arguing, more ambitiously than we do here, for broad Congressional power to subject states to suit in federal court).
\item \textsuperscript{299} 469 U.S. 528 (1985).
\end{itemize}
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ments cannot constitutionally avoid compliance with federal law: Congress can force the states against their will to comply with federal law.\textsuperscript{300} This holding has been recently amplified in \textit{New York v. United States},\textsuperscript{301} which held that Congress can apply laws of general applicability against the states.\textsuperscript{302} Congress may not single out and "commandeer" a state legislature or its executive branch, but it may treat a state just like it treats other actors in the market. Granted, the Court may have assumed that suits against government officials in their personal capacity were the only vehicle to obtain retrospective relief, but we have already noted how unsatisfactory such a regime would be. More importantly, there is no hint in these cases that the states could in any way avoid enforcement of valid laws against them as official entities.

Another relevant line of cases, culminating in \textit{Printz v. United States},\textsuperscript{303} held that Congress can force state courts to hear claims based on the violation of federal rights. In \textit{Printz}, Justice Scalia's opinion for the Court noted that Article III of the Constitution establishes a Supreme Court, but leaves the creation of lower federal courts to the discretion of Congress.\textsuperscript{304} The logical conclusion is that "the Constitution was originally understood to permit imposition of an obligation on state \textit{judges} to enforce federal prescriptions."\textsuperscript{305} It is beyond doubt that a state normally must stand willing to adjudicate federal statutory and constitutional claims brought in its courts.\textsuperscript{306}

Also noteworthy are the cases in which state courts refused to entertain suits brought to enforce a federal law. The Court has permitted such refusal for neutral reasons, like the inconvenience of the forum.\textsuperscript{307} Yet the Court has consistently reversed state court refusals to adjudicate federal claims in cases in which the state court's reasons amount to an assertion that there is a con-

\begin{itemize}
  \item \textsuperscript{300} Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554-57 (1985).
  \item \textsuperscript{301} 505 U.S. 144 (1992).
  \item \textsuperscript{302} New York v. United States, 505 U.S. 144, 149 (1992) (concluding that Congress may not force state to make Hobson's choice between building radioactive waste dump or taking legal title to all low-level radioactive waste within its borders).
  \item \textsuperscript{303} 117 S. Ct. 2365 (1997) (finding that Congress may not force unwilling local sheriffs to conduct background checks on gun purchasers).
  \item \textsuperscript{304} U.S. CONST. art. II, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
  \item \textsuperscript{305} \textit{Printz}, 117 S. Ct. at 2371; \textit{see id.} at 2370 n.1 ("[A] state court must entertain a claim arising under federal law 'when its ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws.'" (quoting Second Employers' Liab. Cases, 223 U.S. 1, 56-57 (1912))).
  \item \textsuperscript{306} We do not rely heavily on this line of cases, however, as these cases do not expressly discuss suits brought against state governments.
  \item \textsuperscript{307} \textit{See generally, e.g.}, Douglas v. New York, New Haven & Hartford R.R. Co., 279 U.S. 377 (1929).
\end{itemize}
flict between federal law and state policy. Relying on the Supremacy Clause, the Court has declared that "the policy of . . . federal [law] is the prevailing policy in every state." 308

We predict that the Court, consistent with all these threads of doctrine, will hold that when a claimant seeks to enforce a generally applicable federal law against a state, it may do so in state court. We believe that as long as the federal law is substantively valid under Garcia and New York, a state court should have to entertain an action to enforce it. The Court seems to have established a clear division of labor—the Tenth Amendment governs issues of substantive immunity and the Eleventh Amendment governs issues of jurisdictional immunity.


The patent, copyright, and trademark laws all impose liability on any person who commits an act of infringement or false advertising. 309 Government officials and local governments who commit violations of the federal copyright, patent, and trademark statutes may be sued like anyone else, although the official immunity doctrine discussed below 310 sometimes shields officials from liability for damages in circumstances in which other defendants would be obliged to pay.

Intellectual property rights created by state law, such as trade secrets and publicity rights, fall outside the terms of the copyright, patent, and trademark laws. There is, however, another avenue by which these interests, as well as violations of copyright, patent, and trademark rights, may be redressed. We have in mind situations in which the interference is serious enough to amount to a "deprivation" of the property in violation of the substantive component of the Due Process Clause of the Fourteenth Amendment. 311 For example, an official who negligently divulges a trade secret could not be held liable because a greater degree of culpability is required to make out a substantive


310. See infra text accompanying notes 311-13.

311. See Zinermon v. Burch, 494 U.S. 113, 125 (1990) (distinguishing between procedural and substantive due process). If the claim is that the government may procure the property, but has not followed proper procedures, then the case may be conceived either as a taking or as a violation of procedural due process, and the plaintiff may well be required to bring an inverse condemnation suit in state court.
due process violation. On the other hand, cases from the land use context suggest that when an official deliberately appropriates intellectual property, knowing he is violating the owner's rights, a substantive due process theory should be successful.

Assuming the elements of substantive due process can be proven, the victim may sue under 42 U.S.C. § 1983, which authorizes damages or injunctive relief against "every person who, under color of [state law]," violates someone's constitutional rights. The advantage of bringing a § 1983 suit, even in fact patterns that may also be framed as patent, copyright, and trademark cases, is that a successful plaintiff in such a suit is ordinarily entitled to attorney's fees.

Such suits are almost never available against federal officers, as they do not usually act under color of state law.

A. Lawsuits Against Officials

For purposes of § 1983, "every person" includes both government officials and local governments, but not the state itself. As we shall see, the requirements for success differ depending on whether the (real) defendant is an officer or a government. Below are some important issues that arise in


313. See, e.g., Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1549 (11th Cir.), vacated en banc, 42 F.3d 626 (11th Cir. 1994) ("Deprivation of a property interest rises to the level of a substantive due process violation if done for improper motives and achieved through means that are arbitrary and capricious, and lacking any rational basis."); Parkway Garage, Inc. v. City of Phila., 5 F.3d 685, 692 (3d Cir. 1993) ("A violation of substantive due process rights is proven: (1) if the government's actions were not rationally related to a legitimate government interest; or (2) if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive.").


315. The plaintiff may choose to pursue both remedies in the same complaint, of course.


suits against officers, and that may be of particular importance in suits involving intellectual property.

1. "Official" Capacity and "Individual" Capacity Lawsuits

Although state and local governments are treated differently for purposes of sovereign immunity law, state and local government officials are all subject to the same rules, with one exception – when they are sued under § 1983. The exception comes up when the plaintiff sues an officer in her "official" capacity. In that event, the officer is treated, for most purposes, like the government for whom she works. An employee of the state government and its instrumentalities sued in her official capacity would be entitled to assert the state’s sovereign immunity against a suit for damages, just as though the state had been named as the defendant. An employee of local government, sued in her official capacity, would have no sovereign immunity shield, simply because local governments have none. Notice, however, a confusing wrinkle in the law: When a state official is sued in her official capacity, it remains possible to obtain prospective relief against the official, even though such a suit would fail on Eleventh Amendment grounds in the event that the state were the named defendant. In fact, the customary practice is to sue the official in her official capacity, so that the injunction may continue in force when the holder of the office is replaced.

When the plaintiff wishes to recover retrospective relief from an officer of state or local government, he should sue the officer in her individual capacity. This is so even though the suit charges that the officer committed a constitutional violation in the course of her official duties. The distinction between "official" and "individual" capacity suits has nothing to do with the public or private nature of the activity. It relates only to the real party in interest: A suit against an officer in her "official" capacity is a suit against the governmental employer, subject to the rules that would apply in a suit naming the governmental employer (except for the prospective relief wrinkle noted above). It is up to the plaintiff to decide how to characterize the claim. For that matter, the plaintiff may choose to sue officers in both their "individual" and "official" capacities.

318. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("[A] plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.").

319. See, e.g., Will, 491 U.S. at 71 n.10 ("[O]fficial-capacity actions for prospective relief are not treated as actions against the State." (quoting Graham, 473 U.S. at 167 n.14)).

320. See HART & WECHSLER, supra note 133, at 1125 & nn. 1-2.

2. "Under Color Of" State Law

Officers may be sued only for constitutional violations committed "under color of" state law. "Under color of" does not mean "authorized" by state law. It simply means that the officer acted under pretense of state law, using her state authority in some way, even if the action is illegal. The inquiry is highly fact-specific. A professor at a state school who infringes protected materials in her courses would act under color of state law even if state law forbids the practice. A professor who buys a book at the local bookstore and makes infringing copies for a private project unrelated to her job very likely does not act under color of state law, although the result may be different if she obtained the book from the school library in the course of her official duties.

3. Injunctive Relief

Despite the Eleventh Amendment, the Court held in Ex parte Young that the victim of a continuing constitutional or federal statutory violation can obtain an injunction directed at the official responsible for the violation. For example, if a university biochemistry department were routinely violating a patent owner's federal rights, an injunction against the responsible infringing employees constitutionally could be issued. If the Court were to hold, contrary to our analysis, that Congress's abrogation of Eleventh Amendment immunity is unconstitutional, Ex parte Young stands as at least a partial remedy for frustrated owners of federal intellectual property.

4. Official Immunity

When government officers perform legislative, judicial, or prosecutorial functions, they are absolutely immune from paying damages. Legislators alone are immune from prospective relief. We suspect these absolute immunities will have little practical importance for the protection of intellectual property rights, as most interferences with intellectual property will arise from the officers' exercise of executive functions of government. Everyone from policemen to the heads of government departments to the mayor and the governor acts in an executive capacity. These officers are always subject to suit for prospective relief but receive a "qualified" immunity from suits for damages. They "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

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323. See generally Ex parte Young, 209 U.S. 123 (1908) (involving injunction against state attorney general to prevent enforcement of unconstitutional rate-setting scheme).
rights of which a reasonable person would have known. Notice that this qualified immunity would be available in a suit under the Copyright Act as well as in a § 1983 suit charging a constitutional violation of property rights.

One can imagine a wide variety of circumstances in which a government employee might find qualified immunity to be a powerful shield. For example, a very persuasive fair use argument can be offered on behalf of teachers who photocopy otherwise protected materials for distribution to their students in the form of "coursepacks." Although one appellate court has found a for-profit copyshop liable for photocopying infringing coursepacks, no court has ever found a teacher liable in a coursepack case. A teacher with a knowledge of the Copyright Act and the relevant case law could reasonably conclude that distributing a photocopied coursepack is not a violation of federal copyright law. Therefore, the teacher could successfully assert qualified immunity from an infringement suit brought by the copyright owner.

We note that the pocketbook of a state employee who is found liable is typically protected by some sort of insurance plan or indemnification scheme. An employee's source of indemnification for an illegal act, whether through insurance or a contractual right to be reimbursed by the state itself, does not, however, cause the state's immunity to rub off on the employee because such private arrangements do not confer upon a successful plaintiff the right to enforce the judgment against the state.

B. Lawsuits Against Local Governments

Municipalities (and municipal officials sued, confusingly, in their "official capacities") cannot assert either the state's sovereign immunity or

326. See id. (stating that fair use includes making of "multiple copies for classroom use"); see also Amy E. Groves, Recent Development, Princeton University Press v. Michigan Document Services, Inc.: The Sixth Circuit Frustrates the Constitutional Purposes of Copyright and Fair Use Doctrine, 31 GA. L. REV. 325, 328 (1996) (arguing that commercial copyshop should have been afforded fair use defense in preparing professors' coursepacks).
328. But see Better Gov't Bureau, Inc. v. McGraw, 904 F. Supp. 540, 553 (S.D. W. Va. 1995) (finding that state attorney general was not entitled to qualified immunity when unlawfulness of his incorporation of state agency with name similar to plaintiffs "should have been apparent to him" in light of existing law), aff'd sub nom. In re Allen, 106 F.3d 582 (4th Cir. 1997), cert. denied, 118 S. Ct. 689 (1998).
329. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.5.2, at 394-95 & n.22 (2d ed. 1994) (discussing lawsuits against state officers and indemnification).
330. Lincoln County v. Luning, 133 U.S. 529, 530-31 (1890); see HART & WECHSLER, supra note 133, at 1056-57.
In order to recover, the plaintiff must, however, meet another requirement. According to the Supreme Court's ruling in *Monell v. Department of Social Services*, a municipality is not liable under § 1983 unless the constitutional injury is inflicted during the "execution of a government's policy or custom." Governments always act through their officers. The point of the requirement is that local governments are not liable on a respondeat superior basis for anything their officers do in the course of their official duties. Local governments are responsible only for those acts that fall within the category of "policy or custom."

The cases on "policy or custom" can be divided into four fact patterns. First, a city or county will be liable for implementing rules of general application enacted by the city council or an agency. The city would almost surely be liable, for example, if the board of education made a decision that teachers should photocopy textbooks and sell them to students, rather than buy the books. Second, the city may be liable for a "custom" involving high officials who are aware of a widespread practice and do nothing to stop it, although there is no written policy requiring or approving the practice. Such a situation may arise if, to alter our hypothetical, infringing copyrights is common practice in the local schools, the superintendent and the school board know about it, and no one takes effective steps to stop it. Third, a government may be liable for unconstitutional acts committed by its employees if the injuries are caused by "inadequate training," or, perhaps, "inadequate hiring" by recklessly hiring a dangerous employee. Although the typical cases arise in the context of physical injuries inflicted by police officers and jailers, it may be possible to construct a lawsuit against a city for failure to train its employees how to deal appropriately with intellectual property as well.

333. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").
334. *Id.*
335. For purposes of the rule discussed in this section, cities and counties are equivalent.
336. See CHEMERINSKY, *supra* note 329, § 8.5.2, at 453-54 (discussing establishment of municipal liability through demonstrating existence of "custom").
338. The Court found that the evidence failed to justify the application of such a theory, but did not wholly reject the theory itself, in the recent case *Board of the County Comm'rs v. Brown*, 117 S. Ct. 1382, 1388-94 (1997).
A fourth principle is less well-defined. Supreme Court cases hold that a city may be liable in the absence of a widespread policy or custom if the official who acts is the city's "policymaker" in a given domain. If so, then his action in that domain will be attributed to the city. In Pembaur v. City of Cincinnati, for example, the local prosecutor told deputies to enter a room without a warrant. The Court held that the prosecutor was the county's policymaker as to police searches, so that the county could be liable for his action. For the sake of illustrating the limits of this principle, it is instructive to compare Pembaur with City of St. Louis v. Praprotnik in which the plaintiff was fired by a mid-level city bureaucrat, allegedly for constitutionally impermissible reasons. Because the firing was subject to review at a higher level, and there was no indication of unconstitutional motives on the part of the reviewers, the Court held that the former employee could not sue the city.

The Court's most recent foray into this area is a 1997 case, McMillian v. Monroe County, in which it stressed the role of state law in determining who is a "policymaker" for the purpose of the "single act" principle. Although state law could not answer the question, the Court stated that the "inquiry is dependent on an analysis of state law," in the sense that the Court's "understanding of the actual function of a governmental official . . . will necessarily be dependent on the definition of the official's functions under relevant state law." The application of the "single act by a policymaker" principle to intellectual property cases, then, is likely to vary depending on the actor, and may vary from one state to another depending on state law. Perhaps the "policy or custom" test of Monell would be satisfied if a powerful mayor or city manager ordered all municipal secretaries to make unauthorized copies of a new word processing program.

IV. Conflicts Between Federal and State Jurisdiction

Remedies for governmental intrusions on intellectual property are available under federal statutory and constitutional law, as well as under state

342. Id. at 485.
345. Id. at 127.
348. Id. at 1737.
condemnation law. Either the government or the property holder may be the plaintiff. Suit may be brought in either federal or state court. This complex remedial landscape gives rise to problems of jurisdictional coordination: May the property owner sue in federal court under § 1983 or under the intellectual property statutes even if a state remedy for inverse condemnation is available?

The answer to the forum issue may vary depending on whether the federal suit is brought under § 1983 or the intellectual property statutes. In any case, keep in mind that this is not merely a dry procedural issue. The remedies may differ depending on the forum, and the differences between federal and state judges may even produce systematically different outcomes on the merits of close cases. Accordingly, an overarching policy issue here should be noted: In addition to the specific considerations identified in the ensuing paragraphs, one’s view of the choice between federal and state courts will be influenced, in part, on a judgment as to whether the property owner or the defendant government or officer ought to get the benefit of any litigating edge that comes with having the case adjudicated in a forum that will likely be sympathetic to his interests.

A. Section 1983 Litigation

It is useful to distinguish between § 1983 suits against governments and those brought against individual officers. We begin with suits against governments. Recall that these suits are possible only when the challenged action meets the "policy or custom" test of Monell.349

1. Lawsuits Against Governments

In Williamson County Regional Planning Commission v. Hamilton Bank,350 Hamilton Bank charged that the Planning Commission had taken its property by unconstitutionally interfering with its efforts to develop land and sued the Planning Commission in federal court under § 1983 to recover the value of the land.351 The Court rejected the bank’s Just Compensation Clause theory of recovery for lack of ripeness, citing two reasons. First, a regulatory taking claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."352 Here, the plaintiff had not sought variances that would have allowed it to develop the property according to its

349. See supra text accompanying note 333.
352. Id. at 186.
proposed plat. Second, "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." The bank went wrong by attempting to sue in federal court under § 1983 rather than bringing an inverse condemnation action under state law in state court.

The Court went on to consider the viability of the case when conceived as a claim that the Planning Commission had deprived the bank of its property without due process of law. This theory, too, was "premature." Viewed in this way, the case would depend on whether the regulation was "so onerous that it has the same effect as an appropriation of the property." That inquiry would turn largely "upon an analysis of the effect the Commission's application of the zoning ordinance... had on the value of [the bank's] property and investment-backed profit expectations." As with the takings claim, that effect could not be measured until the bank applied for variances.

Does Williamson County require persons claiming violations of intellectual property rights to bring inverse condemnation actions in state court before seeking federal relief under § 1983? If the plaintiff frames the § 1983 case as a violation of the Takings Clause, the second prong of the Court's response to the Williamson County plaintiff's takings theory seems equally applicable here. Evidently, any takings claim is premature until the state has failed to adequately compensate, and one must always pursue the state court inverse condemnation action as a means of obtaining compensation.

Suppose the plaintiff frames the case as a deprivation of property without due process of law. Williamson County may not require deference to state

353. Id. at 188.
354. Id. at 195.
355. Id. at 195-96.
356. Id. at 199.
357. Id.
358. Id. at 200.
359. Id.
361. The difference between the two claims is not just procedural. In the "regulatory" context, the plaintiff is hard-pressed to win a "takings" claim because he must show that he has lost all beneficial use of the property. See supra text accompanying note 98; see also First English Evangelical Luth. Church v. County of L.A., 482 U.S. 304, 329 (1987) (Stevens, J., dissenting). In principle, a due process claim should be successful if the plaintiff can show a deprivation of some of his bundle of property rights, even if he is left with some use of the property.
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inverse condemnation law in such a case.\footnote{362} The Court found this claim to be premature solely because of the bank's failure to apply for variances, a rationale that is applicable only to regulatory takings like the one at issue. The rationale is out of place in the context of most violations of intellectual property rights, which are more like possessory takings.\footnote{363} Note that the Court refused to put the due process claim in the same hopper with the takings claim. In contrast to its treatment of the takings claim, it did not go on to require the plaintiff to resort to state courts as a prerequisite to asserting the due process claim in federal court.

This is hardly the sole plausible reading of how \textit{Williamson County} applies to intellectual property cases. The materials are at hand to support an argument that the intellectual property plaintiff must proceed in state court, even if he frames his federal case as a violation of due process. In ruling that the takings issue was not ripe, the Court actually relied on two due process cases, \textit{Parratt v. Taylor}\footnote{364} and \textit{Hudson v. Palmer}.\footnote{365} In \textit{Hudson}, the Court held that in the event of a "random and unaided," deprivation of property by an officer, the violation of the Due Process Clause is not complete "unless or until the state fails to provide an adequate postdeprivation remedy for the property loss."\footnote{366} If this rationale prevails in the event of "random and unauthorized" deprivations for which relief is sought under a due process theory, and if it prevails in the event of a deliberate deprivation for which relief is sought under a takings theory, then it may well prevail in the event of a deliberate deprivation for which relief is sought under a due process theory.\footnote{367}

In \textit{Zinermon v. Burch},\footnote{368} the Supreme Court limited the \textit{Parratt} principle to the context of \textit{procedural} due process.\footnote{369} That is, the rule that the constitu-

\footnote{362. See, e.g., Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1547 (11th Cir. 1994) ("A property owner's [due process] rights are violated the moment a governmental body acts in an arbitrary manner and applies that arbitrary action to the owner's property.")., vacated en banc, 42 F.3d 626 (11th Cir. 1994).

\footnote{363. See supra text accompanying notes 105-11.


\footnote{367. Some lower courts hold that, in the \textit{regulatory} context, the due process claim collapses into the takings claim, which, in turn, is covered by the \textit{Williamson County} takings rule. A recent example is \textit{Villas of Lake Jackson, Ltd. v. Leon County}, 121 F.3d 610 (11th Cir. 1997). It is not clear why the court limited its ruling to the regulatory context. See \textit{id.} at 613. The reason may be that it thought possessory takings present a more serious threat to property rights. See \textit{id.} at 614.

\footnote{368. 494 U.S. 113 (1990).

tional violation is not complete applies only when the plaintiff concedes that the government may deprive him of liberty or property, but objects to the lack of procedural protections accompanying the deprivation. By contrast, the obligation to pursue state remedies does not apply when the plaintiff brings or raises a "substantive" due process objection to the government’s action, claiming that, regardless of the procedure followed, the government may not inflict the injury of which he complains. But confining Parratt in this way presents no serious obstacle to the extension of the Williamson County rule, because governments are always allowed to take property for public use, so long as they pay just compensation. Framing a taking as a due process violation cannot conceal the nature of what the government actually has done, and what it has the power to do. There may be "substantive" due process limits on what the government can do, but they do not include curbs on taking property for public use.

Nor does the application of the Parratt and Hudson doctrine to "random and unauthorized" acts serve to foreclose a rule requiring resort to state courts. The Court in Williamson County relied on Parratt and Hudson for the proposition that certain circumstances may warrant a requirement of postdeprivation resort to state procedures. One such circumstance is the "random and unauthorized" nature of the deprivation, for then "it would be impossible or impracticable to provide a meaningful hearing before the deprivation." Another circumstance, the Court reasoned, is the nature of the right granted by the Takings Clause, which is merely just compensation before or after the taking. Again, framing the claim as procedural due process does not change the nature of the right at stake. The reality that the state is entitled to procure the property and pay for it afterward may well be a sufficient justification for obliging the plaintiff to pursue the inverse condemnation claim, whether the plaintiff has styled the federal case as a taking or as a violation of due process.

2. Lawsuits Against Officers

Now consider cases in which an officer deprives someone of intellectual property rights in circumstances that would not support a "policy or custom"

370. See id. at 125. For further discussion of the difference between procedural and substantive due process, see Michael Wells & Thomas A. Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 GA. L. REV. 201, 215-21 (1984).

371. For arguments that there are such substantive due process limits, see generally Michael Wells, Constitutional Torts, Common Law Torts, and Due Process of Law, 72 CHI.-KENT L. REV. 617 (1997); David H. Armistead, Note, Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests, 29 GA. L. REV. 769 (1995).


373. Id. at 195-96.
suit against the local government.\textsuperscript{374} In that event, the Takings Clause seems to be inapplicable. The clause not only recognizes an individual's right to just compensation, it also authorizes the government to assume control of private property. The premise of the Takings Clause is that the sovereign may, deliberately or otherwise, take private property for public use.\textsuperscript{375} That power is not granted to officers acting under pretense of state authority but without genuine authorization from the government. When an officer injures property rights without the backing of his governmental employer, he may be sued for a violation of rights "under color of" state law,\textsuperscript{376} yet the special rules that arguably channel takings and due process suits against local governments into state court would not apply.

\textbf{B. Lawsuits Under the Intellectual Property Statutes}

The foregoing analysis of the availability of § 1983 suits may apply equally here. For that matter, the Supreme Court may broaden the \textit{Williamson County} holding into a rule that all possessory takings claims, including intellectual property claims, must be pursued in state court inverse condemnation suits before the property owner brings a § 1983 action. Still, some considerations are distinctive to the context of litigation under the intellectual property statutes. Whatever may be true of § 1983 litigation, there are arguments in favor of allowing suits under the intellectual property statutes to go forward in federal court.

First, § 1338's exclusive federal jurisdiction over patent and copyright manifests a strong congressional preference for federal court adjudication of these intellectual property claims. More importantly, the abrogating legislation, which broadly protects intellectual property rights against state invasions, unambiguously demonstrates that Congress wanted plaintiffs to have access to federal court in such cases.\textsuperscript{377} Assume that courts appropriately apply the ripeness rule of \textit{Williamson County} to § 1983 cases for deprivations

\textsuperscript{374} The discussion here is not limited to officers of local governments. An officer who works for an "arm of the state" may also trample on intellectual property rights without the authority of the state to back him up. The ensuing discussion is, of course, applicable to § 1983 suits against such an officer.

For that matter, there are circumstances in which private persons act "under color of" state law and hence may be sued under § 1983, such as when they conspire with state officers to violate the victim's constitutional rights. \textit{See generally}, e.g., Dennis v. Sparks, 449 U.S. 24 (1980).


\textsuperscript{376} \textit{See supra} text accompanying note 322.

\textsuperscript{377} \textit{See supra} notes 1-3.
of property without due process. In such cases, a deference rule may be appropriate, because there is no specific congressional intent to the contrary. In the context of the intellectual property statutes, however, the ripeness rule may be inapplicable, because the claim is for infringement, not for a taking or a deprivation of property without due process. In a statutory action for infringement, the availability of a state remedy may simply be irrelevant. *Williamson County*’s judge-made ripeness rule channelling cases to state court would have to fall before the authority of Congress to allocate jurisdiction, unless of course it is a rule of constitutional dimension. As to this issue of the pedigree of the ripeness requirement, *Williamson County* offers no guidance.\(^3\)

C. Must the Federal Court Defer to State Proceedings?

Suppose we are right in asserting that some federal suits for deprivation of intellectual property may be maintained in spite of the potential obstacles presented by *Williamson County*. A further forum allocation issue must be examined. Recall that the government remains free to institute a condemnation action in its own courts. Accordingly, two lawsuits raising the same issues may unfold at the same time in the federal and state courts. For example, in response to a business filing an action for trademark infringement against a state in federal court, a state might institute the proper state proceedings to pay restitution for a temporary deprivation of the business property. Should the federal court defer to the state court?

The Supreme Court did sometimes require federal courts to defer to pending state litigation. In particular, *Younger v. Harris*\(^3\) and its progeny direct federal courts to dismiss cases brought by persons who are defendants in pending state civil and criminal enforcement proceedings against them, if their federal claims could be raised in the state courts.\(^4\) The application of the *Younger* rule to the sort of conflict we have posed in this section is unclear, because our problem contains elements that point in both directions. On the one hand, the federal plaintiff is, as in the *Younger* paradigm, a state court defendant who could raise his federal claims in state court. On the other hand, the Court held, in *New Orleans Public Service, Inc. v. Council of New Orleans*\(^5\)

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378. One commentator maintains that the ripeness doctrine should never have a constitutional pedigree so that doctrines foreclosing federal jurisdiction due to lack of ripeness are always subject to Congressional revision. *See generally* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153 (1987).


380. *Younger v. Harris*, 401 U.S. 37, 43-46, 50 (1971); *see* Hart & Wechsler, *supra* note 133, at 1256-1308. Note that a state case is "pending" if it is filed before the federal case, or after the federal case begins but before there have been "proceedings of substance on the merits" in federal court. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).
that the Younger rule requires deference not to all state proceedings, but only to state enforcement proceedings against a private defendant who has violated state law. Younger was inapplicable in NOPSI because, although there were two state proceedings pending, neither involved enforcement of state law against a recalcitrant defendant. One of the state proceedings was a petition for review of the rate order, brought by the utility company. In the other state case, the city as plaintiff sought a declaratory judgment that the rate order was valid.

Given the Court's holding in NOPSI, it is unlikely that the Court would extend Younger abstention to suits to recover for governmental invasions of intellectual property rights. The lesson of NOPSI is that Younger is not a general principle that applies across a range of state proceedings. Instead, Younger is a narrow rule of deference: "[T]he type of proceeding to which Younger applies includes "state criminal prosecutions, . . . civil enforcement proceedings, . . . and . . . civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." In refusing to extend Younger to require deference to the declaratory judgment and petition to review, the Court in NOPSI emphasized that "[s]uch a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." The same answer could appropriately be given to a suggestion that Younger abstention be ordered in deference to state condemnation proceedings. In short, we believe the state and federal cases may go forward at the same time.

382. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 366 (1989) (stating that no deference is required when state suits are for review of rate order and for declaratory judgment that rate order is valid).
383. Id. at 355.
384. Id. at 356.
385. Id. at 367.
386. Id. at 368.
387. Id. Note, however, that the Court here omitted any mention of the extension of Younger to administrative proceedings, a development that seems somewhat at odds with the "exceptional circumstances" requirement. See generally, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schs., 477 U.S. 619 (1986).
388. Another, less well-defined, abstention doctrine sometimes requires federal abstention when there are parallel federal and state proceedings, if required by "considerations of wise judicial administration." See Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976). The application of this principle depends on the circumstances of particular cases. See HART & WECHSLER, supra note 133, at 1316-23. It may well require federal abstention in some pieces of intellectual property litigation and not in others.
Conclusion

Do not allow the complexity of this body of law to obscure the central point: One way or another, most victims of governmental invasions of their intellectual property rights should be able to obtain relief, although the plaintiff may be obliged to make his way through a maze of remedial roadblocks until he has found a theory that works for the circumstances of his particular case. Among other things, plaintiffs must consider whether the suit is properly brought against an officer or a government; they should understand the advantages of litigating in federal court and the difficulty of getting there; and they should keep in mind the central premise of Seminole Tribe, which is that state immunity from suit in federal court pre-dates the Eleventh Amendment and may be abrogated only by Congress’s exercise of powers granted in later times.

The sometimes illogical doctrine results from the nature of the problems the Supreme Court has had to face. Governmental and official immunity reflect a set of values that is irreconcilable with governmental and official accountability for their misuse of intellectual property belonging to others. The Court could have resolved the tension through a flat rule denying recovery, an approach it has never taken. Alternatively, it could have done away with immunity, the direction it seemed to have taken in the pre-Seminole Tribe cases. Instead, it has chosen to try to respect both sides of the issue, producing a doctrine that fails the test of coherence but may nonetheless afford a remedy for most violations of intellectual property rights.
What Constitutes a "Disability" Under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?

Maureen R. Walsh*

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I. Introduction

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act of 1990 (ADA).1 Through the ADA, Congress sought to remove barriers that prevented individuals with disabilities from enjoying the same opportunities as the non-disabled.2 At first glance, the ADA seemed sufficient to provide the long-awaited rights for Americans with disabilities.3 Eight years after its enactment, however, the ADA still has not permitted Americans with disabilities to enjoy the protections Congress intended.4 The ambiguous language Congress incorporated into the ADA is to blame.5


2. See id. § 12101(b) (stating purpose of Americans with Disabilities Act of 1990). Congress created the Americans with Disabilities Act (ADA) to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Id.

3. See id. (stating purpose of ADA). Most Americans thought that the ADA could accomplish its stated purpose of eliminating discrimination based on a disability. See Stephanie Proctor Miller, Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability, 85 CAL. L. REV. 701, 702 (1997) (describing public's anticipation, at time of ADA's enactment, of tremendous impact ADA likely would have for individuals with disabilities); see also Bonnie Tucker & Bruce A. Goldstein, The Americans with Disabilities Act of 1990, in AMERICANS WITH DISABILITIES ACT: LAW AND REGULATIONS 1, 1 (lst ed. 1991) (stating that upon ADA's enactment many considered it "Emancipation Proclamation" for disabled and named July 26, 1990 "Liberation Day for the Disabled"). Twenty-six years prior to the enactment of the ADA, Congress passed laws protecting citizens of the United States from discrimination based on race, color, religion, national origin, and sex. Id. According to Tucker and Goldstein, expansion of these civil rights to individuals with disabilities was long overdue. Id.


5. See id. (arguing that ADA's ambiguous terms have caused courts to raise prima facie standards for plaintiffs). Although the heightened prima facie standard works to "weed out" ineligible claimants, it also deprives many disabled individuals of the protection of the ADA. Id. at 108-09.
Congress used broad and vague terms throughout the ADA in an effort to include all Americans with disabilities within the ADA's scope.\(^6\) Rather than increase the rights of the disabled, however, this ambiguous language has only confused courts and, as a result, undermined the ADA's power.\(^7\) This Note addresses one specific area of confusion involving a seemingly fundamental aspect of the ADA: Who is disabled under the ADA?\(^8\) More specifically, did Congress intend to include under the ADA those individuals who treat their impairments with medication, aid their impairments with a device, or ease the effects of their impairments in some other fashion such that the impairment no longer substantially limits any major life activities? The question of what constitutes a disability has divided the United States Courts of Appeals and has perplexed several federal district courts.\(^9\)

\(6\) See Arlene B. Mayerson, Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent, 42 VIll. L. REv. 587, 588-89 (1997) (discussing ADA's broad definition of "disability" and narrow approach many courts use when evaluating individuals' disabilities). Mayerson states that Congress intended to have the courts apply the ADA liberally. \(Id.\) at 588. Rather than liberally construing the term "disability" so as to afford individuals the right to have their claims heard, however, many courts apply a heightened disability standard and dismiss claims for failure to prove a disability under the ADA definition. \(Id.\) at 589-90. This application of a heightened disability standard, Mayerson concludes, is contrary to the purpose of the broad language of the ADA: to protect all individuals with disabilities from discrimination. \(Id.\) Mayerson recognizes this problem of narrow judicial interpretation of the ADA's terms but she focuses her analysis on the "regarded as" prong of the disability definition. \(Id.\)

\(7\) See Carolyn L. Weaver, Disabilities Act Cripples Through Ambiguity, WALL St. J., Jan. 31, 1991, at A16 (highlighting ambiguities within terms of ADA and potential implications of such). Since the enactment of the Rehabilitation Act of 1973, courts and commentators have disagreed on the meaning of the term "disability." \(Id.\) The ADA and the accompanying EEOC regulations continue this ambiguity. Neither clarifies exactly what constitutes a disability. \(Id.;\) see also Catherine J. Lanctot, Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA, 42 Vill. L. Rev. 327, 329 (1997) (stating that until courts resolve issue of exactly who ADA covers, ADA will not have "transformative effect" that Congress intended it to have); Locke, supra note 4, at 109 (discussing danger of ADA becoming ineffective due to ambiguities in its terminology); Noreen Seebacher, Employers' Focus Turns to Disabilities: With Golfer's Case Making Headlines, Many Again Question Parameters of the ADA, THE DETROIT NEWS, Feb. 25, 1998, at B4 (quoting attorney Thomas Kienbaum) (noting that within definition of "disability" under ADA there are "many gray areas, and different interpretations of them by the courts").

\(8\) See 42 U.S.C. § 12102(2) (1994) (defining disability in broad terms). According to this section of the United States Code:

The term "disability" means, with respect to an individual — (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

\(Id.\)

\(9\) See infra Part III (discussing circuit split and district court confusion).
Part II of this Note reviews the relevant sections of Title I of the ADA, the legislative history of Title I, the Equal Employment Opportunity Commission's (EEOC) efforts to implement it, and the elements of a prima facie case under Title I. Part III discusses the current division in the United States Courts of Appeals as well as the confusion among the United States District Courts regarding the appropriate method of analyzing an impairment that a claimant aids with mitigating measures. Part III.A examines decisions in which courts have not considered mitigating measures when evaluating ADA claims. Part III.B discusses decisions in which courts have incorporated the use of mitigating measures into ADA claim evaluations. Part IV considers possible ways to remedy the division among the courts and presents a multi-factored guideline that could assist courts in the evaluation of ADA claims involving mitigating measures. Finally, Part V summarizes this persistent issue and concludes that the multi-factored guideline is the best approach to assessing impairments that individuals control or aid with mitigating measures.

II. Overview of the Americans with Disabilities Act

A. History of the ADA

Congress enacted Title I of the ADA to remove barriers that historically have prevented qualified individuals with disabilities from becoming gainfully employed. The ADA states that "[n]o covered entity shall discriminate..."
against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, . . . [nor any] other terms, conditions, and privileges of employment."

The employment provisions of the ADA originated in Title V of the Rehabilitation Act of 1973 (Rehabilitation Act), which, prior to the enactment of the ADA, was the primary statutory protection for individuals with disabilities. The primary purpose of Title V of the Rehabilitation Act was to prohibit disability discrimination by federally funded employers. Although the Rehabilitation Act is an important civil rights statute for the disabled, it was unsuccessful in fully remedying discrimination against individuals with disabilities. Its scope was too limited to address adequately the widespread discrimination affecting Americans with disabilities. In

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20. See H.R. Rep. No. 101-485, pt. 2, at 32-33 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 314 (1990) (citing Louis Harris poll that documents persistence of disability discrimination even after enactment of Rehabilitation Act of 1973). According to the Louis Harris poll, two-thirds of all disabled persons of working age are not employed and of that group 66% said they would like to have a job. Id. By citing this poll in the CONGRESSIONAL REPORTS, Congress evidenced its concern that the Rehabilitation Act of 1973 was not alleviating the employment discrimination of disabled individuals. See also Robert L. Mullen, The Americans with Disabilities Act: An Introduction for Lawyers and Judges, 21 LAN D & WATER L. REV. 175, 177 (1994) (noting conclusion of National Council on the Handicapped that federal laws and programs existing prior to ADA over-emphasized income support and under-emphasized initiatives to encourage independence and self-sufficiency); Robert E. Rains, A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications, 11 ST. LOUIS U. PUB. L. REV. 185, 189-97 (1992) (outlining deficiencies of Rehabilitation Act of 1973 for protection of disabled individuals). Rains cites several limitations of the Rehabilitation Act that created the need for the ADA: (1) Congress limited the Act's scope to federally funded employers; (2) the Act lacked enforcement mechanisms; and (3) Congress did not adequately fund the Act resulting in the inability of the included employers to comply with the Act's mandates. Id. at 189-91.
21. See Rains, supra note 20, at 189-191 (discussing deficiencies of Rehabilitation Act).
response to the Rehabilitation Act's shortcomings, Congress enacted the ADA.\textsuperscript{22} Congress incorporated much of the language of the employment provisions of the Rehabilitation Act into Title I of the ADA.\textsuperscript{23} In the ADA, however, Congress expanded the Rehabilitation Act's protections to include individuals with disabilities employed in the private sector.\textsuperscript{24} Additionally, the ADA added explicit enforcement mechanisms that the Rehabilitation Act lacked.\textsuperscript{25} These modifications reflect Congress's effort to broaden the already existing protections for individuals with disabilities.\textsuperscript{26}

\textbf{B. Assistance in Interpreting the ADA}

Congress realized that its use of broad language in the ADA rendered the ADA unenforceable as written.\textsuperscript{27} In an attempt to remedy this problem, Congress ordered the EEOC to promulgate regulations to clarify the provisions of the ADA for courts and claimants.\textsuperscript{28} On July 26, 1991, one year after the

\begin{itemize}
  \item \textsuperscript{22} See 42 U.S.C. § 12101 (1994) (describing tremendous need among disabled for protection from discrimination); 29 C.F.R. § 1630.1 (1997) (explaining that EEOC implementation provisions for ADA do not apply lesser standard than that of Rehabilitation Act, indicating that Congress intended to increase rights of disabled); see also Mullen, supra note 20, at 177 (discussing shortcomings of prior disability discrimination legislation that created need for ADA).
  \item \textsuperscript{23} See Feldblum, supra note 18, at 37 (discussing origin of ADA). Congress incorporated much of the language of the Rehabilitation Act into the ADA in an effort to minimize the litigation concerning the application of the ADA. \textit{Id.} Congress intended courts to apply the case law already developed under the Rehabilitation Act to ADA claims. \textit{Id.}
  \item \textsuperscript{24} See 42 U.S.C. § 12111 (1994) (defining "employer" to include private employers); Rains, supra note 20, at 190 (noting modifications of provisions of Rehabilitation Act which Congress incorporated into ADA).
  \item \textsuperscript{25} See Rains, supra note 20, at 189-191 (discussing shortcomings of Rehabilitation Act that Congress intended to remedy by enacting ADA). The Rehabilitation Act did not delegate the duty to enforce its provisions. \textit{Id.} at 190. In contrast, Congress explicitly charged the EEOC with implementing and enforcing the terms of the ADA. 42 U.S.C. § 12116 (1994).
  \item \textsuperscript{26} See 29 C.F.R. § 1630.1 (1997) (stating that under ADA, courts are to apply same or greater standard than that applied under Title V of Rehabilitation Act of 1973).
  \item \textsuperscript{27} See John Parry, \textit{Title I - Employment}, in \textsc{Implementing the Americans with Disabilities Act} 57, 58 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (documenting criticisms of ADA as "too broad," "confusing," and "hard to interpret"). This broad language, Parry states, although confusing, may have been necessary. \textit{Id.} In civil rights legislation, he states, often one must sacrifice certainty in a law's application in order to obtain the desired individualized remedies under the law. \textit{Id.}
  \item \textsuperscript{28} See 42 U.S.C. § 12116 (1994) (conferring upon EEOC duty to issue regulations to carry out Title I of ADA); see also Mullen, supra note 20, at 186 (stating that Congress gave EEOC duty to promulgate rules and regulations to supplement ADA); Tucker & Goldstein, supra note 3, at 3 (stating that Congress requires EEOC to promulgate regulations to carry out Title I of ADA as well as oversee and enforce all employment provisions under ADA).
\end{itemize}
enactment of the ADA, the EEOC issued the requisite regulations.\footnote{29} The EEOC’s regulations are binding on courts if, as stated in \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.},\footnote{30} Congress mandated the regulations and the resulting regulations constitute a permissible construction of the statute.\footnote{31}

Concurrent with the issuance of these regulations, the EEOC published interpretive guidelines.\footnote{32} The EEOC designed the interpretive guidelines to provide further assistance to claimants, courts, and covered entities in interpreting the terms of the ADA.\footnote{33} Unlike the regulations, Congress did not

\footnote{29. 29 C.F.R. § 1630 (1997). The EEOC issued regulations in accordance with the Congressional mandate outlined in the ADA. \textit{Id.}; see 42 U.S.C. § 12116 (1994) (directing EEOC to issue regulations).}
\footnote{30. 467 U.S. 837 (1984).}
\footnote{31. \textit{See} Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (determining that appropriate standard of review for agency statutory interpretations made under congressionally delegated authority is two-part test); \textit{see also} E. Livingston B. Haskell, Note, "Disclose-or-Abstain" Without Restraint: The Supreme Court Misses the Mark on Rule 14e-3 in United States v. O'Hagan, 55 WASH. & LEE L. REV. 199, 206-08 (1998) (discussing \textit{Chevron} test). In \textit{Chevron}, the Supreme Court reviewed the Environmental Protection Agency’s (EPA) interpretation of the term "source" as used in the Clean Air Act Amendments of 1977. \textit{Chevron}, 467 U.S. at 840. The Court’s task in \textit{Chevron} was to determine if courts must adhere to an agency’s interpretation of a statute. \textit{Id.} The interpretation in question in \textit{Chevron} arose from the Clean Air Act. \textit{Id.} In the Clean Air Act Amendments of 1977, Congress required any company that produces a major new "source" of air pollutants to go through an extensive review process to obtain a permit. \textit{Id.} at 850. The EPA interpreted the term "source" to refer to the entire plant such that only new plants were subject to the elaborate review process necessary to obtain a permit. \textit{Id.} at 857-58. Additions and modifications to existing plants were, therefore, not subject to the review process. \textit{Id.} The Natural Resources Defense Council opposed this interpretation of the term "source" and claimed that it contradicted the text and policy of the Clean Air Act. \textit{Id.} at 859. The Court held that the EPA’s definition of "source" was a permissible construction of the statute. \textit{Id.} at 866. In doing this, the Court outlined a two-part test to assist courts in the future review of agencies’ statutory interpretations. \textit{Id.} at 842-43. The two-part test includes analysis of the following: (1) is the agency interpretation contrary to a specific statute or statutory intent and (2) is the interpretation of the statute reasonable. \textit{Id.} The Court ruled that if Congress has given the agency the authority to clarify a specific provision of a statute and the resulting agency regulation is not "arbitrary, capricious, or manifestly contrary to the statute," the agency action is a permissible construction of the statute. \textit{Id.} at 844. Through the application of its newly created test, the Court concluded that: (1) the relevant provisions of the Clean Air Act do not clearly state Congress’s intent in using "source" and (2) the intent that courts can derive from the statutory language reveals that Congress hoped to expand rather than confine the EPA’s power to regulate particular sources through enforcement of the Clean Air Act. \textit{Id.} at 861-62. Thus, the Court held that the EPA’s interpretation of "source" was a permissible construction of the statute and was binding on the courts. \textit{Id.} at 866.}
\footnote{32. 29 C.F.R. app. § 1630 (1997).}
\footnote{33. \textit{See id.} (stating that purpose for interpretive guidance is to assist qualified individuals with disabilities to understand their rights under ADA as well as to ease and to encourage compliance by included employers).}
order the EEOC to create these guidelines. Rather, the EEOC issued the guidelines independently. Because they are not congressionally mandated, the EEOC interpretive guidelines do not bind courts. Agency action that is not congressionally mandated is binding on courts only to the extent that they explicitly adopts the agency’s interpretation. However, courts tend to defer to nonbinding agency pronouncements because they perceive agencies as consisting of experts whose opinions courts should not dismiss lightly. Thus, when evaluating an ADA claim, courts must incorporate the EEOC regulations into their analysis but may choose not to incorporate the EEOC interpretive guidelines.

34. See 29 C.F.R. app. § 1630 (1997) (noting EEOC has duty to issue regulations but that EEOC additionally issued interpretive guidelines because further assistance was necessary).

35. See id. (introducing EEOC interpretive guidelines and stating need for such assistance). "The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of this part in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities." Id.

36. See Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 YALE J. ON REG. 1, 58 (1990) (stating that agency interpretations not mandated by Congress are not binding on courts); see also KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 239-43 (3d ed. 1994) (explaining that when Congress has not delegated power to agency to issue guidelines, guidelines subsequently issued are not binding on court). Davis and Pierce state that a court is free to reject an agency position that is reflected in an interpretive rule. Id. at 239. However, courts must adhere to a congressionally mandated agency rule if it is a permissible construction of the statute at issue. Id. at 235.

37. See Batterton v. Francis, 432 U.S. 416, 424-26 (1977) (stating that courts are to give agency interpretation of statutory terms "important but not controlling significance"); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (stating that EEOC guidelines deserve "great deference," especially if Act and legislative history support such statutory interpretation, but such guidelines are not binding on courts); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that when legislative body has not delegated legislative power to agency, regulations promulgated by such agency are not binding on courts); see also DAVIS & PIERCE, supra note 36, at 239 (stating that courts have choice either to reject explicitly or accept agency interpretation not mandated by Congress); Anthony, supra note 36, at 55 (stating that two-step evaluation from Chevron does not apply to agency interpretations because they are not made through formal rulemaking procedures and thus are not binding on courts).

38. See Griggs, 401 U.S. at 433-34 (noting that courts should give great deference to EEOC interpretive guidelines if guidelines support Act and Act's legislative history); Skidmore, 323 U.S. at 140 (explaining that because EEOC guidelines come from "body of experience and informed judgment," courts "may properly resort [to them] for guidance"); see also DAVIS & PIERCE, supra note 36, at 236-39 (discussing controlling weight of non-congressionally mandated agency interpretations). Some courts appear to give greater deference to the EEOC interpretive guidelines than others. See infra Subparts III.A and III.B (discussing courts’ varying levels of deference to EEOC interpretive guidelines).

39. DAVIS & PIERCE, supra note 36, at 236-39 (discussing levels of deference due various agency actions).
C. Making a Claim Under Title I of the ADA

To survive summary judgment, an individual making a Title I claim under the ADA must sufficiently demonstrate the following: (1) the individual has a disability, (2) the individual is qualified for the job with or without reasonable accommodation, and (3) the individual's employer took the adverse employment action because of the existing disability. The first and often case determinative element is whether the individual has a disability under the ADA. Even though courts treat this element as crucial to the prima facie case, the ADA's text does not describe precisely what a disability is. Congress did outline within the text of the ADA the three ways that a claimant may establish the existence of a disability: (1) demonstration of a physical or mental impairment that substantially limits a major life activity; (2) demonstration of a record of such an impairment; or (3) demonstration of evidence that the employer regarded the claimant as having such an impairment. Beyond this broad description, however, the ADA is silent on the issue of what constitutes a disability. This ambiguity forces courts to look elsewhere for guidance—the EEOC regulations and the appended interpretive guidelines.

1. Impairment that Substantially Limits a Major Life Activity

First, an individual is disabled if that person has a physical or mental impairment that substantially limits a major life activity. Congress so broadly stated this first method of demonstrating a disability that courts may wonder exactly what Congress intended by this statement. To assist the courts, the EEOC promulgated regulations that interpret the following critical terms within the ADA definition: "physical or mental impairment," "major life activity," and "substantially limits." A "physical or mental impairment,"

41. See Locke, supra note 4, at 108 (discussing importance of establishing disability).
42. See 42 U.S.C. § 12102(2) (defining "disability" in broad terms).
43. Id.
44. See id. (limiting discussion of "disability" to three general ways claimant may establish disability under ADA).
45. See id. § 12116 (commanding EEOC to "issue regulations in an accessible format to carry out this subchapter"). It is clear that Congress realized that the broad language of the ADA left it unenforceable on its own. Id.; see also 29 C.F.R. § 1630.2 (1997) (interpreting Title I of ADA); id. app. § 1630 (same).
47. See 29 C.F.R. § 1630.2(h)-(j) (1997) (interpreting "impairment that substantially
according to the EEOC regulations, is any physiological, mental, or psychological disorder. A "major life activity" includes "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." And finally, an impairment is "substantially limiting" if, because of it, the individual is unable to perform any of the major life activities to a level "that the average person in the general population can perform," or if the individual is "[s]ignificantly restricted as to the condition, manner or duration under which [the] individual can perform" this activity as compared to the general population. The EEOC regulations add to the ADA's framework and assist courts in evaluating ADA claims.

The EEOC interpretive guidelines further expand the definition of an "impairment that substantially limits a major life activity" by providing additional considerations and examples of impairments that can satisfy the "substantially limits" requirement. The most controversial of the additional considerations, and the consideration subject to much debate among the courts, is the suggestion that courts should ignore mitigating measures when evaluating both the existence of a physical or mental impairment and the

48. See id. § 1630.2(h) (listing disorders that constitute impairments). The regulations include as impairments

any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or . . . any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

49. Id. § 1630.2(h)(2)(i).

50. Id. § 1630.2(j). The EEOC lists factors to consider in determining if an impairment substantially limits an individual in a major life activity: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id.

51. Id. § 1630.2.

52. See 29 C.F.R. app. § 1630.2 (g)-(j) (1997) (interpreting ADA and EEOC definitions of "disability" and suggesting additional considerations for use in evaluating substantially limiting effects of disabilities). The guidelines mention that the effect of the impairment on the life of an individual is the crucial factor and that a case by case determination is essential. Id. Also, the guidelines further discuss the duration and impact of factors that the EEOC addresses in the regulations. Id. The duration of the impairment, according to the guidelines, refers to the length of time that the impairment itself exists. Id. The impact of the impairment includes the residual effects of the actual impairment. Id. The EEOC cites, as examples of substantially limiting impairments, an individual with artificial legs, a diabetic who without insulin would lapse into a coma, and an individual who is blind. Id.
MITIGATING MEASURES AND THE ADA

extent to which such an impairment limits an individual's major life activities. According to the guidelines, mitigating measures include, but are not limited to, medicines and assistive or prosthetic devices. The appendix to the EEOC regulations suggests that the ADA should protect from discrimination an individual whose medically assisted impairment would substantially limit the individual in a major life activity if left in an unaided state. This implies that even if medical assistance alleviates or minimizes an individual's symptoms, a court could still find that individual to be disabled under the ADA. Through this recommendation, the EEOC appears to advocate the expansion of ADA coverage to individuals who, under the plain language of the ADA, would have received protection only under the third method of proving the existence of a disability: being regarded as having a disability.

2. Record of an Impairment that Substantially Limits a Major Life Activity

An individual who either previously had, but who no longer has, an impairment that substantially limits a major life activity or an individual misclassified as having such an impairment is an individual with a record of an impairment. The ADA protects individuals with a record of an impair-

53. See id. app. §§ 1630.2(h)-(j) (noting that courts should not consider mitigating measures used to alleviate impairment's effects). The EEOC interpretive guidelines provide an example of a claim that a court should evaluate without consideration of mitigating measures. 29 C.F.R. app. § 1630.2(h) (1997). The individual in the example suffers from epilepsy controlled with medication. Id. According to the EEOC interpretive guidelines, the courts should make their determination without considering the medication both if the underlying illness is an impairment and if it substantially limits a major life activity. Id. Under this rationale, the individual clearly has an impairment and if the individual can show that without medication the epilepsy will substantially limit a major life activity, courts can consider the individual disabled as well. Id. The EEOC's interpretation suggests that an individual with epilepsy may, although presently not suffering from any symptoms of the disorder, satisfy the requirements for a disability. Id. See also infra Part III (discussing circuit split on issue of mitigating measures).

54. 29 C.F.R. app. § 1630.2(h) (1997).

55. Id. app. § 1630.2(j) (1997).

56. See id. (providing example of individuals for whom medicine or medical aides alleviate symptoms but who, according to EEOC, are still individuals with disabilities under ADA); see also infra Parts III-V (discussing judicial reaction to EEOC appendix on mitigating measure issue and impact of such reactions).

57. See 29 C.F.R. § 1630.2(l) (1997) (describing individuals who do not have substantially limiting impairment but may still qualify as disabled under ADA); see also infra Part II.C.3 (describing "regarded as" prong of disability definition).

ment to prevent the possibility of discrimination arising from the discovery of a record indicating a prior substantially limiting impairment. The controversial provision of the EEOC interpretive guidelines that addresses mitigating measures also applies to this method of proving the existence of a disability. Mitigating measures should not, according to the EEOC, be a part of a disability analysis. The distinguishing factor in this methodology is that the claimed disability existed in the past. For purposes of the EEOC's provision on mitigating measures, however, the timing of the disability is not critical. The individual still must show that the impairment substantially limited a major life activity, and thus, according to the EEOC interpretive guidelines, the court should not integrate the mitigating measures into the evaluation.

3. Regarded as Having an Impairment that Substantially Limits a Major Life Activity

The final method of demonstrating a disability is by establishing that the employer regarded the individual as having a disability. Claimants who cannot successfully utilize the first or second method of proving a disability

59. See Feldblum, supra note 18, at 40 (explaining EEOC regulations regarding individuals discriminated against because of "record of" impairment). Examples of individuals who may have valid claims under the "record of impairment" prong of the disability definition are individuals who have a history of cancer or heart disease or a misdiagnosis of a learning disability. See id. (citing 29 C.F.R. app. § 1630.2(k)).

60. See 29 C.F.R. app. § 1630.2(h) (1997) (noting that mitigating measures should not be part of claim evaluation). This provision of the interpretive guidelines necessarily applies to the second method of proving a disability, record of a substantially limiting impairment, because a claim brought under this method, like the first method, involves an evaluation of the limiting effects of an impairment. Id.

61. 29 C.F.R. app. § 1630.2(j) (1997). Although the mitigating measure provision applies to this method of proving a disability, the case law and commentaries addressing this issue have focused on the first method: an impairment that substantially limits a major life activity.


63. See id. (explaining congressional intent in creating "record of disability" method of proving disability under ADA). Congress, by creating this provision, intended to protect individuals who suffered from a substantially limiting impairment that no longer substantially affects their lives. Id.

64. See 42 U.S.C. § 12102 (1994) (outlining three methods of proving existence of disability); Nancy Lee Jones, Overview and Essential Requirements of the Americans with Disabilities Act, 64 TEMPLE L. REV. 471, 480-81 (1991) (discussing "regarded as" method of proving disability); see also Mayerson, supra note 6, 591-98 (same). This Note focuses on the first method of proving a disability: an impairment that substantially limits a major life activity. For a thorough analysis of the "regarded as" method of proving a disability, see the above-cited references.
under the ADA often turn to this final option. According to the EEOC regulations, a claimant who an employer regards as having a disability is an individual: (1) who has an impairment that is not substantially limiting but whose employer treats the individual as if it is; (2) whose impairment is substantially limiting only because of employer and employee attitudes toward the impairment; or (3) who does not have an impairment but whose employer treats that individual as if she has a substantially limiting impairment. Individuals who aid their impairment with medication and bring their claims in a court that adheres to the EEOC's position on mitigating measures are less likely to need to resort to this final method of proving their disability. For these individuals, a court that evaluates an impairment in its unaided state is more likely to find that the impairment substantially limits a major life activity. However, under the EEOC's interpretation, this final method of proving a disability is still necessary to protect those individuals who, even without consideration of mitigating measures, do not have an impairment that substantially limits a major life activity.

In addition, this method is necessary to protect those individuals who do not claim to have a substantially limiting impairment but who nonetheless have employers who treat them as if they do.

65. See 29 C.F.R. app. § 1630.2(l) (1997) (discussing third method of proving disability); see also School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987) (stating for first time that disability may substantially limit individual in major life activity because of attitude of employer regarding employee's otherwise nonlimiting impairment). The Court decided Arline under the Rehabilitation Act of 1973. Id. However, case law developed under the Rehabilitation Act is applicable to issues arising under the ADA. 42 U.S.C. § 12117(b) (1994).


69. See Feldblum, supra note 18, at 40 (explaining "regarded as" prong of disability definition). The notion underlying the "regarded as disabled" aspect of the disability claim is that the ADA should cover individuals not only because they have a substantially limiting impairment but also because they are treated as if they do. Id. But see Mayerson, supra note 6, at 594-96 (stressing importance of separating proof requirements for actually disabled and regarded as disabled). Mayerson focuses on courts' convergence of these requirements into one standard and the implications of this convergence. Id. Mayerson stresses the importance of keeping separate the requirements for "substantially limited" and "regarded as." Id. Three different methods exist for demonstrating a disability in order to protect all who may feel the impact of the stigma associated with disabilities. Id. The purpose of the "regarded as" aspect of the disability claim was, according to Mayerson, to protect individuals without disabilities from disability discrimination by employers. Id. at 597.
Regardless of which of the three methods the claimant uses to prove the existence of a disability, the claimant must prove that the basis for the adverse employment action was in fact the disability. It is obvious, then, that the proof of an actual disability, record of a disability, or treatment as a disabled individual is a crucial part of any claimant's case. At this critical phase of a trial, claimants and courts alike need the benefit of a reliable framework to determine what constitutes a disability and who exactly the ADA includes within its definition. This need for certainty has proven to be most poignant in cases in which the claimant suffers from an impairment that is no longer substantially limiting due to the claimant's use of medication or other assistive device. It is in these cases that the courts have been unable to reach a uniform method of evaluation.

III. Dissension Among the United States Courts of Appeals and District Courts

The United States Courts of Appeals disagree whether an individual who has an impairment has a disability under the ADA if that individual alleviates the effects of the impairment with medicine or other assistive devices.

70. See 42 U.S.C. § 12112 (1994) (stating that only adverse employment actions made because of individual's disability are subject to evaluation under ADA).

71. See Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998) (stating that statutory language is not clear regarding meaning of impairment that "substantially limits" individual and that statute completely ignores issue of mitigating measures).

72. See infra Part III (discussing circuit split and district court confusion on issue of mitigating measures).

Because of this, courts are currently unpredictable forums for claimants with such conditions, as well as for the defendant-employers in these actions.\textsuperscript{74} The confusion arises from a disagreement over the statutory requirement that, in order to qualify as a disability under the ADA, an impairment must substantially limit a major life activity.\textsuperscript{75} If an individual suffers from an underlying impairment but, because she receives medical aid, she does not suffer from the impairment's limiting effects, can the impairment still substantially limit a major life activity? The EEOC interpretive guidelines suggest that mitigating measures should not be a factor in evaluating an impairment and, thus, courts could still find that a medicated impairment substantially limits an individual's major life activities.\textsuperscript{76} Some courts, however, have disagreed with the EEOC.\textsuperscript{77} This disagreement has created a division among the circuits.\textsuperscript{78} The United States Courts of Appeals for the First, Third, Seventh, Eighth, and Eleventh Circuits all explicitly follow the EEOC guidelines and do not consider mitigating measures when evaluating an individual's disability.\textsuperscript{79} In

\textsuperscript{74} See \textit{Lanctot, supra} note 7, at 328 (noting that inconsistent evaluation of ADA claims has resulted in "patchwork of holdings, often varying from court to court, as to what set of symptoms constitutes a disability"); \textit{Huntley Paton, ADA Still Baffling to Employers, DALLAS BUS. J., Dec. 5, 1997, at 42, 44 (noting that ADA is continual source of confusion for litigants).

\textsuperscript{75} See \textit{Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858-60 (1st Cir. 1998) (explaining that several interpretations of ADA's term "substantially limiting" exist); see also Mayerson, \textit{supra} note 6, at 589 (claiming judicial interpretations of "disability" under ADA are too narrow in scope). Mayerson, however, focuses on the "regarded as" prong of the definition of disability under the ADA. \textit{Id.} Nonetheless, she supports the tenet of this Note in that she agrees that courts' interpretation of "disability" has led to inconsistent rulings and precedents. \textit{Id; see also Locke \textit{supra} note 4, at 109 (arguing that ambiguity of ADA's terms has led to narrowing of scope of "disability").}

\textsuperscript{76} See \textit{29 C.F.R. app. § 1630.2(j) (1997) (stating that courts should not consider mitigating measures when evaluating limiting effects of impairment).

\textsuperscript{77} See cases cited \textit{infra} note 151 (listing circuit and district court decisions in which court decided not to adhere to EEOC interpretive guidelines regarding issue of mitigating measures).

\textsuperscript{78} See \textit{Major Depression and Other Psychiatric Disorders Under ADA: EEOC Guidance, EMPLOYMENT L. UPDATE (Rutkowski & Assocs.), June 1997, § F (discussing disagreement among courts regarding deference due EEOC's guidelines on mitigating measures).

\textsuperscript{79} See \textit{Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-31 (7th Cir. 1998) (following EEOC guidelines on issue of mitigating measures); \textit{Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-63 (1st Cir. 1998) (same); \textit{Matczak v. Frankford Candy and Chocolate Co., 136}
contrast, the United States Courts of Appeals for the Sixth and Tenth Circuits have determined that mitigating measures should be part of the inquiry when evaluating this threshold issue.\(^8\) Similarly, the district courts in the remaining circuits have disagreed regarding the proper standard to apply.\(^8\)

This dissension among the courts can prove to be of significant importance for ADA claimants and their employers alike.\(^2\) Several circuits permit easy passage through this threshold requirement, thereby affording the claimant the opportunity to present her claim in court.\(^3\) However, the same claim in a circuit that does not broadly interpret the term "disability" may not survive a summary judgment motion.\(^4\) For example, if a court does not defer to the EEOC interpretive guidelines and instead rules that a court should consider mitigating measures in an impairment evaluation, a claimant with an impairment aided by mitigating measures has drastically diminished odds of surviving a summary judgment motion in that court.\(^5\) Likewise, a defendant-

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\(^8\) See Hollihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (accepting, without analysis, EEOC guidelines that suggest courts should evaluate impairments without considering mitigating measures), cert. denied, 117 S. Ct. 1349 (1997).

\(^80\) See cases cited supra note 73 (listing cases in which courts have evaluated and ruled on issue of mitigating measures in disability determination).

\(^81\) See Mark Johnson, Lawsuits Expanding Scope of Disabilities Act, LAS VEGAS REV. J., Aug. 31, 1997, at 39 (discussing implications of ambiguities in ADA). "The courts are all over the place . . . [s]omeone with diabetes in one jurisdiction is considered disabled, while if it's controlled with medication in another jurisdiction it's not. It's very hard to divine any guidance." Id. (quoting Stanley Kiszkiel, former regional attorney with EEOC in Miami).

\(^82\) See, e.g., Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-31 (7th Cir. 1998) (relying on EEOC's position on mitigating measures and, as result, permitting plaintiff to present his claim in full); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-63 (1st Cir. 1998) (same); Matczak v. Frankford Candy and Chocolate Co., 136 F. 3d 933, 937-38 (3d Cir. 1997) (same); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (same); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1028-29 (W.D. Va. 1997) (same).


\(^84\) See, e.g., Baert, 149 F.3d at 631 (relying on EEOC's position on mitigating measures and, as result, permitting plaintiff to present his claim in full); Arnold, 136 F.3d at 859 (same); Matczak, 136 F. 3d at 937 (same); Harris, 102 F.3d at 521 (same); Shiflett, 960 F. Supp. at 1028-29 (same). In all of these cases, the court dismissed the ADA action for failure to state a claim.

\(^85\) See, e.g., Sutton, 130 F.3d at 902 (denying claimants opportunity to present their claims because court did not apply EEOC guidelines and therefore evaluated claimants' impair-
employer who knows that a court does not apply the EEOC guidelines will not be eager to settle with such a claimant in anticipation of a summary judgment motion in its favor. Thus, the court in which an individual brings a claim becomes crucial to the individual's case. Congress did not intend such a result.  

A. Courts Should Not Consider Mitigating Measures: Deference to EEOC Interpretive Guidelines

The courts that have chosen to give deference to the EEOC's position on mitigating measures have done so after evaluating the language of the ADA, its legislative history, and Congress's intent in creating the ADA. These courts agree that the position on mitigating measures that the EEOC presented in its interpretive guidelines comports with the language of the ADA and the ADA’s legislative history. Additionally, several courts have pointed to overarching policy concerns that have compelled them to apply the method of evaluation that the EEOC embodied in its interpretive guidelines.

I. Legislative History and Language of the ADA

The United States Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. stated "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the

86. See Mayerson, supra note 6, at 588-89 (noting Congress intended courts to interpret "disability" broadly).

87. See Arnold, 136 F.3d at 859-61 (reviewing legislative history of ADA and Congressional intent in creating ADA); Matczak, 136 F.3d at 937 (examining legislative history to determine if EEOC guidelines are permissible construction of ADA); Harris, 102 F.3d at 521 (same); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 905-06 (E.D. Pa. 1997) (examining legislative history and finding that regardless of EEOC guidelines, ADA's legislative history dictates evaluation of impairments without considering mitigating measures); Shiflett, 960 F. Supp. at 1028-29 (concluding EEOC interpretation is "entirely consistent" with legislative history and ADA itself); Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) (finding ADA legislative history dictates evaluation of impairments in their unmedicated states); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1437-38 (N.D. Iowa 1996) (finding legislative history supports EEOC interpretive guidelines).

88. See cases cited supra note 87 (listing cases in which courts have agreed with EEOC's position on mitigating measures).

89. See Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997) (finding it would be improper to create blanket exclusion to specific groups simply because disability is easy to correct); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 906 (E.D. Pa. 1997) (pointing to remedial nature of ADA as reason to construe ADA's terms broadly enough to evaluate individuals without consideration of medicinal aides).
agency’s answer is based on a permissible construction of the statute.\textsuperscript{90} 

*Chevron* binds courts to an agency’s interpretation of a statute if Congress requested such an interpretation and if the resulting interpretation is reasonable.\textsuperscript{91} An unrequested interpretation, like the EEOC interpretive guidelines, is not binding, but courts may defer to it nonetheless.\textsuperscript{92} Courts have consistently agreed that if an agency interpretation is a reasonable construction of the statute, it merits adherence.\textsuperscript{93} Several courts have evaluated the EEOC interpretive guidelines under this reasonableness test.\textsuperscript{94} To be a reasonable construction of the ADA and thus worthy of adherence, the EEOC interpretive guidelines must not contradict the plain language of the ADA and must find support in the legislative history of the ADA.\textsuperscript{95}

In *Harris v. H & W Contracting Co.*,\textsuperscript{96} the United States Court of Appeals for the Eleventh Circuit addressed the reasonableness of the EEOC’s interpretive guidelines when deciding if a disability evaluation should include an assessment of mitigating measures.\textsuperscript{97} The claimant in *Harris* suffered from

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  \item \textsuperscript{91} Id. at 843-44.
  \item \textsuperscript{92} See Anthony, supra note 36, at 58 (discussing when courts must defer to agency interpretation and when they may defer to agency interpretation).
  \item \textsuperscript{93} Id. at 59-60 (discussing courts’ general support of non-congressionally mandated agency determinations if they are reasonable).
  \item \textsuperscript{95} See Chevron, 467 U.S. at 842-43 (creating test for courts to apply when evaluating agency interpretations).
  \item \textsuperscript{96} 102 F.3d 516 (11th Cir. 1996).
  \item \textsuperscript{97} See Harris v. H & W Contracting Co., 102 F.3d 516, 521-22 (11th Cir. 1996) (finding court should not consider mitigating measures when determining disability). In *Harris*, the court evaluated the ADA claim that Harris brought after H & W Contracting Company terminated her. Id. at 518. Harris alleged that the termination was in response to a panic attack she suffered following a change in the medication she took for an underlying thyroid condition (Graves’ disease). Id. To decide if Harris had an impairment that rose to the level of a disability, the court first determined if it should consider Harris’s Graves’ disease in the medicated or unmedicated state. Id. at 520. To decide this issue, the court undertook an analysis of the following: (1) the EEOC interpretive guidelines which dictate that courts disregard mitigating measures; (2) the plain language of the ADA; and (3) the legislative history behind the ADA’s passage. Id. at 521-22. The court reasoned that, following *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, it must adhere to a congressionally mandated agency interpretation that is a reasonable construction of the statute. Id. at 521 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). The EEOC’s interpretation, the court reasoned, was not in direct conflict with the language of the ADA. Id. In
Graves' disease, the symptoms of which she controlled medically. To analyzing Harris's claim, the court examined the EEOC interpretive guidelines to determine if her medication should be a factor in the evaluation of her disability. To ascertain the reasonableness of the EEOC position on mitigating measures, the court first examined the text of the ADA and compared it to that of the EEOC interpretive guidelines. Upon review, the court found no direct conflict between the EEOC interpretation and the language of the ADA. The court then looked to the relevant House and Senate Reports. In these reports, the court discovered that Congress clearly intended to have the courts evaluate impairments without consideration of mitigating measures. As a result of these two findings, the court concluded that the EEOC interpretive guidelines were a reasonable construction of the ADA and thus merited the court's deference. The Eleventh Circuit adopted the EEOC's interpretation and chose to evaluate Harris's impairment without consideration of the mitigating measures used to alleviate her symptoms.

addition, the legislative history of the Act directly supports the agency interpretation. Thus, the court found that it should adhere to the EEOC's interpretive guidelines. As a result, the court remanded the case to the district court to evaluate Harris's Graves' disease in its unmediated state.

98. Id. at 522-23. Graves' disease may involve any of the following conditions: hyperthyroidism accompanied by goiter, exophthalmos, or myxedema. See id. at 522 (citing MERCK MANUAL OF DIAGNOSIS AND THERAPY, 1038-39 (Robert Berkow et al. eds., 15th ed. 1987)). Without medication, the most frequent symptoms of the disease include nervousness, increased sweating, hypersensitivity to heat, palpitations, fatigue, weight loss, weakness, and frequent bowel movements. Id. In some extreme cases, Graves' disease can result in "thyroid shock" which, if untreated, can cause cardiovascular collapse. Id. Because Harris controlled her disorder with medication, the court's position on the mitigating measures issue was critical to the viability of her claim. Id.

99. See id. at 520 (evaluating EEOC interpretive guidelines).

100. Id. at 521.

101. See id. (stating "[t]here is nothing inherently illogical about determining the existence of a substantial limitation without regard to mitigating measures such as medicines or assistive or prosthetic devices").

102. Id.

103. Id.

104. Id.

105. Id. Following its decision, the court denied H & W Contracting Co. summary judgment. To avoid summary judgment in this instance, Harris needed only to demonstrate the existence of a genuine issue of material fact. Id. at 521-22. In this case and many other similar ADA cases, the claimant must show that an issue of fact exists regarding whether an impairment rises to the level of disability. Id. The evaluation of the issue of mitigating measures determines whether a claimant with a treatable impairment ever has the opportunity to present her claim. See Mayerson, supra note 6, at 589 (discussing dismissal of ADA claims through summary judgment motions); Locke, supra note 4, at 109 (arguing that courts are
In *Matczak v. Frankford Candy and Chocolate Co.*, the United States Court of Appeals for the Third Circuit similarly relied on the EEOC interpretive guidelines in evaluating a claimant’s epilepsy without considering the medication the claimant took to control the symptoms. The *Matczak* court, like the *Harris* court, found the ADA’s legislative history to be supportive of the EEOC’s position. This support, the court reasoned, allowed it to adhere to the EEOC’s recommendations.

The *Matczak* and *Harris* decisions exemplify the notion that courts should give deference to agency interpretations, even if Congress has not mandated such agency action, provided that: (1) the interpretations are not in conflict with the terms of the statute which they are expounding and (2) the legislative history of the statute supports the interpretations. These courts, raising prima facie standard for Title I ADA claims resulting in increased summary judgments against plaintiffs).

106. 136 F.3d 933 (3d Cir. 1997).

107. *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 936-37 (3d Cir. 1997) (following EEOC interpretive guidelines and stating that courts should not consider mitigating measures when evaluating disabilities). In *Matczak*, the court considered whether Matczak had established the existence of his disability such that it should not grant summary judgment as a matter of law. *Id.* at 935. Matczak was diagnosed with epilepsy thirty years before Frankford Candy and Chocolate Company hired him as a Maintenance Supervisor in April 1993. *Id.* at 935. He controlled his epilepsy with medication and did not suffer from any seizures until November 1993. *Id.* Following this seizure, Matczak’s doctor put him on a new course of medication for five and one-half months. *Id.* Although Matczak could only do limited work during those five and one-half months, the doctor permitted him to return to a regular schedule after the course of medication. *Id.* Frankford fired Matczak during this restrictive period. *Id.* Matczak alleged that the firing was due to his disability (epilepsy). *Id.* The Court of Appeals for the Third Circuit overruled the district court’s decision to grant Frankford summary judgment by finding that Matczak had adequately shown that epilepsy substantially limits him in a major life activity. *Id.* at 937. In evaluating this impairment, the court determined that mitigating measures, in this case the medicine controlling his seizures, should not factor into the evaluation. *Id.* The court outlined two reasons for deferring to the EEOC guidelines on this matter: (1) courts should give an agency’s interpretation of its own regulations great deference and (2) the ADA’s legislative history strongly supports this method of evaluation. *Id.* As a result, the court did not consider Matczak’s medication and found enough evidence showing that Matczak’s epilepsy substantially limited a major life activity to preclude summary judgment. *Id.* at 938.

108. *Id.* at 937.


110. *See id.* (accepting EEOC interpretation); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (same); *see also Anthony, supra* note 36, at 59-60 (discussing authoritative power of congressionally mandated agency interpretations versus interpretations that Congress did not mandate).
along with several district courts, have concluded that the EEOC’s position on mitigating measures is in accordance with Congress’s intent as evidenced by both the language of the ADA and the House and Senate Reports that accompanied the ADA’s passage.\textsuperscript{111} Several courts that have concurred in this reasoning have additionally put forth policy-based arguments in support of their decisions to consider impairments in their unaided states.\textsuperscript{112}

2. Policy Reasons in Support of the EEOC’s Interpretation

Congress created Title I of the ADA to ensure the same employment opportunities for individuals with and without disabilities.\textsuperscript{113} To further this goal, many courts reason that a broad interpretation of the ADA is necessary.\textsuperscript{114} They argue that because Congress intended the ADA to be a sweeping anti-discrimination statute, courts must liberally apply the ADA’s terms.\textsuperscript{115} As a result, these courts find that the only permissible way to deal with the issue of mitigating measures is to disregard the measures when evaluating the

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\textsuperscript{111} See Matczak, 136 F.3d at 937 (finding EEOC’s position is in accordance with Congress’s intent); Harris, 102 F.3d at 521 (same); Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 905 (E.D. Pa. 1997) (finding that "even a cursory examination of the legislative history" indicates that EEOC patterned its guidelines on language found in congressional reports); Shiflett v. GE Fanuc Automation Corp., 960 F. Supp. 1022, 1029 (W.D. Va. 1997) (concluding that EEOC interpretation is "entirely consistent" with legislative history of ADA and ADA itself); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1435-38 (N.D. Iowa 1996) (stating that legislative history supports EEOC interpretive guidelines).


\textsuperscript{113} See 42 U.S.C. § 12101 (1994) (outlining purpose of ADA); see also Subpart II.A (outlining history of ADA).

\textsuperscript{114} See Arnold, 136 F.3d at 861 (1st Cir. 1998) (finding that remedial nature of ADA necessitates broad interpretation of it by courts). But see Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898, 906 (E.D. Pa. 1997) (noting but then disregarding policy concerns in support of evaluating impairments in their medicated state). The court in Wilson concluded that courts should evaluate impairments in their unmedicated states. \textit{Id.} at 907. In reaching this conclusion, the Wilson court addressed and then discredited policy arguments contrary to its conclusion. \textit{Id.} at 906-07. The greatest concern in interpreting the ADA in accordance with the EEOC on the issue of mitigating measures is that such an interpretation will lead to the "unwarranted expansion of disability laws beyond their intended scope." \textit{Id.} at 906. The Wilson court noted this concern but found it unconvincing. \textit{Id.}

\textsuperscript{115} See \textit{id.} at 861 (finding courts must apply terms of ADA broadly); Wilson, 964 F. Supp. at 906 (finding remedial nature of ADA necessitates broad interpretation of its terms); Shiflett, 960 F. Supp. at 1029 (finding courts' liberal application of ADA terms is proper).
limiting effect of an impairment. Acceptance of the EEOC's position on this issue, these courts reason, will allow courts to apply liberally the ADA's protections.

In *Fallacaro v. Richardson*, the United States District Court for the District of Columbia addressed these policy concerns regarding the consideration of mitigating measures. In its evaluation of a claimant's vision impairment claim, the court found that it should not consider corrective eye wear. It is unfair, the court reasoned, to deprive a group of individuals of coverage under the ADA simply because their disability is one that is easy to correct. This reasoning, the court continued, is based on common sense. An individual does not eliminate an underlying disability by the use of a prosthetic device or medication even though such assistance may alleviate the impairment's effects. If a court did choose to evaluate an underlying impairment in its aided state, the court would unreasonably exclude from

116. See *Arnold*, 136 F.3d at 863 (finding courts should evaluate impairments in their unmedicated states); *Wilson*, 964 F. Supp. at 898 (finding remedial purpose of ADA dictates evaluation without consideration of mitigating measures); *Shiflett*, 960 F. Supp. at 1029 (same).

117. See *Arnold*, 136 F.3d at 863 (finding courts must evaluate impairments in their unmedicated states); *Wilson*, 964 F. Supp. at 905-06 (concluding liberal application of ADA requires evaluation of impairment without consideration of mitigating measures); *Shiflett*, 960 F. Supp. at 1029 (same).


119. See *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (following EEOC guidelines). In *Fallacaro*, the court evaluated whether an individual who has corrected vision of 20/20 but is legally blind without corrective lenses has an impairment that substantially limits a major life activity. *Id.* at 90. The Internal Revenue Service (IRS) denied *Fallacaro* a promotion because she did not satisfy the uncorrected vision requirement of the position. *Id.* *Fallacaro* alleged that the vision requirement was a blanket exclusion of individuals with vision impairments. *Id.* The IRS stated that it based its exclusion in safety concerns and that *Fallacaro* was simply medically ineligible and not handicapped under the Rehabilitation Act. *Id.* After evaluating recent case law and the legislative history of both the Rehabilitation Act and the ADA, the court reasoned that it would be furthering the purpose of both of the acts if it evaluated *Fallacaro*'s impairment in its uncorrected state. *Id.* at 92-94. The court, therefore, denied the IRS's motion to dismiss and found that the IRS must justify its adverse employment decision before a fact-finder. *Id.* at 94. The court also denied partial summary judgment to *Fallacaro* and noted that simply because her vision impairment may rise to the level of a disability did not mean that she did not have to satisfy the requirement that she was a "qualified individual." *Id.* In summary, the court concluded that it should enable *Fallacaro* to benefit from the provisions of the ADA and granted her an evaluation of the alleged adverse employment action. *Id.*

120. *Id.* at 94.

121. *Id.* at 93.

122. *Id.*

123. *Id.*
MITIGATING MEASURES AND THE ADA

coverage an entire group of potentially disabled individuals at the threshold question level.\textsuperscript{124} Such individuals would be deprived of even the chance to present their claims to the court.\textsuperscript{125} According to the \textit{Fallacaro} court, it then follows that to prevent this inequitable result, courts should evaluate the underlying impairment rather than the temporarily corrected state of the impairment.\textsuperscript{126} Therefore, in its attempt to further the broad anti-discrimination policy of the ADA, the \textit{Fallacaro} court ruled that it should not consider mitigating measures when evaluating the limiting effects of an impairment.\textsuperscript{127} The court eventually denied summary judgment for the defendant-employer and ordered an assessment of the claimant’s vision without the assistance of corrective lenses.\textsuperscript{128}

In \textit{Wilson v. Pennsylvania State Police Department},\textsuperscript{129} the United States District Court for the Eastern District of Pennsylvania also advanced a policy argument in support of its decision to evaluate a claimant’s vision impairment without the aid of corrective lenses.\textsuperscript{130} In particular, the court cited to the generally accepted policy that because the ADA is a remedial statute, courts should construe it broadly.\textsuperscript{131} Agreeing with this proposition, the court further

\begin{itemize}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.} The court stated that the facts of this case exemplify this logic. \textit{Id.} The IRS argued that the Rehabilitation Act did not protect Fallacaro because her corrected vision did not rise to the level of a disability. \textit{Id.} However, the IRS excluded her from the special agent position specifically because of her uncorrected vision level. \textit{Id.} The court reasoned that the fact that the IRS considers the uncorrected vision level in its qualifications for the agent position demonstrates that the IRS itself did not think that the corrective measures eliminated the underlying impairment. \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} 964 F. Supp. 898 (E.D. Pa. 1997).
\item \textsuperscript{130} See \textit{Wilson v. Pennsylvania State Police Dept.}, 964 F. Supp. 898, 907 (E.D. Pa. 1997) (finding that courts should not consider mitigating measures when evaluating impact of impairment). The court in \textit{Wilson} examined whether individuals denied positions as state troopers due to a failure to satisfy the uncorrected visual acuity requirement can bring a claim under the ADA. \textit{Id.} at 900. The police department argued that because Wilson can see clearly with corrective lenses his impairment does not substantially limit him in any major life activities. \textit{Id.} at 902. The court disagreed with this rationale and denied the police department’s motion for summary judgment. \textit{Id.} at 908-09. According to the court, the EEOC guidelines and the legislative history on the issue supported its decision to evaluate Wilson’s vision without consideration of his corrective lenses. \textit{Id.} at 905. The court found that a claimant who does not currently experience the adverse effects of his impairment because of medication should still have the opportunity to present his ADA claim to a fact-finder. \textit{Id.}
\item \textsuperscript{131} See \textit{id.} at 906 (discussing remedial nature of ADA) (citing Heilweil v. Mt. Sinai Hosp., 32 F.3d 718, 722 (2d Cir. 1994)).
\end{itemize}
explained that a broad interpretation of the ADA necessarily entails a liberal application of its protections.\textsuperscript{132} Such a liberal application, the court reasoned, includes the evaluation of an individual’s impairment in its unmedicated state.\textsuperscript{133} The court recognized that this was the best way to ensure coverage of all individuals with disabilities.\textsuperscript{134} This broad application will likely result in coverage of individuals who are not obviously substantially impaired.\textsuperscript{135} The court recognized that the public may not think of these individuals as being disabled.\textsuperscript{136} However, it reasoned that societal intuition should not dictate nor interpret the ADA.\textsuperscript{137} Instead, looking to Congress’s intent to create a broadly sweeping remedial statute, the court discovered that an evaluation of an impairment in its unaided state is proper.\textsuperscript{138} The \textit{Wilson} court, in its conclusion on this issue, decided that corrective eye wear should not be a consideration in evaluating a vision impairment.\textsuperscript{139}

The United States Court of Appeals for the First Circuit added yet another policy argument in support of the EEOC’s position on mitigating measures.\textsuperscript{140} In \textit{Arnold v. United Parcel Service, Inc.},\textsuperscript{141} the First Circuit reasoned that an evaluation of a claimant’s impairment in its medicated state would result in different treatment of individuals who are financially able to treat their impairment.\textsuperscript{142} For example, courts will evaluate an individual who

\begin{enumerate}
\item \textit{Id.} at 907.
\item See \textit{id.} (concluding that courts should not interpret "substantially limits" so narrowly as to exclude automatically individuals whose impairments are correctable with medical assistance).
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{id.} at 906-07 (giving example of individual confined to wheelchair as compared to individual who can alleviate impairment by putting on eyeglasses).
\item \textit{Id.} at 907.
\item \textit{Id.}
\item See \textit{id.} at 906-07 (concluding that corrective lenses should not be consideration when deciding if impairment substantially limits major life activity). The court first determined whether the EEOC guidelines were a reasonable construction of the ADA and worthy of the court’s deference. \textit{Id.} at 904-05. The language of the EEOC and the legislative history of the Act convinced the court that the EEOC’s position on the issue of mitigating measures was reasonable. \textit{Id.} at 905. The court supplemented its conclusion with the policy argument stated in the text of this Note. See \textit{supra} notes 129-138 and accompanying text (outlining policy argument).
\item See Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998) (expressing policy in support of EEOC guidelines regarding mitigating measures).
\item 136 F.3d 854 (1st Cir. 1998)
\item See Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998) (supporting EEOC interpretive guidelines on issue of mitigating measures). In \textit{Arnold}, the court had to determine if Arnold had a disability under the ADA and, if he did, whether the United Parcel Service
cannot afford medication that may fully alleviate her symptoms in her untreated state. On the other hand, courts will evaluate in her treated state an individual who can afford the medication and uses it. Under this rationale, courts will treat less favorably under the ADA individuals who are more financially secure. Congress did not, according to the court in Arnold, intend this inequitable result. The Arnold court suggests that the only equitable remedy is to evaluate all claimants' impairments in their unmedicated states.

After analyzing the legislative history of the ADA and the policy considerations involved in its enactment, these courts have concluded that the suggestions of the EEOC interpretive guidelines properly interpret the ADA. Thus, according to these courts, a court should disregard mitigating measures when evaluating impairments. Because of this broad interpretation of the ADA, individuals with impairments aided by medication or other assistive devices who bring their claims in these courts can expect to have the opportunity to present their claim fully. Not all courts, however, have accepted the EEOC's position on the issue of mitigating measures.

Id. at 856. Arnold suffered from insulin-dependent diabetes which he controlled through daily injections of insulin and a regimen of diet and exercise. Id. Arnold alleged that he is disabled under the ADA because, according to his doctor's reports, he would die without his medication. Id. The court evaluated the legislative history of the ADA, the plain statutory language of the ADA that addresses the "substantially limiting" requirement, and the policy considerations for and against the courts' consideration of mitigating measures in the evaluation of a claimant's impairment. Id. at 857-863. The court concluded that all of these sources support the theory that courts should disregard mitigating measures when evaluating a claimant's impairment. In addition, the court noted that the EEOC interpretive guidelines support this application of the ADA. Id. at 863-64. The court realized that the EEOC interpretive guidelines do not have controlling weight but concluded, nonetheless, that because the guidelines are reasonable and consistent with the remedial purpose of the ADA, they were worthy of the court's deference. Id. at 864. As a result of its evaluation, the court concluded that it should not consider mitigating measures when evaluating impairments for an ADA claim. Id. at 866. The Arnold court, however, limited its holding to the particular medical condition in question in this claim, diabetes mellitus. Id.

143. Id. at 861.
144. Id.
145. Id.
146. Id.
147. Id.
148. See cases cited supra note 87 (listing cases in which courts have agreed with EEOC's position on mitigating measures).
149. See cases cited supra note 87 (listing court decisions which adhere to EEOC interpretive guidelines on issue of mitigating measures).
150. See, e.g., Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 866 (1st Cir. 1998) (remanding claim to lower court to determine ADA claim on presented facts); Matczak v.
B. Courts Should Consider Mitigating Measures:
Non-Deferential Treatment of the EEOC Interpretive Guidelines

Similar to the courts that have explicitly followed the EEOC’s position on mitigating measures, the courts of appeals and district courts that have chosen not to adhere to the EEOC interpretive guidelines have done so only after a thorough evaluation of both the language of the ADA and its legislative history. These courts, however, have concluded that the EEOC’s interpretive guidelines are not a reasonable construction of the ADA. In support of their decisions to disregard the EEOC’s position on mitigating measures, these courts consistently have put forth two basic arguments: (1) the language of the EEOC interpretive guidelines regarding mitigating measures directly conflicts with the plain language of the ADA and (2) the EEOC’s directions to evaluate the effects of an impairment without considering the measures used to alleviate its effects conflict with other provisions of the EEOC interpretive guidelines.

1. Conflict Between the Language of the EEOC Interpretive Guidelines and the Plain Language of the ADA

To accept that the EEOC interpretive guidelines are a reasonable construction of the ADA, courts must find that the guidelines do not contradict
the ADA’s plain language.\(^{155}\) Not all courts have found this to be true.\(^{156}\) To many, the EEOC guidelines directly contradict the language of the ADA.\(^{157}\) If such a conflict exists, then the guidelines are neither reasonable nor worthy of judicial deference.\(^{158}\)

In *Gilday v. Mecosta County*,\(^{159}\) for example, a divided United States Court of Appeals for the Sixth Circuit found that the EEOC’s position on mitigating measures directly contradicts the ADA’s requirement that an impairment be substantially limiting.\(^{160}\) The claimant in *Gilday* suffered from diabetes, which he controlled with a prescribed regime of medication, diet, and medication.\(^{155}\) See *Davis & Pierce*, supra note 36, at 239-43 (discussing necessary requirements for court to find agency interpretation is reasonable construction of statute).

\(^{156}\) See *Sutton*, 130 F.3d at 902 (finding EEOC guidelines directly at odds with plain language of ADA); *Gilday*, 124 F.3d at 767 (same); *Hodgens*, 963 F. Supp. at 107-08 (same); *Murphy*, 946 F. Supp. at 880-81 (same).


\(^{158}\) See *Davis & Pierce*, supra note 36, at 239-43 (explaining that courts do not have to adhere to unreasonable agency interpretations of statute); *Anthony*, supra note 36, at 58 (explaining deference due non-congressionally mandated agency interpretations).

\(^{159}\) 124 F.3d 760 (6th Cir. 1997).

\(^{160}\) See *Gilday* v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (deciding mitigating measures should be part of evaluation of impairment’s substantially limiting impact). In *Gilday*, the Court of Appeals for the Sixth Circuit considered whether Gilday presented sufficient evidence of a disability to avoid summary judgment on his claim. *Id.* at 761. In particular, the court had to decide if a diabetic who controls the symptoms of his disease with medication can still satisfy the requirements of a disability under the ADA. *Id.* Kevin Gilday was an emergency medical technician for 16 years until Mecosta County terminated him for "conduct unbecoming a paramedic" and several instances of rudeness to co-workers and patients. *Id.* Gilday alleged that Mecosta County terminated him because of his diabetic condition. *Id.* Mecosta County, he alleged, should have accommodated his diabetic condition by permitting him to be in a less chaotic atmosphere. *Id.* Such accommodation, he claimed, would have prevented the sudden alterations in his blood sugar that often resulted in his hostile behavior. *Id.* Thus, Gilday requested that the court adhere to the EEOC interpretive guidelines and consider his diabetes in its unmedicated state, the state in which it is substantially limiting. *Id.* Judge Kennedy, writing the majority opinion on this issue, concluded that the EEOC’s interpretation is in direct conflict with the ADA and therefore is not a reasonable construction of the statute. *Id.* at 767. The ADA requires that an impairment be substantially limiting to be a disability. *Id.* The EEOC’s method of evaluation allows coverage of an individual whose impairment does not actually substantially limit her activities. *Id.* This, Judge Kennedy reasoned, is an impermissible construction of the ADA. *Id.* This issue divided the court with Judges Kennedy and Guy agreeing that the EEOC’s interpretation was not a permissible one. *Id.* at 768. All three judges, however, concurred that in this case, a material issue of fact did remain. *Id.* at 766. Thus, the court remanded Gilday’s claim for further proceedings. *Id.*
and exercise. In determining the summary judgment issue, all three judges on the panel concurred that a material issue of fact remained. The judges did not, however, concur on the issue of how to evaluate a medicated impairment under the ADA.

Judge Kennedy, joined by Judge Guy, concluded that the court must evaluate an individual’s impairment in light of the mitigating measures the individual uses to alleviate its effects. Judge Kennedy pointed to a direct conflict between the EEOC interpretive guidelines and the ADA to support her conclusion. Under the express terms of the ADA, an impairment does not rise to the level of a disability unless it substantially limits a major life activity. The related provision of the EEOC interpretive guidelines suggests that courts partake in the substantially limiting evaluation without consideration of mitigating measures. If a court chooses to follow the EEOC’s recommendation, an impairment that does not substantially limit an individual because of the medication used to treat it may still constitute a disability under the ADA. This interpretation, according to Judge Kennedy, essentially eliminates the substantially limiting requirement of the ADA.

See id. at 761 (describing Gilday’s condition). Gilday suffered from non-insulin dependent diabetes. He treated this condition with oral medication, blood sugar monitoring, and a restricted diet.

With or without consideration of mitigating measures, all three judges on the panel agreed that, in this case, the plaintiff had presented a material issue of fact regarding the existence of a disability. In other words, Judges Kennedy and Guy found that Gilday’s impairment in its aided state may still substantially limit a major life activity.

See id. (showing contrasting opinions among judges). The majority opinion of the court remanded the claim for further consideration. All three judges concurred that, with or without consideration of mitigating measures, Gilday had presented a material issue of fact regarding the substantially limiting nature of his impairment. Judge Moore wrote the opinion for the court on this issue. Judge Kennedy, however, wrote the opinion for the court on the issue of mitigating measures, finding that courts should consider mitigating measures when evaluating the limiting effects of an impairment.

Id. at 766-70.


See id. at 767 (citing 29 C.F.R. app. § 1630.2(j) (1997)) (discussing assistance of EEOC regulations and interpretive guidelines).

Id.
Judge Kennedy recognized that the ADA's legislative history appears to support the EEOC's position. However, she noted that when the actual text of the statute is unambiguous, there is no need to look to the legislative history for clarification. According to Judge Kennedy, the statutory language on this issue was clear: an impairment must actually substantially limit a major life activity in order to rise to the level of a disability. Judge Kennedy concluded, and Judge Guy concurred, that courts should not adhere to the EEOC interpretive guidelines on the issue of mitigating measures.

2. Internal Inconsistencies of the EEOC Interpretive Guidelines

An agency's interpretation of a statute is unreasonable if the interpretation itself is internally inconsistent or is inconsistent with other agency positions on that statute. In such situations, courts are justified in disregarding agency interpretations. Many courts have determined that the EEOC's position on mitigating measures does not coincide with its interpretation of other aspects of the ADA including, in particular, what constitutes a substantially limiting impairment. This internal inconsistency has led these courts to disregard the EEOC interpretive guidelines and to formulate for themselves the correct method of evaluating claims aided by medication.

The United States Court of Appeals for the Tenth Circuit, in *Sutton v. United Air Lines, Inc.*, addressed this internal tension in the EEOC interpretive guidelines and concluded that a court, not the EEOC, should formulate the correct method of evaluating claims. The court reasoned that the EEOC's position on mitigating measures does not coincide with its position on the substantially limiting requirement, and that the EEOC's position on mitigating measures contradicts its own interpretation of the "regarded as" disabled prong of the disability definition.

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171. *Id.*
173. *Id.*
174. *Id.*
175. *See DAVIS & PIERCE, supra* note 36, at 108 (describing when courts should follow agency's interpretation).
176. *See id.* (stating that courts do not have to follow unreasonable agency interpretation); *Anthony, supra* note 36, at 54-58 (same). If an agency interpretation is internally inconsistent, the courts can determine that it is an unreasonable interpretation and not worthy of deference. *Id.*
178. *See Sutton*, 130 F.3d at 902 (disregarding EEOC position on mitigating measures); *Hodgens*, 963 F. Supp. at 108 (same); *Murphy*, 946 F. Supp. at 881 (same).
179. 130 F.3d 893 (10th Cir. 1997).
The claimants in *Sutton* contested United Air Lines's (United) decision not to hire them. The parties stipulated that United failed to hire the claimants because of their uncorrected visual acuity levels. In deciding whether to dismiss the case for failure to state a claim, the court directly addressed the issue of mitigating measures.

The *Sutton* court concluded that it should evaluate vision impairments and other correctable impairments in light of the assistive devices that the

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180. See *Sutton* v. United Air Lines, Inc., 130 F.3d 893, 901-02 (10th Cir. 1997) (deciding that individuals who suffer from vision impairment that is correctable with lenses are not disabled for purposes of ADA because, with lenses, they are not substantially limited in major life activity). In *Sutton*, two regional commercial airline pilots brought a claim against United Air Lines (United) for violation of the ADA following United's failure to hire them because of their uncorrected vision level. *Id.* at 895. According to United's policy, a pilot must have uncorrected vision of 20/100 or better in each eye. *Id.* The plaintiffs in this action were twin sisters who both have uncorrected vision of 20/200 in their right eyes and 20/400 in their left eyes. *Id.* Both, however, had corrected vision of 20/20. *Id.* The plaintiffs argued that, according to the EEOC interpretive guidelines, the court should evaluate their vision in its uncorrected state. *Id.* With such an evaluation, the court would most likely have found that their vision impairment substantially limited the major life activity of seeing. *Id.* Thus, they argued, they had a disability under the ADA and were entitled to the ADA's protection. *Id.* The court disagreed with the plaintiffs' argument and in turn disregarded the EEOC interpretive guidelines on the matter. *Id.* at 901. The court found that it should not adhere to the portion of the EEOC interpretive guidelines that addresses the issue of mitigating measures in the "substantially limiting" test because: (1) it is in direct conflict with the ADA and (2) it is internally inconsistent with other portions of the EEOC's interpretive guidelines. *Id.* at 902. The ADA requires that, in order to rise to the level of a disability, an impairment must substantially limit the individual in a major life activity. *Id.* If a court does not consider mitigating measures in the assessment of the impairment, it cannot truly evaluate the actual impact of the disability. *Id.* According to the court, Congress did not intend this type of assessment. *Id.* Additionally, the court pointed out that the EEOC itself mentions within another section of its own interpretive guidelines that the impact of an impairment is not contingent on the name of the diagnosis but rather on the actual effect that the impairment has on the individual's life. *Id.* (quoting 29 C.F.R. app. § 1630.2(f) ¶¶ 1-2 (1997)). Thus, even within its own guidelines, the EEOC recognizes that the hypothetical effects of an impairment that may arise without the use of the mitigating measures are not the effects that the court should analyze for purposes of determining who has a disability under the ADA. *Id.* In accordance with this rationale, the court affirmed the district court's decision to dismiss the action and found the claimants, whose corrected vision was 20/20, were not individuals with disabilities under the ADA. *Id.*

181. *Id.* at 895.

182. See *id.* (discussing plaintiffs' allegations of ADA violation). The claimants both suffered from a visual impairment of 20/200 in their right eyes and 20/400 in their left eyes. *Id.* United's policy required pilots to have an uncorrected visual acuity of 20/100 or better. *Id.*

183. See *id.* at 901 (explaining that its decision on mitigating measures issue will have determinative effect on case). The court recognized the existing division among courts on this issue, especially within the Tenth Circuit. *Id.* at 901 nn.7-8. As a result, it attempted to evaluate thoroughly the issue and create a precedent for the district courts within the Tenth Circuit to follow. *Id.* at 901-03.
claimant used to alleviate the impairment’s effects. In reaching this conclu-
sion, the court first looked to the EEOC interpretive guidelines. Upon
examination, the court discovered that the guidelines themselves were in-
consistent on this issue. In particular, the court noted that the EEOC’s
position on mitigating measures contradicts its position on what constitutes a "substan-
tially limiting" impairment. In its interpretive guidelines, the EEOC ex-
plained that Congress intended the determinative factor of a substantially
limiting analysis to be the actual effect that an impairment has on an individ-
ual. The court found that the EEOC specifically stated that the diagnosis
or name of an impairment should not be dispositive on the issue of whether
it substantially limits an individual. The actual effect is most important.
Additionally, the EEOC advocated a case-by-case analysis to assess the actual
impact of the impairment on the individual.

The Sutton court noted that the EEOC continued its explanation of the
"substantially limiting" requirement in a contradictory fashion. The EEOC
stated that in the evaluation of an impairment’s limiting effect mitigating
measures should not be a consideration. In suggesting this, the court
reasoned, the EEOC recommended that courts evaluate the effects of an
impairment that might occur without medication -- in other words, the hypo-
thetical impact of an impairment. This method of evaluation, the Sutton
court reasoned, is totally inconsistent with the EEOC’s prior statement that the
actual effect on the individual’s life is the determinative factor in assessing
whether or not the impairment is substantially limiting. Because of this
underlying tension within the EEOC guidelines, the Sutton court did not
adhere to the recommendations contained in the guidelines. Instead, the

184. See id. at 902 (deciding to evaluate claimants' visual impairment in its corrected state).
185. See id. (evaluating EEOC guidelines on mitigating measures).
186. See id. (stating tension in EEOC guidelines undermines the guidelines' credibility).
187. Id.
188. Id. (citing 29 C.F.R. app. § 1630.2(j) (1997)).
189. Id. (citing 29 C.F.R. app. § 1630.2(j) (1997)).
190. Id. (citing 29 C.F.R. app. § 1630.2(j) (1997)).
191. See id. (citing 29 C.F.R. app. § 1630.2(j)) (discussing EEOC’s preference for case by
case analysis of ADA claims).
192. Id.
193. See id. (citing 29 C.F.R. app. § 1630.2(j) (1997)) (discussing EEOC’s position on
mitigating measures).
194. See id. (pointing out inevitable result of adherence to EEOC’s position: courts will
permit hypothetical limits of impairments to raise impairment to level of disability).
195. Id.
196. Id.
*Sutton* court applied what it considered to be the plain language of the ADA: an impairment must substantially limit a major life activity.\(^{197}\) This plain language, the court concluded, necessarily dictates an evaluation of an impairment in its medicated state.\(^{198}\)

The *Sutton* court, along with several district courts, concluded that the underlying tension of the EEOC interpretive guidelines made the EEOC's position an unreasonable construction of the ADA.\(^{199}\) As a result, these courts chose not to adhere to the agency's instructions to disregard mitigating measures in their evaluations.\(^{200}\) Instead, these courts concluded from the plain language of the ADA that courts should incorporate mitigating measures into the evaluation of an impairment.\(^{201}\)

The courts described in this section have concluded that courts should incorporate into their impairment analysis mitigating measures which the claimant uses to alleviate the symptoms of her impairment.\(^{202}\) According to these courts, the plain language of the ADA and certain sections of the EEOC regulations dictate such a decision.\(^{203}\) This conclusion has placed these courts directly at odds with the courts that have chosen to disregard mitigating measures in impairment evaluations, creating a division among the circuits and confusion among litigants. Clearly, this issue must be resolved.

### IV. A New Approach: A Multi-Factored Guideline to the Mitigating Measures Analysis

After evaluating the legislative history, the plain language of the ADA, and the information disseminated by the EEOC, courts are still in disagreement about whether they should disregard mitigating measures when evalu-

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197. *Id.*

198. *Id.*

199. See *id.* (finding internal inconsistencies within EEOC interpretive guidelines); see also Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 107-08 (D.R.I. 1997) (same); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 880 (D. Kan. 1996) (same), aff'd, 141 F.3d 1185 (10th Cir. 1998).

200. See cases cited supra note 151 (listing cases in which courts decided EEOC interpretive guidelines were not reasonable construction of ADA and therefore not worthy of court's deference).

201. See cases cited supra note 87 (listing cases in which courts adhere to EEOC interpretive guidelines).

202. See cases cited supra note 151 (listing cases in which courts disregarded EEOC's position on mitigating measures).

203. See cases cited supra note 151 (listing cases in which courts disregarded EEOC's position on mitigating measures).
It is unclear which courts are right: the courts in which mitigating measures are not a consideration or the courts that find the use of mitigating measures an integral part of the impairment analysis. An evaluation of the decisions on either side of the disagreement demonstrates that neither approach is entirely correct.

One commentator, Professor Catherine J. Lanctot, builds upon the notion that neither the EEOC's position on mitigating measures nor the position of the courts in opposition to the EEOC's position is correct. As a solution, Lanctot proposes the creation of a "per se disability" list. According to Lanctot, certain impairments, such as insulin-dependent diabetes or the HIV infection, should constitute per se disabilities for purposes of an ADA claim evaluation. The instance of these impairments alone satisfy independently the threshold question of whether or not an individual has a disability, regardless of whether the individual uses mitigating measures. According to Lanctot, an evaluation of these per se disabilities should incorporate the use of mitigating measures for the limited purposes of determining the individual's qualifications for the position in question, an evaluation that takes place after a determination that the individual has a disability. It is at that point in the court's analysis, Lanctot suggests, that an individual should present her use of mitigating measures to show that, with the assistance of the mitigating measure, she is a qualified individual with a disability.

Although this approach may be helpful in a court's analysis of impairments that are included in a per se disability list, this proposal is too limited in its scope to be a useful solution to the overall problem of mitigating measures. Lanctot limits her proposal to the analysis of what she considers "per se disabilities." She does not address whether courts should consider

204. See supra Part III (discussing confusion among Courts of Appeals as well as district courts regarding mitigating measures).
205. See Lanctot, supra note 7, at 333 (discussing need to recognize certain impairments as per se disabilities which would eliminate need for courts to analyze these impairments under "substantially limiting" test).
206. See id. (proposing list of per se disabilities).
207. See id. at 333-36 (stating need to recognize per se disabilities such as diabetes and HIV infection).
208. See id. (describing proposal for "per se disability" list). Lanctot suggests that because prejudice against individuals is not fact-specific for certain disabilities, the evaluation of these same disabilities should not be fact-specific. Id. at 337.
209. Id. at 337.
210. Id.
211. See id. (discussing per se disabilities).
mitigating measures when evaluating impairments that do not make her list of per se disabilities. Furthermore, Lanctot fails to note Congress's and the EEOC's original hesitation in making a list of automatically included disabilities.\(^2\) Both the EEOC and Congress recognized the importance of individualized analyses of disabilities.\(^2\) Categorization of impairments, Congress reasoned, precludes courts from performing this desired individual analysis.\(^2\) Thus, Lanctot's per se disability list is not likely to be an approach that Congress would favor. Even if Congress accepted Lanctot's proposal, her approach is still too limited to solve the general problem when evaluating any claimant who uses mitigating measures.

A solution to the mitigating measures issue that would be a useful tool for the courts should do the following: (1) address all situations in which mitigating measures might play a role; (2) comply with the purpose of Title I of the ADA; and (3) be easily applied by the courts. An approach to the mitigating measures issue that satisfies these criteria and that, if used, might remedy the division in the Courts of Appeals is the following multi-factored guideline that incorporates a three-part test. The multi-factored guideline allows courts to determine, on a case-by-case basis, if they should include a particular mitigating measure in the impairment evaluation.\(^2\) It works by directing courts to evaluate each mitigating measure's reliability, effectiveness, and potential for unreliability and ineffectiveness for the claimant.

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213. See 29 C.F.R. app. § 1630 (stating that "the case by case approach is essential").

214. Id. The Supreme Court also hesitates to recognize "per se" disabilities. In Bragdon v. Abbott, the Supreme Court evaded the task of determining if HIV is a per se disability. Bragdon v. Abbott, 118 S. Ct. 2196 (1998). Rather, the court found that the effects of the disorder substantially limited the claimant in the major life activity of reproduction. Id. Thus, the Court avoided the need to determine if HIV, and potentially many other impairments, are "per se" disabilities.

215. See 29 C.F.R. app. § 1630.2(j) (outlining factors for courts to consider when determining if impairment is substantially limiting). The multi-factored guideline is structured after and can be compared to the three-part analysis the EEOC created for courts to assist them in deciding whether or not the effects of an impairment are substantially limiting. Id. According to the EEOC regulations, when evaluating the limiting effects of an impairment the courts should consider the following three factors: "(1) the nature and severity of the impairment, (2) [t]he duration or expected duration of the impairment, and (3) [t]he permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment." Id. Both this three-part analysis and the proposed multi-factored guideline provide courts a method of evaluation which permits them to consistently rule on issues that are inherently case specific.
Courts should consider each factor equally; no one factor should determine independently whether a court should consider the mitigating measure in the impairment evaluation.

This approach is rooted in the basic premise that some, but not all, mitigating measures should be a part of a court’s impairment analysis. In general, courts should include mitigating measures that are so infallible and reliable that, because of them, the underlying impairment essentially never impacts the claimants. On the other hand, courts should not include in their impairment evaluations those mitigating measures that are not fully effective or reliable. These mitigating measures more easily allow for a surfacing of the symptoms of the underlying impairment. The factors incorporated into the three-part guideline should ease the courts’ analysis of the distinction between those types of mitigating measures. The factors address the attributes of the mitigating measure itself as applied to a specific individual’s impairment. In particular, the courts should consider the following factors when evaluating a mitigating measure: (1) effectiveness of the mitigating measure; (2) reliability of the mitigating measure; and (3) potential unreliability and ineffectiveness of the mitigating measure. These three factors should enable the courts to distinguish between mitigating measures that should be a part of the impairment analysis and those that should not.

A. Effectiveness of the Mitigating Measure

When evaluating the specific treatment used to limit the effects of an underlying impairment, the court should first look at the effectiveness of the mitigating measure for the claimant. How effective is this mitigating measure? Does it alleviate all or most of the individual’s symptoms? If the individual uses a mitigating measure that is not truly effective in alleviating symptoms, a court should not include it in the impairment evaluation. But if the mitigating measure alleviates all of the effects of the underlying impairment, a court should evaluate the impairment in its medicated state. For example, a court should disregard corrective eye wear when evaluating an individual’s vision impairment if the individual can demonstrate that, even with the corrective lenses, the individual still suffers from the effects of the underlying impairment. Another example is an individual who

216. See id. (stating that courts should disregard all mitigating measures). The multi-factored approach is not as broad. The multi-factored approach necessarily implies that courts should disregard only some mitigating measures.

suffers from insulin-dependent diabetes. Although the individual may be able to regulate blood sugar with the insulin, she may, in certain situations, still not be able to control the effects of the diabetes. Therefore, for this individual, the insulin treatment is not totally effective. Courts should not disqualify such an individual from ADA coverage because of inconsistently effective insulin treatment. If the treatment is not effective, courts should evaluate the impairment in its unmedicated state.

B. Reliability of the Mitigating Measure

A second factor to consider is the reliability of the mitigating measure. What is the likelihood that the mitigating measure will become an insufficient method of alleviating the claimant’s symptoms? Again, consider a claimant with a vision impairment who wears corrective lenses. How frequently has the claimant’s impairment been substantially limiting because, for example, something knocked her glasses off? How likely is this occurrence? If it is very likely, then it would be unreasonable to consider the claimant’s vision in its corrected state. The mitigating measure she uses is not reliable enough. In the case of the insulin dependent diabetic considered above, the reliability of the treatment is closely related to the effectiveness of such a treatment. It is possible that the insulin may not be effective in certain situations. In that case, the insulin is neither effective nor reliable and the courts should not evaluate the diabetes in its medicated state.

F. Supp. 898, 901 (E.D. Pa. 1997) (same). But see Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) (concluding that courts should evaluate vision impairments in corrected state); Cline v. Fort Howard Corp., 963 F. Supp. 1075, 1080-81 n.6 (E.D. Okla. 1997) (same). In the above cases, the courts would have to determine on a case-by-case basis if the individual’s corrective eye wear should be a part of the impairment evaluation. The multi-factored guideline would prevent the inconsistency that resulted under the influences of the EEOC interpretive guidelines.

218. See Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (evaluating ADA claim of non-insulin dependent diabetic). The court in Gilday evaluated an insulin dependent diabetic who claimed that, even with treatment, certain stressful situations caused a fluctuation in his blood sugar level. Id. at 761. This, he alleged, resulted in the display of the normally controlled adverse effects of his impairment. Id. Under the multi-factored guideline approach, the court would evaluate Gilday’s impairment in its unmedicated state. The mitigating measure Gilday used was not effective at all times nor was it a reliable treatment. Id.

219. See supra Part IV.A (applying effectiveness factor to claimant with vision impairment).

220. See supra note 160 (discussing Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997)).
C. Potential for Ineffectiveness or Unreliability of the Mitigating Measure

A final factor that the courts should consider is the potential that the mitigating measure will become ineffective or unreliable in the future. For this evaluation, the court must consider the mitigating measure as it has worked for the general population. Does this mitigating measure traditionally lose its effectiveness or become unreliable after a certain time period? Do individuals often become immune to its ameliorative effects? This factor is a synthesis of the first two factors and involves an assessment of hypothetical factors. Although courts generally do not favor hypothetical approaches, it is necessary to evaluate fully the characteristics of the mitigating measure. If a particular mitigating measure has traditionally been effective in eliminating symptoms of an impairment but for only a limited time period, courts should not treat it as if it eliminates the underlying impairment. Similarly, if individuals typically become immune to the ameliorative effects of the medication, a court should not include the medication in the impairment evaluation.

This multi-factored guideline can resolve the problem of mitigating measures that presently divides the circuits. This approach is fair for both the plaintiff and the employer, is consistent with the provisions of the ADA, and is easy for courts to apply. The multi-factored guideline demands that courts, in accordance with the ADA and the EEOC interpretive guidelines, give individual attention to each claim. This individualized analysis protects plaintiffs by preventing courts from imposing blanket exclusions to coverage. Courts cannot evaluate a claim in its medicated state if it bases its decision to do so on general information about a mitigating measure and its effects on particular impairments. Similarly, an employer has a benefit under the multi-factored guideline that she did not have under the EEOC’s interpretive guidelines: courts will, in some instances, consider mitigating measures when evaluating an impairment. Finally, this approach is not difficult for the courts to apply. As case law applying these guidelines develops, the multi-factored guideline will provide a workable framework for the courts. As a result, courts will become a more predictable and fair forum for ADA claimants and employers.

V. Conclusion

Eight years after Congress enacted the ADA, courts are still uncertain as to exactly who this anti-discrimination statute covers. The courts are clearly fractured on this issue, particularly regarding individuals who alleviate the effects of their impairment with medical devices. For these individu-
als, the court in which they bring their claim could be the determinative factor in their claim’s success or failure. Because Congress did not intend this result, the Supreme Court or Congress needs to resolve the persistent issue of how courts should treat mitigating measures.

The multi-factored guideline to mitigating measures is the best approach. It allows for an individualized evaluation of the mitigating measures involved in each plaintiff’s claim but within a specific framework. Application of this framework will eventually create a standard by which courts, claimants, and employers can predictably evaluate the results of their claim. The multi-factored guideline will allow courts to bypass some of the ambiguous language of the ADA and provide, as Congress intended, a "clear, strong, consistent, enforceable standard addressing discrimination against individuals with disabilities." \(^{221}\)

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Modern Partnership Interests as Securities: The Effect of RUPA, RULPA, and LLP Statutes on Investment Contract Analysis

James B. Porter*

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I. Introduction

The evolution of business organization law in recent years is striking. Traditionally, lawyers could consistently rely on certain categorical norms. For example, a clear difference existed between general partnerships and limited partnerships.\(^1\) Partners in general partnerships faced unlimited personal liability for partnership obligations and were expected to participate in firm management.\(^2\) Alternatively, limited partnerships offered limited liability for those partners who had little desire to participate in firm management.\(^3\) Such stark formal differences made application of federal securities law\(^4\) to partnership interests relatively simple.\(^5\)

Although federal securities law does not specifically mention partnership interests in the definition of a "security," courts and commentators agree that partnership interests should be analyzed as investment contracts, a term included in the definition of a "security."\(^6\) In *SEC v. W. J. Howey Co.*,\(^7\) the Supreme Court announced an investment contract test that required profits to be derived from the "efforts of others."\(^8\) Building on *Howey*'s "efforts of

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1. *Compare* UNIF. PARTNERSHIP ACT (1914) § 15 [hereinafter UPA] (providing that partners are jointly and severally liable for another partner's wrongful act or breach of trust and jointly liable for all other partnership obligations) *with* UNIF. LIMITED PARTNERSHIP ACT (1916) § 7 [hereinafter ULPA] (providing limited liability for limited partners unless they participate in control of business).


3. *See* Comment, The Limited Partnership, 45 YALE L.J. 895, 904-05 (1936) (discussing extent to which limited partners expect to participate in firm management).


5. *See infra* Part II.B.1 & 2 (discussing traditional treatment of general and limited partnership interests under securities law).


8. *See* SEC v. W. J. Howey Co., 328 U.S. 293, 301 (1946) (concluding that interests in question are investment contracts and thus securities). In *Howey*, the Supreme Court created a test for determining when an investment is an "investment contract" under the federal securities laws. *Id.* The investors in *Howey* purchased small tracts of citrus groves consisting of individual rows or portions thereof. *Id.* at 295. A single row of forty-eight trees constituted one acre, and thirty-one of the forty-two investors bought less than five acres. *Id.* In addition to a land sales contract, most investors also purchased a service contract from Howey Co. that gave the company full discretion and authority over cultivation, harvesting, and marketing of the investors’ crops, with net profits later distributed to the investors. *Id.* at 296. Most of the
MODERN PARTNERSHIP INTERESTS AS SECURITIES

others' test, lower federal courts developed presumptions that general partnership interests are not securities and that limited partnership interests are securities. These presumptions rely on traditional notions of the roles that general and limited partners play within their respective firms.

Recent changes in partnership law have uprooted traditional notions of partnership, causing a blurring of the lines and a collision of categories so that traditional presumptions no longer provide sufficient analytical tools when deciding whether partnership interests are securities. General partnership law no longer guarantees general partners enough control over partnership affairs to protect their investment. Statutory norms no longer restrict limited partners to merely passive roles. Moreover, the development of limited liability partnerships (LLPs) effectively eliminates the traditional tradeoff between partnership control and limited liability. This Note considers whether changes to partnership law and the development of LLPs should alter the effect of federal securities law on partnership interests.

In Part II, this Note discusses the traditional application of federal securities law on general and limited partnership interests. Part III provides a lengthy but necessary discussion of the changes in modern partnership law that make traditional form-based presumptions less reliable. Specifically, Part III discusses the increased freedom of contract available under the Revised Uniform Partnership Act (RUPA) and explains how this freedom enables partnerships to create strong centralized management and stripped general

investors were professionals who lacked the "knowledge, skill and equipment necessary for the care and cultivation of citrus trees." Id. Taking the position that substance prevails over form, the Howey Court held that the land sales contract and the service contract taken together constituted investment contracts under the securities laws. Id. at 299. In reaching its conclusion, the Court held that an investment contract exists when there is an investment of money in a common enterprise with an expectation of profit to be derived solely through the efforts of others. Id. at 301. See infra Part II (discussing traditional treatment of general and limited partnership interests under federal securities law).

9. See Williamson v. Tucker, 645 F.2d 404, 422 (5th Cir. 1981) (suggesting that general partnership interests presumptively are not securities); SEC v. Murphy, 626 F.2d 633, 640-41 (9th Cir. 1980) (suggesting that limited partnership interests presumptively are securities).

10. See Michael J. Garrison & Terry W. Knoepfle, Limited Liability Company Interests as Securities: A Proposed Framework for Analysis, 33 AM. BUS. L.J. 577, 617 (1996) (stating that general partnership interests are usually not securities because owners are active participants who directly control partnership).


12. See infra Part III.B (discussing change in limited partnership law that allows limited partners to exercise control over business).

13. See infra Part III.C (discussing LLPs and elimination of tradeoff between partnership control and limited liability).
partners. In addition, Part III explains how the Revised Uniform Limited Partnership Act (RULPA) allows limited partners to exercise control without incurring personal liability. Part III concludes with a discussion of LLPs and compares LLPs to general partnerships. Part IV suggests that changes in modern partnership law remove the basis for presuming that partnership interests are or are not securities based solely on formal categories. Furthermore, Part IV proposes a test for determining whether an interest in a general partnership, a limited partnership, or an LLP is a security. Part V concludes that formal categories no longer reflect economic reality and that courts should disregard form-based distinctions when deciding whether partnership interests are securities.

II. Federal Securities Law and the Definition of "Security"

Congress intended the federal securities laws to ensure fair disclosure of financial information to potential investors. The federal securities laws apply to transactions involving "securities" as defined in the Securities Act of 1933 and the Securities Exchange Act of 1934. According to the Supreme Court, the fundamental purpose of the securities laws was "to substitute a philosophy of full disclosure for the philosophy of caveat emptor"; and the purpose of securities law is to protect investors by requiring disclosure.

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14. See infra Part III.A (discussing RUPA and situation where partner has little or no power). The term "stripped general partner" refers to general partners who lack the traditional attributes normally associated with being a partner (for example, participation in management and control, sharing in partnership profits, and participating in decisions to admit new partners).


16. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (stating that fundamental purpose of statutes was "to substitute a philosophy of full disclosure for the philosophy of caveat emptor"); A.C. Frost & Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38, 40 (1941) (stating that purpose of securities law is to protect investors by requiring disclosure).

17. Section 2(1) of the Securities Act of 1933 provides:

The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.


18. Section 3(a)(10) of the Securities Exchange Act of 1934 provides:

The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas,
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Court, the definitions of the term "security" in the two Acts are essentially the same.\textsuperscript{19} The definitions do not explicitly include either general or limited partnership interests.\textsuperscript{20} Thus, to be deemed securities, partnership interests must fall into one of the general categories enumerated in the definition of a security.\textsuperscript{21}

\textbf{A. SEC v. Howey and the Investment Contract Test}

Courts and commentators generally agree that when deciding whether partnership interests are securities, applying an investment contract analysis is proper.\textsuperscript{22} In the landmark case \textit{SEC v. W. J. Howey Co.}, the Supreme Court developed a four-part test for identifying an investment contract.\textsuperscript{23} According to the \textit{Howey} Court, an investment contract is a contract, transaction, or scheme in which there is an investment of money in a common enterprise with an expectation of profits to be derived solely from the efforts of others.\textsuperscript{24} The Court intended the \textit{Howey} test to protect passive investors who lack the necessary knowledge or power to protect their investments.\textsuperscript{25} In formulating the

or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, \textit{investment contract}, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security;" or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.


21. See Everhard, supra note 6, at 444 (discussing treatment of partnership interests under federal securities law).

22. See id. at 444 & n.22 (discussing investment contract analysis and its application to partnership interests).


24. Id.

25. See id. at 299 (stating that test embodies flexible principle capable of adaptation to meet various schemes devised by those who seek to use other people's money with promise of profits).
Howey test, the Court clearly stated that the test embodies a flexible principle that courts should adapt to new profit-making schemes when appropriate.\textsuperscript{26}

\textit{Howey} involved operations by two Florida corporations, W. J. Howey Company (Howey Co.) and Howey-in-the-Hills Service, Inc. (HHS), that were under direct common control and management.\textsuperscript{27} Howey Co. would plant approximately five hundred acres of citrus groves annually, keep half for itself, and sell the other half to the public in small tracts to finance further development.\textsuperscript{28} HHS provided services in cultivating, developing, harvesting, and marketing the crops that the citrus groves produced.\textsuperscript{29} When entering into the land sales contracts with the public, Howey Co. told prospective investors that their investment would not be feasible unless they also signed a service contract with HHS.\textsuperscript{30} Not surprisingly, HHS acquired service contracts for eighty-five percent of the acreage sold.\textsuperscript{31} These service contracts gave HHS full discretion and authority over cultivation, harvesting, and marketing of the investors' crops, with net profits later distributed to the investors.\textsuperscript{32} Most of the investors were not Florida residents.\textsuperscript{33} Additionally, most were professionals or business people who lacked the necessary knowledge, skill, and equipment required to care for and to cultivate citrus trees.\textsuperscript{34} According to the Court, the people were "attracted by the expectation of substantial profits."\textsuperscript{35}

The \textit{Howey} Court began its analysis by noting that the securities issue turned on whether the land sales contract, the deed, and the service contract collectively constituted an investment contract under federal securities law.\textsuperscript{36} The Court further noted that neither the Securities Act nor its legislative history defined the term investment contract.\textsuperscript{37} Turning to state blue sky laws that included the term "investment contract" prior to the enactment of federal securities law, the Court found that state courts construed the term broadly "so

\begin{itemize}
\item \textsuperscript{26} See id. (stating that \textit{Howey} test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits").
\item \textsuperscript{27} Id. at 295.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id. at 296.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. at 297. The Court noted that the lower courts treated the contracts and deeds as separate transactions and therefore determined that no investment contract existed. Id. at 297-98.
\item \textsuperscript{37} Id. at 298.
\end{itemize}
as to afford the investing public a full measure of protection." State courts placed substance over form and emphasized the economic reality of investments. State law generally defined an investment contract as a "contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." The Court concluded that adopting the state law interpretation of the term "investment contract" was reasonable and consistent with the purposes of the Securities Act. In restating the test, the Court declared that an investment contract is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." This broad definition embodies a flexibility designed to include the numerous profit-making schemes that enterprising individuals might develop.

By cutting through legal terminology and focusing instead on economic reality, the Howey Court found that the transactions involved were clearly investment contracts. The investors relied exclusively on HHS for any profits derived from their investments. Moreover, any attempt by an investor to manage his tract individually would have been economically unfeasible.

Partnerships, like other business organizations, generally involve a for-profit investment in a common enterprise. As a result, the first three parts of Howey's test are almost always satisfied. The primary question when dealing with partnership interests, then, is whether an interest meets Howey's "solely by the efforts of others" test.

38. Id.
39. Id.
40. Id. (quoting State v. Gopher Tire & Rubber Co., 177 N.W. 937, 938 (Minn. 1920)).
41. Id.
42. Id. at 298-99.
43. Id. at 299.
44. Id.
45. Id. at 300.
46. Id. The Court explained that to make a profit in the citrus industry, one must take advantage of economies of scale because care, cultivation, harvesting, and marketing expenses for a small tract would be cost prohibitive. Id.
48. BROMBERG & RIBSTEIN, LLPs, supra note 47, at 234.
Use of the word "solely" in Howey's test is problematic. If interpreted literally, the term "solely" creates a significant loophole for those wishing to avoid the securities laws and undermines protection of investors and the spirit of flexibility embodied in Howey. In SEC v. Glenn W. Turner Enterprises, Inc., the United States Court of Appeals for the Ninth Circuit applied a liberal interpretation to Howey's "solely by the efforts of others" test. The Glenn Turner court declared that Howey's "efforts of others" test is satisfied when those other than the investor make the essential managerial efforts that affect the success or failure of the enterprise. The Glenn Turner interpretation of Howey has been adopted by several other federal circuit courts and apparently approved by the Supreme Court. Glenn Turner and subsequent cases


50. 474 F.2d 476 (9th Cir. 1973).

51. See SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 482 (9th Cir. 1973) (stating that adherence to "solely" requirement would create unduly restrictive definition of investment contract). Glenn Turner involved the sale of self-help plans by Dare To Be Great, Inc. (Dare), a wholly owned subsidiary of Glenn W. Turner Enterprises (GWT). Id. at 477-78. Dare sold five different plans varying in price and in contents, all of which purported to improve the self-motivation and sales ability of the purchaser. Id. at 478. If a buyer purchased one of the three most expensive plans, he obtained the right to sell plans to others and to retain a portion of the purchase price. Id. The SEC brought suit seeking to enjoin Dare from selling the plans on the ground that Dare was allegedly violating federal securities law. Id. at 477. The district court granted the injunction and GWT appealed, arguing that the plans were not securities. Id. at 476. The Glenn Turner court, after reciting the fraudulent excesses Dare employees would undertake to pressure prospective purchasers into buying, noted that the remedial nature of federal securities law called for broad interpretation of the term security. Id. at 482. The court found that Dare's plans easily satisfied the first three parts of the investment contract test established in Howey, but that the "solely" requirement in the "efforts of others" test was problematic. Id. In noting that strict interpretation of the word "solely" would result in an "unduly restrictive" interpretation of what is or is not an investment contract, the court opted for a more "realistic test." Id. Thus, the court decided that the "efforts of others" test is satisfied where the "efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." Id. With the test restated, the court deemed plans sold by Dare to be investment contracts, and thus securities. Id.

52. Id. at 482.

53. See Sobel, supra note 49, at 1325 n.59 (citing numerous cases adopting Glenn Turner analysis).

54. See International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 561 (1979) (citing United Hous. Found. v. Forman, 421 U.S. 837, 852 (1975) and stating that "touchstone of the Howey test is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others"); Forman, 421 U.S. at 852 (stating that "touchstone [of cases defining securities] is the presence of an investment in a common venture premised on a reasonable expectation of profits to be
suggest that an investment contract exists when there is an investment in a
common venture with a reasonable expectation that profits will come primar-
yly or substantially from the entrepreneurial or managerial efforts of others.\textsuperscript{55}

\textbf{B. Traditional Securities Law Analysis of Partnership Interests}

\textit{1. General Partnership Interests as Securities}

The Supreme Court has never addressed whether general partnership
interests or joint venture interests are securities; however, several other courts
have discussed the issue.\textsuperscript{56} In \textit{Williamson v. Tucker},\textsuperscript{57} the United States Court
of Appeals for the Fifth Circuit found that certain joint venture interests were
not securities under federal securities law.\textsuperscript{58} The investors in \textit{Williamson}
purchased interests in real estate development projects in the form of three joint
ventures.\textsuperscript{59} Although the promoter agreed to perform all management duties
with respect to the property, the joint venture agreements granted each inves-
tor some managerial power.\textsuperscript{60} The \textit{Williamson} court stated that joint venture

\textsuperscript{55} See Garrison & Knoepfle, \textit{supra} note 10, at 616 (stating that question is whether
investors are relying "primarily" on efforts of others); Elaine A. Welle, \textit{Limited Liability
Companies as Securities: An Analysis of Federal and State Actions Against Limited Liability
interest may be security if profits come "substantially" from efforts of others).

\textsuperscript{56} See Stephen G. Christianson, Annotation, \textit{What is "Investment Contract" within
Meaning of § 2(1) of Securities Act of 1933 (15 USCS § 77b(1)) and § 3(a)(10) of Securities
Exchange Act of 1934 (15 USCS § 78c(a)(10)), Both Defining Term Security as Including
whether general partnership interests are securities).

\textsuperscript{57} 645 F.2d 404 (5th Cir. 1981).

\textsuperscript{58} See Williamson v. Tucker, 645 F.2d 404, 421 (5th Cir. 1981) (stating that courts
ruling on issue of whether general partnership interests are securities have held that such
interests generally are not investment contracts under securities laws). The \textit{Williamson}
court explained that general partnership interests are traditionally not securities because general
partners and joint venturers "have the sort of influence which generally provides them with
access to important information and protection against a dependence on others." \textit{Id.} at 422.
Furthermore, an "investor who is offered an interest in a general partnership or joint venture
should be on notice... that his ownership rights are significant, and that the federal securities
acts will not protect him from a mere failure to exercise his rights." \textit{Id.}

\textsuperscript{59} \textit{Id.} at 408.

\textsuperscript{60} \textit{Id.} at 408-09. Each agreement required unanimous consent of the venturers to confess
a judgment; to make execute, or deliver any commercial paper; to borrow money in the joint
venture's name; to use joint venture property as collateral; and to amend the joint venture
agreement. \textit{Id}. Joint venturers also had power to remove the manager by a vote of 60% or 70%
and general partnership interests are presumptively not securities because investors in such entities normally have broad managerial powers. The court cautioned, however, that substance might prevail over form in some cases.

In focusing on the "efforts of others" part of Howey's test, the Williamson court found that a general partnership or joint venture interest might be an investment contract, and thus a security, if the investor can establish that:

1. an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or
2. the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or
3. the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

In finding that none of the factors from this disjunctive test were present, the court held that the joint venture interests in question were not securities.

The Williamson court placed great importance on the power that the agreement granted to the joint venturers. The joint venturers purportedly purchased their interests with the expectation that they would not exercise managerial control, but the agreement nonetheless authorized such control. In addition, the court stressed the high degree of business acumen possessed by the joint venturers as evidence of their ability to exercise genuine managerial control over the enterprise. Finally, in reference to the third alternative of its test, the court noted that the plaintiffs did not assert that the promoter

Id. at 409. It is not clear whether the joint venturers ever actually exercised their powers. Id.

Id. at 422.

See id. (stating "that the mere fact that an investment takes the form of a general partnership or joint venture does not inevitably insulate it from the reach of the federal securities laws"). The court provided three examples of when partnership powers may be inadequate to protect a partner from dependence on others: (1) if the partner irrevocably delegates his powers, (2) if the partner is incapable of exercising his powers, or (3) if the partner is so dependent on the particular expertise of the promoter or manager that he has no reasonable alternative but to rely on that person. Id. at 422-23.

Id. at 424.

Id. at 425-26.

See id. at 424 (explaining that agreement granted joint venturers ultimate control even though they did not expect to exercise control).

Id.

See id. at 425 (noting high degree of business experience and knowledge of joint venturers). The court noted that among the joint venturers were three top executives, including the Chairman of the Board and the President of Frito-Lay, Inc. Id.

Id. at 424. The third alternative for determining whether a joint venture (or partner-
had unique entrepreneurial or managerial skills or that their dependence on the promoter was so great that they could not reasonably replace him. Thus, the interests in *Williamson* were not securities.

*Williamson* created a workable but somewhat rigid test for determining when partnership interests are securities. Although widely regarded as authoritative, *Williamson* has been modified by some circuits and rejected by the United States Court of Appeals for the Third Circuit in *Goodwin v. Elkins & Co.* The *Goodwin* court relied on state partnership law and the

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69. *Id.* at 425. Here, the court injected a reasonableness standard into its third alternative determination by requiring plaintiffs to allege that they were "incapable, within reasonable limits, of finding a replacement manager." *Id.* (emphasis added).

70. *Id.* at 425-26.

71. See Garrison & Knoepfle, *supra* note 10, at 619 (criticizing *Williamson* for placing "undue emphasis on the legal aspects of general partnerships," and asserting that rigid *Williamson* test requires "a lack of sophistication or a type of dependence on unique skills that will rarely be present in an investment setting"); see also Larry E. Ribstein, *Private Ordering and the Securities Laws: The Case of General Partnerships*, 42 CASE W. RES. L. REV. 1, 49-50 (1992) [hereinafter Ribstein, *Private Ordering*] (asserting that "*Williamson* comes very close to holding that a bona fide general partnership interest is per se not a security even if the *Howey* factors are satisfied").

72. See, e.g., Banghart v. Hollywood Gen. Partnership, 902 F.2d 805, 808 (10th Cir. 1990) (adopting only part one of *Williamson* test which focuses simply on whether partnership agreement grants sufficient power to partners, and not on whether partners actually exercise those powers); Matek v. Murat, 862 F.2d 720, 730 (9th Cir. 1988) (explicitly adopting first part of *Williamson* test and rejecting parts two and three). Note, however, that the Ninth Circuit effectively overruled *Matek* in *Hocking v. DuBois*, 885 F.2d 1449 (9th Cir. 1989), and confirmed the effect of *Hocking* in *Holden v. Hagopian*, 978 F.2d 1115, 1119 (9th Cir. 1992). Under *Holden*, the Ninth Circuit now applies all three parts of the *Williamson* test to determine whether general partnership interests are securities. *Holden*, 978 F.2d at 1119. The *Holden* court stated that the heart of the inquiry is whether, although on the face of the partnership agreement the investor theoretically retains substantial control over the investment and an ability to protect the investment from the managing partner or hired manager, the investor nonetheless can demonstrate such dependence on the promoter or on a third party that the investor was in fact unable to exercise meaningful partnership powers.

*Id.*

73. See *Goodwin v. Elkins & Co.*, 730 F.2d 99, 100 (3d Cir. 1984) (holding that general partnership interest involved therein was not investment contract). Although the three judge panel in *Goodwin* was unanimous in its decision that the partnership interests involved were not securities, each judge penned a separate opinion. *Id.* at 100, 111, 113. Goodwin, a former general partner of defendant Elkins & Co., brought suit alleging a violation of the Securities Exchange Act of 1934. *Id.* at 100. Goodwin asserted that the partnership agreement gave him so little power that he was in effect a limited partner. *Id.* at 103. In the opinion announcing the judgment of the court, Judge Garth held that even if Goodwin could prove the partnership
powers given to the partners in the partnership agreement to find that the partnership interest at issue was not a security.\textsuperscript{74} Although the three judge panel in \textit{Goodwin} unanimously agreed that the general partnership interest involved was not a security, the judges differed in their reasoning. Judge Garth, delivering the opinion of the court, decided that general partnership interests are never securities because of the inherent power that state partnership law vests in partners.\textsuperscript{75} In separate concurrences, Chief Judge Seitz and Judge Becker confined their analyses to the power distribution in the partnership agreement.\textsuperscript{76} Other federal courts have not adopted Judge Garth's per se rule that general partnership interests are not securities, but instead employ either all or part of the \textit{Williamson} test and apply a rebuttable presumption that general partnership interests are not securities.\textsuperscript{77}

2. \textit{Limited Partnership Interests as Securities}

In contrast to general partnership interests, courts generally presume that limited partnership interests are securities.\textsuperscript{78} The rationale for this presumption is simple. A limited partnership, like most other business entities (including general partnerships), almost always involves an investment of money in agreement restricted his powers, his partnership interest would not be a security. \textit{Id.} Judge Garth reasoned that because state partnership law endows general partners with certain "powers, rights, and responsibilities," their interests cannot be securities under the Securities Act. \textit{Id.} at 104. In separate concurring opinions, Chief Judge Seitz and Judge Becker disagreed with the breadth of Judge Garth’s opinion and based their decisions that Goodwin was not a security holder solely on power granted in the partnership agreement. \textit{Id.} at 112. Chief Judge Seitz and Judge Becker agreed they "need not decide here whether a general partner's rights and responsibilities under the Pennsylvania Uniform Partnership Act are sufficient to prevent a general partner's interest from being treated as a security for purposes of federal law." \textit{Id.}

\textsuperscript{74} \textit{See supra} note 73 (discussing \textit{Goodwin} and differences in judges’ opinions).

\textsuperscript{75} \textit{See Goodwin}, 730 F.2d at 103 (declaring that law extends role of general partner well beyond permitted role of passive investor); \textit{see also} Ribstein, \textit{Private Ordering, supra} note 71, at 41-45 (arguing for per se rule that general partnership interests are not securities so as to promote private ordering).

\textsuperscript{76} \textit{Goodwin}, 730 F.2d at 111-13 (Seitz, C.J., concurring); \textit{id.} at 113-14 (Becker, J., concurring).

\textsuperscript{77} \textit{See Bailey v. J.W.K. Properties, Inc.}, 904 F.2d 918, 924-25 (4th Cir. 1990) (applying \textit{Williamson} factors and finding that interest is security when investor was "practically dependent" on manager); \textit{Hocking}, 885 F.2d at 1460-61 (effectively overruling \textit{Matek v. Murat} and adopting three-prong test set out in \textit{Williamson}). \textit{But see Banghart}, 902 F.2d at 808 (adopting only part one of \textit{Williamson} test, which focuses simply on whether partnership agreement grants sufficient power to partners, and not on whether partners actually exercise those powers). For a general discussion of the approaches that courts take when deciding whether general partnership interests are securities, see Sobel, \textit{supra} note 49, at 1327-44.

\textsuperscript{78} \textit{See SEC v. Murphy}, 626 F.2d 633, 640-41 (9th Cir. 1980) (stating that limited partnership interest is generally security because, by definition, limited partnerships involve investments where profits are derived from efforts of others).
a common enterprise with an expectation of profit, and thus a limited partnership interest usually satisfies the first three parts of Howey. General and limited partnerships are, however, distinguished by the fourth part of Howey's test — whether profits derive primarily from the efforts of others. In general partnerships, partners expect to participate equally in the management and in the conduct of the business. Typically, however, a limited partner does not participate in management and, historically, could lose his limited status and incur personal liability for partnership obligations by participating in control of the enterprise. Therefore, limited partners usually do not participate in control of the business and thus rely on the efforts of others for a return on their investment.

According to the United States Court of Appeals for the Fifth Circuit in Youmans v. Simon, limited partners simply do not have the kind of authority

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79. See supra note 8 (discussing Howey). The first three parts of Howey's test require (1) an investment of money (2) in a common enterprise (3) with an expectation of profits. SEC v. W. J. Howey Co., 328 U.S. 293, 298 (1946).

80. See supra notes 48-55 and accompanying text (discussing original "solely" requirement in Howey's fourth part, subsequent liberal interpretations by lower courts, and apparent approval by Supreme Court).

81. See UPA (1914) § 18(e) (providing default rule that partners share equally in management); REVISED UNIF. PARTNERSHIP ACT (1996) § 401(f) [hereinafter RUPA] (providing default rule that partners share equally in management). RUPA incorporates the limited liability partnership amendments adopted in 1996. Note, however, that both UPA and RUPA provide that an agreement among the partners may alter the general rule regarding management rights. UPA § 18; RUPA § 103(a). See also POSNER, supra note 2, at 291 (suggesting that unlimited liability encourages general partners to participate in firm management).

82. See ULP A (1916) § 7 (providing that limited partner may become liable as general partner if he "takes part in the control of the business"); REVISED UNIF. LIMITED PARTNERSHIP ACT (1976) § 303(a) [hereinafter RULPA] (providing that limited partner is not liable for partnership obligations unless he participates in control of business). RULPA did, however, significantly increase the ability of limited partners to participate in the control of the business. Under RULPA, a limited partner participating in control is only liable "to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner." RULPA § 303(a). Limited partners may now participate in management with impunity so long as they disclose to third parties their limited partner status. Id; see RULPA § 303 (Tentative Draft No. 2, 1998) (eliminating all language in current Section 303 and providing limited liability for limited partners "even if" they participate in management and control). The tentative draft for RULPA Section 303 provides in part: "(a) A limited partner is not liable for a debt, obligation or other liability of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership." RULPA § 303 (Tentative Draft No. 2, 1998).

83. See Garrison & Knoepfle, supra note 10, at 626 (stating that limited partnership interests generally are securities because limited partners generally are passive investors). As a result, a limited partnership interest is generally a security.

84. 791 F.2d 341 (5th Cir. 1986).
that general partners possess.85 The Youmans court stated that limited partners' positions are analogous to those of corporate stockholders because limited partners have limited liability, cannot dissolve the partnership, cannot bind other partners, and have no authority to actively manage the partnership.86 Supported by the weight of judicial authority, the principle that limited partnership interests are presumptively securities is very strong.87

In Rodeo v. Gillman,88 the United States Court of Appeals for the Seventh Circuit provided an example of investment contract analysis of limited partnership interests.89 In Gillman, the plaintiffs purchased limited partnership interests in several apartment buildings.90 A few years later, the plaintiffs brought suit against the managing general partners alleging, among other things, federal securities law violations.91 The trial court granted the defendants' motion for summary judgment.92 On appeal, the defendants contended

85. See Youmans v. Simon, 791 F.2d 341, 346 (5th Cir. 1986) (suggesting that limited partnership interests are securities within statutory definition). In Youmans, a physician who participated in several real estate joint ventures brought suit alleging federal securities law violations. Id. at 343-44. After discussing Howey and the Williamson factors, the court looked to the economic reality of the investments to determine whether the joint venture interests were securities. Id. at 345-47. Of the two joint ventures discussed, the court found the Dickinson Apartment Project Venture was not a security because the investors held a 63% interest and could terminate the joint venture by majority vote. Id. at 346. The Bideo-Tomball Joint Venture was a security because the investors lacked management power, had no power to dissolve the venture, and could not remove the managing venturer. Id. at 347. The court drew a clear distinction between treatment of general partnership interests and limited partnership interests, and suggested that limited partnership interests are always securities because limited partners are passive investors. Id. at 346. But see supra note 82 (discussing impact of RULPA Section 303 and increased power for limited partners if they disclose limited status).

86. Youmans, 791 F.2d at 346.

87. See Garrison & Knoepfle, supra note 10, at 626-27 (discussing treatment of limited partnership interests under federal securities law).

88. 787 F.2d 1175 (7th Cir. 1986).

89. See Rodeo v. Gillman, 787 F.2d 1175, 1177-79 (7th Cir. 1986) (deciding that limited partnership interest is security even if accompanied with option to purchase enterprise). In Gillman, the plaintiffs purchased limited partnership interests in apartment buildings and later brought securities fraud allegations when the deal went sour. Id. at 1175. The plaintiffs held an option to buy the general partners' interests, but never executed that option. Id. at 1176. In deciding that the plaintiffs' limited partnership interests were securities, the court drew a distinction between potential control and actual control. Id. at 1177. The court stated that potential managerial control is not enough to take a limited partnership interest outside the reach of securities law. Id. at 1178.

90. Id. at 1175. The investors, in addition to their limited partnership interest, obtained an option to buy out the general partners. Id. The trial court granted summary judgment for the defendants after concluding that such an option gave plaintiffs enough control over the investment to remove their interest from protection under the securities laws. Id.

91. Id.

92. See id. (granting defendant's summary judgment motion because plaintiffs' option to
that the plaintiffs' limited partnership interests were not securities because the plaintiffs held an option to buy the general partners' interests and thus had ultimate control over management of the apartments.\textsuperscript{93} The Seventh Circuit rejected the defendants' argument and noted that complete passivity is not a requirement for an individual to be a security holder.\textsuperscript{94} The court, in finding that the investors' limited partnership interests were securities, noted a difference between potential control and actual control.\textsuperscript{95} According to the court, "[p]otential managerial control – even if easily assumed – is not enough to take a limited partnership [interest] out of the reach of the securities laws."\textsuperscript{96}

In contrast, the United States Court of Appeals for the Third Circuit in \textit{Steinhardt Group Inc. v. Citicorp}\textsuperscript{97} found that a limited partnership interest was not a security.\textsuperscript{98} \textit{Steinhardt} involved a highly structured securitization transaction that required defendant Citicorp to create a limited partnership, Bristol Oaks, L.P. (Bristol), that would serve as an investment vehicle for issuance of both debt and equity securities to investors.\textsuperscript{99} Bristol issued equity securities in the form of limited partnership interests.\textsuperscript{100} Bristol had one buy general partners' interests removed plaintiffs' limited partnership interests from protection under securities law).

93. \textit{Id.} at 1176.

94. \textit{See id.} at 1177 (stating that "we cannot agree with respondents that the Acts were intended to cover only 'passive investors' and not privately negotiated transactions involving the transfer of control to entrepreneurs" (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 692 (1985))).

95. \textit{Id.}

96. \textit{Id.} at 1178; \textit{see} Garrison & Knoepfle, \textit{supra} note 10, at 627 (analyzing previous Seventh Circuit opinion \textit{Goodman v. Epstein}, 582 F.2d 388 (7th Cir. 1978)). \textit{Goodman} suggested that a party can overcome the presumption that limited partnership interests are securities by showing a "significant degree of managerial control" by the limited partners. Garrison & Knoepfle, \textit{supra} note 10, at 627. The presumption may be overcome if the limited partners are not relying on the general partners' managerial efforts to obtain profits from the enterprise. \textit{Id.} at 627-28.

97. 126 F.3d 144 (3d Cir. 1997).

98. \textit{See} Steinhardt Group Inc. v. Citicorp, 126 F.3d 144, 155 (3d Cir. 1997) (finding that limited partner retained pervasive control and cannot be passive investor for purposes of investment contract analysis). In \textit{Steinhardt}, defendant Citicorp created a limited partnership for the purpose of engaging in a securitization transaction. \textit{Id.} at 146. Steinhardt was a limited partner with a 98.79% ownership interest. \textit{Id.} at 145. The Limited Partnership Agreement (LPA) restricted the managing partner's right to take material actions without the consent of a majority of the partners. \textit{Id.} at 153. Because Steinhardt alone constituted a majority of the partners, Steinhardt's consent was a prerequisite for material action. \textit{Id.} at 154. Steinhardt could also remove and replace the general partner without notice. \textit{Id.} Because of the power provided to Steinhardt under the LPA, the court deemed Steinhardt's interest significant and thus, not a security. \textit{Id.} at 155.

99. \textit{Id.} at 146.

100. \textit{Id.} Bristol issued debt securities in the form of nonrecourse bonds. \textit{Id.}
general partner and two limited partners. Steinhardt, the party alleging securities laws violations, was a limited partner with a 98.79% ownership interest in Bristol. In deciding whether Steinhardt’s limited partnership interest in Bristol constituted an investment contract, and thus a security, the court focused on the Limited Partnership Agreement (LPA) to determine who exercised control in generating profits. The LPA restricted the managing partner’s right to take material actions without the consent of a majority of the partners. Because the LPA defined "Majority of the Partners" as partners holding more than a fifty percent interest in Bristol, Steinhardt alone constituted a majority. Thus, Steinhardt had to consent before Bristol could take any material action. Steinhardt also had the power to remove and to replace the general partner without notice. Given these facts, the court held that Steinhardt’s powers under the LPA "were not nominal, but rather, were significant and, thus, directly affected the profits it received from the Partnership." Therefore, Steinhardt’s limited partnership interest was not an investment contract.

### III. Modern Partnership Law

As illustrated above, specific factual circumstances are very important in determining whether a partnership interest is a security. Some courts, however, invariably approach securities cases with preconceived notions that a partnership interest is or is not a security based solely on the type of partnership involved. This Part discusses the minutiae of modern partnership law and demonstrates that changes in the law provide significant flexibility in forming partnerships. This flexibility masks formal categories such that distinctions based solely on form have little basis. Thus, courts should re-examine whether traditional notions of partnership provide an adequate framework for securities law analysis.

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101. Id.
102. Id. at 145.
103. Id. at 153-54.
104. Id. at 153.
105. Id. at 154.
106. Id.
107. Id.
108. Id. at 155.
109. Id.
110. See Goodwin v. Elkins & Co., 730 F.2d 99, 103 (3d Cir. 1984) (suggesting that general partnership interests are per se not securities because of power provided in state partnership law).
A. General Partnerships Under RUPA

Until recently, the Uniform Partnership Act (UPA) provided the basic format from which states derived their partnership statutes. Adopted in 1994, the Revised Uniform Partnership Act (RUPA) is in many ways similar to UPA. There are, however, some significant differences. UPA Section 18 contains default rules that establish the rights and duties of partners in relation to the partnership and makes those rules subject to modification by the partnership agreement. Under UPA Section 18, only certain rights and duties are subject to change by the partnership agreement and other duties, such as a partner’s fiduciary duty, are nonwaivable. In contrast, RUPA Section 103 clearly grants broad contractual freedom followed by a short, exhaustive list of rights and duties that the partnership agreement may not modify.

111. Similarities between UPA and RUPA include the following: (1) the definition of "partnership" in UPA Section 6 and in RUPA Section 101(6), (2) rules governing partnership formation in UPA Section 7 and in RUPA Section 202, and (3) characterization of partner’s interest as personal property in UPA Section 26 and in RUPA Section 502.

112. See UPA (1914) § 18 (providing that "[t]he rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them," by rules in Section 18).

113. See Wartski v. Bedford, 926 F.2d 11, 20 (1st Cir. 1991) (stating that fiduciary duty of partners is integral part of partnership and that words of partnership agreement cannot negate fiduciary duty).

114. RUPA (1996) § 103. Section 103 provides in pertinent part:

(a) Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

(b) The partnership agreement may not:

(1) vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all of the partners;
(2) unreasonably restrict the right of access to books and records under Section 403(b);
(3) eliminate the duty of loyalty under Section 404(b) or 603(b)(3), but:
   (i) the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or
   (ii) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;
(4) unreasonably reduce the duty of care under Section 404(c) or 603(b)(3);
(5) eliminate the obligation of good faith and fair dealing under Section 404(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable; . . .
RUPA's break from the statutory regime of UPA is subtle, yet important. The provisions in UPA Section 18 were clearly subject to change by the partnership agreement. Other sections, such as UPA Section 20, which deals with a partner's right to demand information concerning the partnership, did not mention the partnership agreement. UPA's silence about whether some provisions were subject to change resulted in inconsistent court decisions. RUPA attempts to correct this flaw by clearly identifying provisions the partnership agreement may modify. This clarity confirms the ability to create partnerships with strong centralized management where some partners have virtually no power to participate in management. This lack of power reduces the ability of partners to protect adequately their investments and thus implicates securities law because insufficient power suggests reliance on the efforts of others.

One primary safeguard protecting partners under the UPA regime was the requirement of unanimous consent for undertaking extraordinary matters. Extraordinary matters include amending the partnership agreement and other matters outside the ordinary course of the partnership's business. Although UPA did not specifically provide rules regarding extraordinary matters, courts routinely required the partners' unanimous consent for extraordinary actions. RUPA allows partnerships to eliminate completely the unanimous consent requirement for extraordinary matters. Eliminating a general partner's

(10) restrict rights of third parties under this [Act].

Id.  

115. See supra note 112 (providing language from UPA Section 18).

116. UPA § 20. Section 20 provides: "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." Id.

117. See ROBERT W. HILLMAN ET AL., GENERAL AND LIMITED LIABILITY PARTNERSHIPS UNDER THE REVISED UNIFORM PARTNERSHIP ACT 21 (1996) (stating that UPA silence held to preclude modification in some situations but not in others).

118. Id.

119. See infra notes 121-159 and accompanying text (discussing creation of stripped general partners).

120. See supra notes 48-55 and accompanying text (discussing "efforts of others" test).

121. See RUPA (1996) § 401 cmt. 11 (discussing extraordinary matters and general treatment under UPA).

122. See id. (equating "extraordinary matters" with matters outside ordinary course of partnership business and amendments of partnership agreement).

123. Id. (citations omitted).

124. See id. § 401(j) (providing that "act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the
ability to halt extraordinary matters is the first step toward creating a stripped general partner.

In addition to the unanimous consent rule for extraordinary matters, all other rights and duties enumerated in RUPA Section 401 are subject to modification or complete elimination. Applying the broad freedom of contract granted in RUPA Section 103 to the rights and duties in RUPA Section 401, a partnership agreement may, among other things, eliminate a partner’s right to share in partnership profits, eliminate a partner’s right to participate in the management and conduct of the business, and eliminate the unanimous consent requirement for adding new partners. RUPA clearly provides tools that allow a partnership to eliminate the essential attributes normally associated with general partners. Indeed, under RUPA, a partnership can completely strip a partner of meaningful partnership powers and yet the partner could remain personally liable for partnership obligations.

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125. See id. § 103 (providing broad general rule that default rules in RUPA are subject to modification or elimination and excepting no RUPA Section 401 provisions from general rule).

126. See id. § 401(b) (providing that each partner is entitled to share equally in partnership profits).

127. See id. § 401(f) (providing that each partner has equal management rights).

128. See id. § 401(i) (providing that all partners must consent for person to become partner).

129. See id. § 306(a) (stating that "all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law"). Notwithstanding joint and several liability of partners authorized under RUPA Section 306, RUPA places restrictions on a judgment creditor’s access to assets of partners. Id. § 307(d). RUPA Section 307 provides in part:

(c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner’s assets unless there is also a judgment against the partner.

(d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless the partner is personally liable for the claim under Section 306 and:

(1) a judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) the partnership is a debtor in bankruptcy;

(3) the partner has agreed that the creditor need not exhaust partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court’s equitable powers; or
In addition to allowing the partnership agreement to restrict a partner's power, RUPA allows restrictions on a partner's right to access information. RUPA Section 403(b) provides that a partnership shall provide its partners access to the partnership's "books and records." A partnership may not unreasonably restrict such access to "books and records." RUPA Section 403(c) provides partners with rights to access any information concerning the partnership's "business and affairs" unless the demand or information requested is unreasonable or improper. However, RUPA Section 403(c) is conspicuously absent from the RUPA Section 103(b) list of provisions not subject to change by the partnership agreement. Although the common law may independently provide partners with the right to access business information, RUPA, on its face, clearly allows elimination of a partner's right to access information concerning the partnership's business and affairs.

Partnerships may also restrict a partner's power by filing statements of partnership authority pursuant to RUPA Section 303. The purposes of

(5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

130. Id. § 103(b). Section 103(b) expressly prohibits an unreasonable restriction on a partner's right to access "books and records" under RUPA Section 403(b), but does not prohibit restrictions on a partner's right to access information concerning the partnership's "business and affairs" under RUPA Section 403(c).

131. Id. § 401(b). Section 401(b) also provides access to a partner's agents and attorneys, and former partners and their agents and attorneys for the period during which they were partners. Id. For a discussion of what the term "books and records" includes, see HILLMAN ET AL., supra note 117, at 130-31 (concluding that "books and records" includes records beyond mere financial records).


133. Id. § 403(c). The partner or partnership subject to the demand for information bears the burden of showing that the demand is unreasonable or improper. Id. § 403 cmt. 3.

134. See id. § 103(b) (omitting RUPA Section 403(c) from list of provisions not subject to modification by partnership agreement).


136. See RUPA § 403(c) (providing that partnership shall furnish partner with information concerning partnership business and affairs). But see RUPA § 103 (providing broad rule that all default rules in RUPA are subject to change or elimination if not included in Section 103(b)). The information rights provision in Section 403(c) is not among those provisions enumerated in Section 103(b). Id.

137. See id. § 303(a)(2) (providing that partnership may file statement of partnership authority that states authority or limitations on authority of its partners to enter into transactions
RUPA Section 303 are threefold: it creates a system for filing standard business documents,\(^\text{138}\) it binds the partnership to extraordinary grants of authority to partners in real property transfers,\(^\text{139}\) and it binds third parties to restrictions on authority of partners.\(^\text{140}\) A partnership may file a statement that grants or limits the authority of some or all of its partners to transact with third parties on behalf of the partnership.\(^\text{141}\) Statements of partnership authority memorialize grants or restrictions of authority so as to provide certainty to third parties.\(^\text{142}\) Statements of authority also impact the rights and remedies of third parties who transact with partners named in a statement. In real property transfers, statements of authority, if properly filed, provide third parties with constructive notice that certain partners have no authority to transfer real property on behalf of the partnership.\(^\text{143}\) In all other transactions with partners, a third party’s remedy is curtailed only if he has actual notice of a limitation contained in a filed statement.\(^\text{144}\)

One might think it unlikely that a prospective general partner would sign a partnership agreement providing almost no power with which to protect his partnership interest. In some very large partnerships in which prospective partners have weak bargaining positions, they must agree, however, to have limited power if they want to become a partner. The partnership agreement

\(^{138}\) See HILLMAN ET AL., supra note 117, at 94 (noting that filing system allows third parties to record instruments to protect themselves when dealing with partnerships and provides assurance to third parties that partner has actual authority to act on behalf of partnership).

\(^{139}\) See id. (noting that third parties have statutory right to rely on statements granting partners extraordinary authority to act for partnership).

\(^{140}\) Compare RUPA (1996) § 303(e) (providing that third parties have constructive notice of limitation on partner’s right to transfer real property if statement of authority is properly filed) with RUPA § 303(f) (providing general rule that statement of authority does not impart constructive notice on third parties).

\(^{141}\) RUPA § 303(a)(2).

\(^{142}\) See HILLMAN ET AL., supra note 117, at 94 (stating that third parties (for example, lenders, landlords, and sellers) often require partnerships to submit names of all partners with authority to bind partnership and that filing system eliminates this step and binds partnership to authority granted in statement).

\(^{143}\) RUPA § 303(e). Section 303(e) provides:

A person not a partner is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is of record in the office for recording transfers of that real property.

\(^{144}\) See id. § 303(f) (providing general rule that third parties are "not deemed to know of a limitation on the authority of a partner merely because the limitation is contained in a filed statement").
in *Simpson v. Ernst & Young*\(^{145}\) provides a particularized example of how a partnership can strip a partner of the essential attributes traditionally associated with general partners.\(^{146}\)

The *Simpson* case involved the merger of two large accounting firms, Ernst & Whinney and Arthur Young & Co., forming a 2200 partner mega-firm styled Ernst & Young.\(^{147}\) Simpson, a former managing partner of Arthur Young’s Cincinnati office, became a partner in Ernst & Young and served as Director of Entrepreneurial Services in Cincinnati.\(^{148}\) The partnership structure of Ernst & Young involved a highly centralized management scheme and included general partners with little or no voice in the firm.\(^{149}\) The court held that for the purposes of the Employee Retirement Income Security Act (ERISA) and the Age Discrimination in Employment Act (ADEA), Simpson was in economic reality an employee and not a partner.\(^{150}\)

Of particular interest to the court was the firm’s Management Committee.\(^ {151}\) The Management Committee consisted of ten to fourteen members who exercised exclusive control over the firm’s business and affairs, including the

\(^{145}\) 100 F.3d 436 (6th Cir. 1996).

\(^{146}\) See *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996) (comparing partnership agreement to principles codified in UPA and concluding that lack of indicia of ownership qualifies partner as employee for purposes of Employee Retirement Income Security Act and Age Discrimination in Employment Act claims). In *Simpson*, the Sixth Circuit determined relevant factors for distinguishing between an "employee" and a "partner" for purposes of the Employee Retirement Income Security Act (ERISA) and the Age Discrimination in Employment Act (ADEA). *Id.* at 444. The plaintiff, a general partner at Ernst & Young, brought suit alleging damages pursuant to ERISA and ADEA. *Id.* at 438. Ernst & Young raised as a defense Simpson’s status as a "partner." *Id.* Although Simpson signed a document titled "Partnership Agreement," he argued that in reality he was merely an employee entitled to protection under federal law. *Id.* at 440. The *Simpson* court engaged in a behind-the-documents analysis in determining whether Simpson qualified as an employee. *Id.* at 444. In reaching its conclusion, the court enumerated several common law attributes of partners as codified in the Uniform Partnership Act. *Id.* These attributes included the following: (1) the right to participate in management, (2) the right to act as an agent of other partners, (3) personal liability, (4) a fiduciary relationship among partners, (5) using the term "co-owners" to indicate each partner’s "power of ultimate control," (6) participating in firm profits and losses, (7) an investment in the firm, (8) part ownership of the firm’s assets, (9) meaningful voting rights, (10) the ability to control and operate the business, (11) compensation calculated as a percentage of the firm’s profits, (12) employment security, and (13) other similar indicia of ownership. *Id.* After finding most of these attributes missing, the court decided that Simpson qualified as an employee and could bring suit under ERISA and ADEA. *Id.*

\(^{147}\) *Id.* at 440, 445.

\(^{148}\) *Id.* at 440.

\(^{149}\) *Id.* at 441.

\(^{150}\) *Id.* at 444.

\(^{151}\) *Id.* at 441-42.
admission and discharge of all personnel. In addition, the Management Committee was a self-perpetuating entity, with the Committee appointing its chairman and, in turn, the chairman appointing its new members. 

In addition to creating a strong centralized management scheme, the partnership agreement also curtailed almost all "meaningful attributes" of Simpson's status as a partner. For example, the trial judge found that Simpson had no authority to participate in decisions to admit or discharge new partners, participate in decisions regarding partner compensation, vote for members or the chairman of the Management Committee, or share in the firm's profits. Clearly, Simpson lacked the kind of authority that general

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152. Id. A centralized management structure is permissible under RUPA because the default rule that provides partners with equal management rights is subject to change by the partnership agreement. RUPA (1996) § 103.

153. Simpson v. Ernst & Young, 100 F.3d 436, 442 (6th Cir. 1996).

154. Id.

155. Id. at 441. This runs contrary to the default rule in RUPA Section 401(i) which provides that all partners must consent to admission of new partners. RUPA § 401(i). This default rule is, however, subject to modification or elimination pursuant to RUPA Section 103. See id. § 103(b) (providing exhaustive list of things partnership agreement may not do and not including RUPA Section 401(i)).

156. Simpson, 100 F.3d at 441. Participating in decisions regarding partner compensation might be among the powers normally given to partners to participate in the firm's management and control. See RUPA § 401(f) (providing each partner with equal rights in management and conduct of partnership's business). The rule in RUPA Section 401(f) is, however, subject to modification or elimination pursuant to RUPA Section 103. See id. § 103(b) (omitting RUPA Section 401(f)).

157. Simpson, 100 F.3d at 441. There is nothing inherently suspect about a management committee controlling firm operations. In large law and accounting firms with hundreds of partners, requiring each partner to vote on every management decision would be impractical. Administrative feasibility and economic efficiency problems force some centralization of management in large firms. Often in these cases, partners vote for management committee members and thus participate in management through their representatives. In Simpson, however, the partnership agreement even removed Simpson's power to vote for management. Id. at 441-42. RUPA Section 103(b) places no restrictions on the degree to which the partnership agreement may curtail a partner's right to participate in management and control. RUPA § 103(b).

158. Simpson, 100 F.3d at 441. The default rule in RUPA Section 401(b) entitles each partner to an equal share of the firm's profits. RUPA (1996) § 401(b). This rule is, however, subject to modification pursuant to RUPA Section 103. Id. § 103(b). In large partnerships, there are inevitably some partners with more seniority than others, and thus some partners earn a greater share of the firm's profits. Modifying a partner's share of profits is common, but entirely eliminating a partner's right to profits is problematic. At least one commentator has questioned the Simpson court's factual determination that Simpson did not share in the firm's profits. See Sixth Circuit Holds that Partners in an Accounting Firm are Employees for Purposes of ERISA and the ADEA, 6 No. 1 ERISA LITIG. REP. 16, 18 (1997) (discussing Simpson's compensation scheme and suggesting that he did share in firm profits). According to this article, Simpson received a fixed "salary" and an additional "allocation" at year's end based on firm profits. Id.
partners traditionally hold. Although *Simpson* may be an extreme case, the degree to which the Ernst & Young partnership agreement restricted Simpson's authority provides a clear example of a stripped general partner.

In summary, this section illustrates the subtle changes in modern general partnership law that enable partnerships to modify drastically or to even eliminate those essential attributes traditionally associated with being a general partner. For example, a partnership agreement may eliminate a partner's right to vote on important business decisions, eliminate his right to share in profits, and eliminate his access to information concerning the partnership's business and affairs. General partnership law provides partnerships with maximum flexibility to shape management and organizational structure in almost any way imaginable. Flexibility, however, may solve some problems while creating others not imagined.159

**B. Limited Partnerships Under RULPA**

Limited partnerships developed to allow noncorporate profit-sharing investors to limit their liability to the amount they contributed to the firm.160 Initially, limited partnership statutes permitted limited partners to obtain limited liability and to participate in management.161 Thereafter, courts looked toward limited partnerships with skepticism because conventional wisdom suggested that those participating in profits during prosperity should likewise suffer losses upon failure.162 To provide some certainty in this area, the Committee on Commercial Law drafted the Uniform Limited Partnership Act (ULPA) in 1916.163 ULPA clarified limited partnership law significantly, but its control provision proved somewhat vague.164 ULPA provided that a limited partner exercising control might be treated as a general partner, but did not define the word "control."165

159. Potential problems might include actions under employment discrimination laws or actions for securities fraud under federal or state securities laws.

160. See Comment, supra note 3, at 895-96 (providing brief history of limited partnerships).

161. See id. (discussing first limited partnership statute, which was enacted in New York in 1822).

162. See id. (discussing degree to which courts scrutinized limited partnership formation and required strict adherence to statutory provisions to maintain limited partnership status).

163. 3 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP 11:20 (1988) [hereinafter BROMBERG & RIBSTEIN, PARTNERSHIP]. The Committee on Commercial Law wrote ULPA and the National Conference of Commissioners on Uniform State Laws presented it. Id.

164. ULPA (1916) § 7. Section 7 provides: "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." Id.

165. Id. For an in-depth discussion of activities that may or may not result in loss of
The Revised Uniform Limited Partnership Act of 1976 and the 1985 amendments thereto (collectively RULPA) clarify the meaning of control. Under RULPA, a limited partner may still be treated as a general partner if he participates in control of the firm, but the limited partner is only liable to those third parties who reasonably believe that the limited partner is a general partner. Furthermore, for the limited partner to lose limited status, third parties must base their reasonable beliefs upon the limited partner's conduct. Thus, the clear import of RULPA is that a limited partner may control the business without incurring personal liability so long as he notifies third parties with whom he is dealing that he is not a general partner.

The latest proposed revision to RULPA would further encourage limited partners to participate in firm management. A proposed draft of RULPA Section 303 entirely eliminates previous language and provides instead that a limited partner is not liable for partnership obligations "even if" he participates in management and control. The current trend of allowing limited partners to participate actively in firm management undermines the traditional tradeoff between control and liability and serves to blur distinctions between general and limited partnerships. Blurred distinctions between general and limited partnerships suggest that traditional presumptions applied in securities law analysis may no longer be valid.

C. Limited Liability Partnerships Under RUPA

1. Background

The recent advent of limited liability partnerships (LLPs) coupled with the freedom of contract permitted under RUPA effectively eliminate the traditional tradeoff between control and liability. Both the corporate and traditional limited partnership forms exemplify this tradeoff. A corporation's limited status for participation in "control," see 3 BROMBERG & RIBSTEIN, PARTNERSHIP, supra note 163, at 15:116-15:130.

166. See RULPA (1976) § 303(b) (providing list of activities that do not qualify as participating in control).

167. Id. § 303(a).

168. Id.

169. Id. In addition, RULPA also provides a nonexhaustive list of activities that do not qualify as participating in the control of the business. Id. § 303(b).

170. Id. § 303(a) (Tentative Draft No. 2, 1998).

171. See supra Parts II.B.1-2 (discussing traditional treatment of general and limited partnership interests under federal securities law). Traditionally, courts presume that limited partnership interests are securities and that general partnership interests are not securities. See Williamson v. Tucker, 645 F.2d 404, 422 (5th Cir. 1981) (suggesting that general partnership interests presumptively are not securities); SEC v. Murphy, 626 F.2d 633, 640-41 (9th Cir. 1980) (suggesting that limited partnership interests presumptively are securities).
shareholders have limited personal liability and risk nothing beyond their initial investment. 172 Traditionally, in exchange for limited liability, the shareholders give up their right to manage directly corporate affairs and instead must exercise their power by electing directors. 173 Limited partners obtain limited liability by giving up management rights in the business. 174 Traditionally, if a limited partner went beyond his rights and participated in the control of the business, he lost limited status and became personally liable for partnership obligations. 175 In contrast to corporations and limited partnerships, LLPs provide partners with limited liability 176 without restricting management rights.

172. See MODEL BUS. CORP. ACT § 6.22(b) (1984) [hereinafter MBCA] (providing that shareholder is not personally liable for corporate obligations, but may become liable by reason of his own acts or conduct).

173. See DOUGLAS M. BRANSON, CORPORATE GOVERNANCE 2 (1993) (stating that power to elect directors is power most central to shareholder’s role). The MBCA allows corporations to change this traditional separation between shareholders and managers in a corporation. MBCA § 7.32. The MBCA authorizes shareholder agreements among the shareholders that eliminate entirely the board of directors, thereby permitting direct shareholder management. Id. § 7.32(a)(1). Obviously, administrative feasibility limits such a management scheme to closely held corporations.

174. ULPA (1916) § 7; RULPA (1976) § 303(a). Modern limited partnership statutes further erode the traditional tradeoff between control and liability in limited partnerships. See supra notes 166-71 and accompanying text (discussing degree to which limited partner may participate in control of firm).

175. See ULPA § 7 (providing for loss of limited status if limited partner participates in control of business). But see RULPA § 303 (replacing ULPA Section 7). RULPA Section 303 adopted the idea that a limited partner forfeits limited status by participating in control of the business. Id. § 303(a). However, RULPA Section 303 declares that a limited partner participating in control of the business "is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner." Id. This language takes much of the bite out of the traditional tradeoff between control and liability and suggests that a limited partner may engage in unlimited control without fear of losing limited status as long as he discloses to third parties that he is a limited partner and not a general partner. Furthermore, a proposed revision to RULPA Section 303 would provide limited liability for a limited partner "even if" he participates in the management and control of the firm. RULPA § 303(a) (Tentative Draft No. 2, 1998).

176. RUPA (1996) § 306(c) provides:

An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such a partnership obligation solely by reason of being or so acting as a partner. This subsection applies notwithstanding anything inconsistent in the partnership agreement that existed immediately before the vote required to become a limited liability partnership under Section 1001(b).

Id.

177. See id. § 401(f) (providing that each partner has equal rights in management and conduct of partnership). This rule, however, is merely a default rule and is subject to modifica-
LLPs originated in Texas in response to the savings and loan crisis and several lawsuits imposing personal liability on partners in various law and accounting firms.\(^{178}\) Although styled as "limited liability partnerships," LLPs are simply general partnerships that obtain limited liability for their partners by filing a registration in their respective state.\(^{179}\) Proving to be very popular among state legislatures, LLP provisions have been enacted in almost every state and in the District of Columbia.\(^{180}\) In most of these states, any general partnership may register as an LLP, but California, Nevada, New York, and Oregon limit LLP election to partnerships that provide professional services.\(^{181}\) Because LLP statutes may vary from state to state, this Note focuses its discussion on the 1996 Limited Liability Partnership amendments to RUPA.

A general partnership may become an LLP pursuant to RUPA Section 1001 by filing a statement of qualification.\(^{182}\) Upon filing the statement of qualification, the LLP must include in its name words identifying its limited liability status.\(^{183}\) Although uniform in name, the nature of the liability shield afforded partners in LLPs varies from state to state.\(^{184}\) Over the past five years, three generations of LLP statutes have evolved with ever broadening by the partnership agreement; see also id. § 103(a) (providing that relations among partners and between partners and partnership are governed by partnership agreement); supra Part III.A (discussing provisions under RUPA subject to modification or elimination).

178. See HILLMAN ET AL., supra note 117, at 301 (stating that LLPs developed in response to Resolution Trust Corporation and Federal Deposit Insurance Corporation holding lawyers and accountants liable for losses caused by failed savings and loan associations).

179. See RUPA § 1001 (authorizing statements of qualification enabling partnerships to become LLPs).

180. As of January 1998, Arkansas, Vermont, and Wyoming were the only states that had not adopted limited liability partnership provisions.

181. See CAL. CORP. CODE §16101(6) (West 1991 & Supp. 1998) (providing that only accounting firms, law firms, and firms related to registered accounting or law firms may register as limited liability partnerships); NEV. REV. STAT. § 87.020(7) (1997) (providing that only firms formed for purpose of rendering professional services may register as limited liability partnerships); N.Y. PARTNERSHIP LAW, § 121-1500(a) (McKinney 1988 & Supp. 1997) (providing that only firms authorized to render professional services in New York may register as limited liability partnerships); OR. REV. STAT. § 68-110(3) (1995) (providing that registration as limited liability partnership is permissible if firm provides professional services or is affiliated with domestic or foreign limited liability partnership that provides related or complementary services).

182. See RUPA (1996) § 1001 (providing rules for filing and content requirements for statements of qualification).


ing liability shields. RUPA includes the third generation comprehensive liability shield giving partners protection from direct or indirect liability for partnership debts and obligations whether arising from tort, contract or otherwise. This broad liability shield does not, however, protect a partner from liability stemming from his own negligence, malpractice, misconduct, or wrongful acts.

2. Comparison of LLPs to General Partnerships

RUPA defines an LLP explicitly as a "partnership" that has achieved limited liability by filing a statement of qualification. Thus, RUPA’s default rules for general partnerships apply equally to LLPs and provide for many similarities between general partnerships and LLPs. There are, however, some important differences. Unlike a general partnership, forming an LLP requires certain formalities and thus formation cannot occur inadvertently. The most important difference between general partnerships and LLPs, however, is the limited liability shield, which may affect other aspects of the partnership.

Obtaining limited liability will likely affect the distribution of partners’ management rights in the partnership agreement. Conventional wisdom suggests that partners with limited liability are less concerned with active participation in the management and in the control of the business. Thus, becoming an LLP may encourage centralization of management.

185. Id. First generation statutes provided a liability shield for non-negligent partners who had no notice or knowledge of the misconduct that created the liability for the partnership. Id. Thus, these first generation statutes did not entirely shield partners from others’ negligence. Id. at 155. Second generation statutes broadened the liability shield to protect partners from liability stemming from another partner’s misconduct. Id. These statutes also included protection from indirect liability by way of contribution or indemnification. Id. Third generation statutes provide an even broader shield protecting partners from personal liability for all partnership debts and obligations. Id.

186. See RUPA § 306(c) (providing for broad limited liability shield). For the exact language of RUPA Section 306(c), see supra note 176.

187. See id. § 306 cmt. 3 (stating that partners remain personally liable for their own misconduct).

188. Id. § 101(5).

189. See BROMBERG & RIBSTEIN, LLPs, supra note 47, at 17 (discussing formalities such as registration and name requirements).

190. See id. at 22 (noting that express statutory differences may support other differences between general partnerships and LLPs).

191. See id. at 77-85 (suggesting changes partners should consider making to partnership agreement upon obtaining LLP status).

192. See id. at 82 (noting that LLP registration does not require restructured management rights but may justify judicial enforcement of centralized management schemes). Professors Bromberg and Ribstein point out, however, that an LLP should be careful to not jeopardize its status as a partnership under employment discrimination, tax, and securities law. Id. at 82-83.
registration may also encourage partnerships to reallocate profit distribution plans to reflect increased risk to partners in more liability-prone practice areas.\footnote{193} The increased flexibility provided in modern partnership law and the development of limited liability partnerships serves to blur form-based distinctions between business entities.\footnote{194} It is now possible to have general partners with almost no power and limited partners exercising pervasive control without incurring personal liability.\footnote{195} Part IV discusses the effect this flexibility has on investment contract analysis.

**IV. Investment Contract Analysis Under Modern Partnership Law**

**A. Diminished Importance of Formal Categories**

The Supreme Court often emphasizes the importance of economic reality in defining the word "security."\footnote{196} In carrying out the Supreme Court's directions, the Fifth Circuit, in *Williamson v. Tucker*,\footnote{197} developed a test designed to allow substance to prevail over form in some situations.\footnote{198} However, the

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\footnote{193} See id. at 83 (discussing impact of LLP election on profit sharing ratios).

\footnote{194} See supra Part III.A (discussing freedom of contract under RUPA and creation of general partners with little or no managerial control); see also supra Part III.B (discussing changes to RULPA that allow limited partners more ability to exercise control without losing limited liability).

\footnote{195} See supra Parts III.A-III.B (discussing changes in law that affect traditional tradeoff between control and liability in partnerships).

\footnote{196} See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (stating that in defining security, "form should be disregarded for substance and the emphasis should be on economic reality"); SEC v. W. J. Howey, Co., 328 U.S. 293, 298 (1946) (discussing definition of investment contract under state law and stating that "[f]orm was disregarded for substance and emphasis was placed upon economic reality").

\footnote{197} 645 F.2d 404 (5th Cir. 1981). As discussed above in Part II.B.1, *Williamson* involved the purchase of joint venture interests in real estate development projects. Id. at 408. For a discussion of the facts and the result in *Williamson*, see supra notes 57-70 and accompanying text.

\footnote{198} See Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981) (providing three part test). The *Williamson* court found that a general partnership or joint venture interest might be deemed an investment contract, and thus a security, if the investor can establish that:

1. an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or
2. the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or
3. the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

*Id.*
Williamson court explicitly acknowledged the importance it placed on form. The court stated that a general partner who claims his interest is a security has a "difficult burden to overcome" because the general partner retains substantial control over his investment. But general partners do not always retain substantial control because RUPA permits a partnership agreement to strip a general partner of power and to thus provide the partner with no control over his investment. A partner with no power should not face a "difficult burden" in proving his interest is a security. Furthermore, the first part of Williamson's test provides that a general partnership interest might be a security if the partnership agreement distributes power "as would a limited partnership." But limited partnerships do not distribute power according to any one particular management scheme. Instead, power distribution depends on the terms of the limited partnership agreement, and RULPA permits limited partners to exercise significant control over partnership affairs. The Williamson court clearly placed significant importance on formal categories, but Part III of this Note demonstrates that form has little meaning.

To support the assertion that the labels general partnership and limited partnership now have little meaning, compare the underlying general partnership in Simpson v. Ernst & Young with the limited partnership in Steinhardt Group Inc. v. Citicorp. In Simpson, the typical general partner could not vote for management committee members, could not participate in compensation decisions, could not share in firm profits, and had no part in decisions to admit new partners. In contrast, the limited partner in Steinhardt held a 98.79% ownership interest and retained pervasive control over the partnership.

199. See Ribstein, Private Ordering, supra note 71, at 49-50 (suggesting that Williamson comes close to establishing per se test that general partnership interests are not securities).
200. Williamson, 645 F.2d at 424.
201. See supra Part III.A (discussing RUPA and flexibility provided to create stripped general partners).
202. Williamson, 645 F.2d at 424.
203. See supra Part III.B (discussing RULPA and ability of limited partners to exercise control over partnership affairs).
204. See Park McGinty, The Limited Liability Company: Opportunity for Selective Securities Law Deregulation, 64 U. Cin. L. Rev. 369, 374 (1996) (stating that formal categories become less useful when they mask substantive economic reality); see also supra Part III (discussing effect of modern partnership statutes).
205. 100 F.3d 436 (6th Cir. 1996); see supra notes 145-158 and accompanying text (discussing Simpson).
206. 126 F.3d 144 (3d Cir. 1997); see supra notes 97-109 and accompanying text (discussing Steinhardt).
207. See supra notes 154-158 and accompanying text (discussing degree to which partnership agreement curtailed Simpson's power).
208. See Steinhardt Group Inc. v. Citicorp, 126 F.3d 144, 154 (3d Cir. 1997) (stating that
These cases demonstrate that the words general partnership and limited partnership have lost much of their descriptive value and now are merely labels. Courts should abandon presumptions based entirely on these labels.

Form-based presumptions are convenient, but they make little sense. Congress designed the securities laws to provide protection for investors who lack the ability to protect themselves. Focusing on form rather than substance undermines investor protection by providing protection to savvy entrepreneurs who possess the knowledge to choose the favored form. When elevating substance over form, it is necessary to determine which factors are most important. The following section addresses this issue.

B. Modified Williamson Proposal

This Note proposes that courts should disregard formal categories and adopt a modified Williamson test when determining whether an interest in a general, limited, or limited liability partnership is a security. The proposed test adopts the second and third factors from Williamson, modifies Williamson’s first factor to eliminate reference to a limited partnership, and adds a fourth factor focusing on the partnership’s size. Thus, under this proposed modified Williamson test, a general, limited, or limited liability partnership interest might be a security if the investor establishes that: (1) the partnership agreement leaves so little power in the hands of the partner that the partner...
cannot adequately protect his partnership interest;\textsuperscript{213} or (2) the partner has so little knowledge or experience with the partnership's business that he is incapable of intelligently exercising his partnership powers;\textsuperscript{214} or (3) the partner is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that the partner cannot reasonably replace the manager or otherwise exercise meaningful partnership powers;\textsuperscript{215} or (4) the partnership is so large and the partner's interest so small that he effectively has no influence over essential managerial functions.\textsuperscript{216} The following subsections discuss each modified \textit{Williamson} factor separately.

1. Partnership Agreement

Part one of the proposed modified \textit{Williamson} test states that a partnership interest might be a security if the investor establishes that the partnership agreement leaves so little power in the hands of the partner that the partner cannot adequately protect his partnership interest. Looking to the power given to partners in the partnership agreement is the logical starting point in a securities analysis because the partnership agreement provides the law for that partnership.\textsuperscript{217} Consider the partnership agreement in \textit{Simpson v. Ernst &...
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Young. Simpson provides a clear example of a partnership agreement that would satisfy the first part of the modified Williamson test.

The partnership agreement in Simpson severely restricted Simpson's power and hampered his ability to protect his partnership interest. Three key factors support classifying Simpson's partnership interest as a security. First, the agreement established a very strong centralized management structure in which a management committee exercised exclusive control over the firm's business and affairs. Generally, using a management committee in a large firm is not problematic because economic efficiency and administrative feasibility require some centralization of management. But in Simpson, the Management Committee was a self-perpetuating entity in which members of the committee appointed its chairman and the chairman, in turn, appointed its members. Because partners did not vote for Management Committee members, the committee was hardly a representative body. Second, the partnership agreement gave Simpson no right to participate in decisions to admit or discharge new partners. This factor is important because admission of new partners impacts the success of the enterprise and thus supports the assertion that Simpson relied on others to make essential managerial decisions that affected the success of the firm. Third, the partnership agreement curtailed Simpson's right to inspect partnership books and records. Re-

218. 100 F.3d 436 (6th Cir. 1996). See supra notes 145-158 and accompanying text (discussing Simpson and power held under partnership agreement).

219. See Simpson v. Ernst & Young, 100 F.3d 436, 441 (6th Cir. 1996) (discussing Simpson's lack of power within partnership). According to the trial judge, Simpson had no authority to (1) participate in admission or discharge of partners, (2) participate in determining partner compensation, (3) vote for Management Committee members or its chairman, (4) participate in firm profits or losses, (5) examine books and records unless authorized by the Management Committee, (6) sign promissory notes for the firm or pledge, assign, or transfer his partnership interest, (7) access various client accounts, or (8) participate in annual performance reviews. Id.

220. See id. at 441 (discussing Ernst & Young's Management Committee).

221. See 3 Bromberg & Ribstein, Partnership, supra note 163, at 6:60 (stating that centralization of management is common in large partnerships where there are too many partners for each to participate effectively in daily decision making).

222. See Simpson, 100 F.3d at 441 (discussing Ernst & Young's Management Committee).

223. See id. (reiterating trial court's findings of fact).

224. See SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 482 (9th Cir. 1973) (restating "efforts of others" test and providing that interest is security where those other than investor make undeniably significant and essential managerial efforts that affect success of enterprise).

225. See Simpson v. Ernst & Young, 100 F.3d 436, 441 (6th Cir. 1996) (stating that Simpson had no right to "examine books and records of the firm except to the extent permitted by the Management Committee"). Under RUPA, a partnership may restrict its partners' rights to access books and records as long as the restriction is reasonable. RUPA (1996) § 103(b)(2).
stricting a partner's right to information hampers his ability to protect adequately his partnership interest.

In contrast to the agreement in Simpson, a general or limited liability partnership agreement that largely adopts the RUPA default provisions easily satisfies the first part of the modified Williamson test. Such a partnership agreement provides each partner with equal voice in management and unfettered access to partnership information. In addition, all partners have to consent to admitting new partners into the partnership. An interest in this partnership is probably not a security because a partnership agreement that gives its partners significant powers provides persuasive evidence that partners are not relying primarily on the efforts of others for their profit.

Like general and limited liability partnership interests, a limited partnership interest will likely not be a security when the partnership agreement provides the limited partner with power sufficient to protect his investment. One of the most extreme examples of this power is when the partnership agreement gives a limited partner the right to remove and to replace a general or managing partner without cause. Such power provides limited partners with significant control because managers must be responsive to the limited partners or face removal. In small limited partnerships, removal power is probably enough to take the limited partnership interests outside securities law protection. But in large limited partnerships, the right to remove a general partner becomes attenuated and has little practical effect and thus should not rule out classification of limited partnership interests as securities. In some

226. See RUPA § 401 (providing default rules regarding partners' rights and duties).
227. See id. § 401(f) (providing that each partner has equal rights in management and conduct of partnership); see also id. § 403 (providing partner with right to access partnership books and records and other information concerning partnership's business and affairs).
228. See id. § 401(i) (providing that person may become partner only with consent of all partners).
229. If a partner does not rely on the efforts of others to obtain profit, his partnership interest is not an investment contract and, thus, not a security. See SEC v. W. J. Howey Co., 328 U.S. 293, 298-99 (1946) (announcing investment contract test and including "efforts of others" prong).
230. See Steinhardt Group Inc. v. Citicorp, 126 F.3d 144, 154 (3d Cir. 1997) (finding that partnership agreement provided limited partner with pervasive control over partnership management and determining that limited partnership interest was not security). For an in-depth discussion of Steinhardt, see supra notes 97-109 and accompanying text.
231. See 3 BROMBERG & RIBSTEIN, PARTNERSHIP, supra note 163, at 12:147 (discussing effects of limited partner's right to exercise control).
232. Id.
233. See id. (discussing removal power and its effect on securities law analysis).
234. See id. at 12:147-48 (discussing effect of removal power in large firms).
cases, limited partners are so reliant on the managing partner that removal, even if authorized by the partnership agreement, is not a realistic option. In those cases, removal power should not preclude securities law protection.

2. Partner's Knowledge and Expertise

Part two of the proposed modified Williamson test states that a partnership interest might be a security if the investor can establish that the partner has so little knowledge or experience with the partnership’s business that he is incapable of intelligently exercising his partnership powers. To some extent, the powers provided to a partner in the partnership agreement mean very little if the partner lacks the sophistication to use those powers.

Consider, for example, a lawyer who is a general partner in two separate partnerships. One partnership is a law firm in which the partner and his colleagues perform legal services. The efforts of others generate a portion of the partner’s profits, but assuming the partner has sufficient voice and access to information, he is probably not a security holder. His expertise as a lawyer provides him with the knowledge and ability to evaluate adequately and to exercise some control over his investment. In the second partnership, the partner is one of several professionals who purchased an interest in a wireless cable television business. He has no intention of actively participating in the management or operation of the business but merely expects to fund partially a startup venture with the expectation of future profits. He also lacks knowledge of the cable television industry and has none of the necessary equipment to perform the required work. Even though his interest is called a general partnership interest, in economic reality it is an investment, and federal securities laws should protect it.

235. See id. (discussing effect of removal right where limited partners depend on special expertise of managing partner).
236. Id.
237. See SEC v. W. J. Howey Co., 328 U.S. 293, 299-300 (1946) (placing emphasis on fact that partners lacked equipment or knowledge to successfully operate citrus groves).
238. See id. at 300 (suggesting that lack of partner expertise in partnership’s business is factor weighing in favor of finding that interest is security); see also SEC v. Telecom Mkgt., Inc., 888 F. Supp. 1160, 1166 (N.D. Ga. 1995) (finding that general partnership interests were securities where partnership agreement indicated that partners possessed real power, but evidence suggested that defendants targeted investors because of their ignorance of law, accounting, and wireless cable television industry).
239. See generally Telecom Mkgt., 888 F. Supp. 1160 (involving securities fraud violations and finding that general partnership interests in wireless cable television business are securities).
240. See id. at 1166 (finding that similar general partnership interest was security when investors lacked knowledge and equipment to successfully operate partnership’s business).
The wireless cable television example above demonstrates that courts must look not only to the investor's general business acumen, but also to the investor's knowledge of the partnership's particular business—especially when the partnership's business is highly specialized. In Bailey v. J.W.K. Properties, Inc., the court's decision turned on the specialized nature of the investment. Bailey involved a cattle crossbreeding venture in which the investors purchased cattle embryos from the promoter and the promoter agreed to raise and to market the resulting calves. The court decided that the plaintiffs' interests were investment contracts because practical limitations hindered the plaintiffs' ability to protect their investments. First, although the agreements gave the investors significant powers, the investors lacked the technical knowledge needed to successfully operate the business. Second, an economies of scale problem existed in that no single investor owned enough cattle to make crossbreeding profitable. Thus, the investors' dependence on each other and on the promoter limited the investors' ability to protect their investment. The court, therefore, found that the investors' interests were securities.

241. 904 F.2d 918 (4th Cir. 1990).

242. See Bailey v. J.W.K. Properties, Inc., 904 F.2d 918, 924-25 (4th Cir. 1990) (finding investment contract when lack of expertise of plaintiffs in cattle crossbreeding venture imposed practical limitations on plaintiffs' ability to protect their interests). In Bailey, the plaintiffs invested in a cattle crossbreeding program in which the plaintiffs bought embryos from the promoter and the promoter agreed to raise the resulting calves and to market them as they matured. Id. at 919. Although no formal partnership agreement existed, the court apparently considered the "Purchase Agreement" and the "Management Contract" together as a single joint venture, and thus applied a Williamson-type analysis focusing on investor sophistication and reliance on the promoter (parts two and three of the Williamson test). Id. at 924-25. The two agreements purportedly gave the investors significant control over the investment, but the court stated that "limiting the examination to the contract itself would provide an easy loophole through which sellers could circumvent federal securities law." Id. at 920, 922 n.6. The court based its decision that the interests were securities on two practical limitations. First, the plaintiffs had no experience in selecting embryos and had an extremely limited range of alternative sources of information. Id. at 924. Second, economies of scale prevented an individual investor from running a successful breeding operation and required the investors to pool their herds. Id. Based on the plaintiffs' lack of sophistication concerning cattle crossbreeding and their reliance on the promoter, the court found that the plaintiffs' interests were investment contracts and thus securities. Id. at 925.

243. Id. at 919.

244. See id. at 920 & n.4 (discussing plaintiffs' "substantial rights" and providing language from "Management Contract"). The investors' substantial rights included the right to direct the promoter's activities, to choose embryos, to terminate the management agreement, and to direct the sale of herds. Id. at 920.

245. See id. at 924 (stating that investors lacked expertise to make embryo selections and had limited access to other sources of information).

246. See id. at 924-25 (noting that case is similar to Howey in that program required participation of other investors with centralized coordination by promoter).

247. Id. at 925.
MODERN PARTNERSHIP INTERESTS AS SECURITIES

The investors' lack of expertise made them dependent on the promoter. This dependence is demonstrative of the interrelatedness between parts two and three of the modified Williamson test.

3. Partner's Dependence

Part three of the proposed modified Williamson test states that a partnership interest might be a security if the investor can establish that the partner is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot reasonably replace the manager or otherwise exercise meaningful partnership powers. Note that this phrasing is slightly different than the test that Williamson originally stated. The Williamson court did not include the word "reasonably" in its test, but elsewhere in its opinion the court indicated that the words "cannot replace" should be construed broadly. In discussing part three of its test, the court stated that the investors must allege that they were "incapable, within reasonable limits," of replacing the promoter. Such language indicates that the court intended its test to be interpreted realistically rather than rigidly. Thus, this Note inserts the word "reasonably" into its modified Williamson test.

Consider the facts in Bailey v. J.W.K. Properties, Inc. The investors in Bailey had the actual power to remove the promoter, but lacked the knowledge or expertise to operate the business effectively. A rigid application of part three of Williamson would have removed the protection of the securities laws. The Bailey court, however, recognized that although the investors had the power to remove the promoter, they could not reasonably replace him because of his special expertise and his knowledge of cattle cross-breeding.

248. See Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981) (providing part three of test and not including word "reasonably"). Part three of the original Williamson test stated that an interest might be a security if the partner is so dependent on the manager that "he cannot replace" him or otherwise exercise meaningful partnership powers. Id.

249. Id.

250. See id. at 425 (stating that plaintiffs must allege that partners were "incapable, within reasonable limits, of finding a replacement manager").

251. Id.

252. See supra note 215 and accompanying text (stating part three of modified Williamson test); see also Sobel, supra note 49, at 1349-51 (arguing for nonliteral interpretation of part three of Williamson and suggesting use of word "practically").

253. 904 F.2d 918 (4th Cir. 1990). See supra note 242 (providing facts and result in Bailey).

254. See Bailey v. J.W.K. Properties, Inc., 904 F.2d 918, 920 (4th Cir. 1990) (noting that investors had power to terminate management agreement).

255. See id. at 925 (stating that under circumstances, investors could not meaningfully exercise rights "theoretically available to them").
4. Partnership Size

Part four of the proposed modified Williamson test states that a partnership interest might be a security if the investor can establish that the partnership is so large and the partner's interest is so small that he effectively has no influence over essential managerial functions. Although it did not include this factor in its test, the Williamson court recognized that firm size may be a factor in an investment contract analysis. According to the Williamson court, at some point a partnership becomes so large that a partner's vote is more like a shareholder's vote in a corporation. As the number of partners in a partnership increases, each partner's vote becomes very attenuated, thus causing partners to rely substantially on others to make managerial decisions. This implicates Howey's "efforts of others" test and suggests that the partners' interests are securities.

C. General Comments Concerning Treatment of Limited Liability Partnership Interests

No federal courts have addressed the treatment of LLP interests under federal securities law. Surprisingly, commentators have written very little concerning this topic. The consensus among those broaching the issue is that courts should treat LLP interests like general partnership interests because LLPs are simply general partnerships that elect to obtain limited liability for their partners. But the freedom of contract provided in modern partnership
law makes such categorical grouping based entirely on form an inappropriate classification. With the addition of limited personal liability, one could fashion a partnership agreement that makes an LLP more analogous to a closely held corporation than to a traditional general partnership.

As with general and limited partnership interests, deciding whether an LLP interest is a security should depend on the facts and circumstances of each case. Some might suggest that the mere presence of limited liability creates a presumption that securities law ought to apply. Clearly, limited personal liability may encourage partners to take a less active role in managing partnership affairs, thus leading to centralization of management—a factor in investment contract analysis. It is true that limited personal liability may have an impact on a partner’s conduct with respect to the partnership, but it is the partner’s conduct—whether he has the power and ability to protect his interest—that should factor into the securities analysis, not the mere presence or absence of limited liability.

Some might suggest that courts should treat LLPs and limited liability companies (LLCs) similarly because they are both unincorporated limited liability entities. This argument has merit because LLP and LLC enabling statutes provide enough flexibility so that the two entities may sometimes appear functionally equivalent. However, this same flexibility permits entrepreneurs to create LLPs and LLCs that are drastically different. Thus, a strict comparison to LLCs is also not appropriate. The ability to alter significantly entity attributes undermines categorical form-based classifications and counsels for fact-sensitive case-by-case analysis.

V. Conclusion

In analyzing whether a partnership interest is a security, courts apply the investment contract test announced in Howey and its progeny. Generally, a partnership interest is a security if an expectation exists that profits will derive primarily or substantially from the efforts of others. In applying

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259. See supra Parts III.A-B (discussing features of RUPA and RULPA that permit flexibility and blur distinctions between business forms).

260. See Walters, supra note 216, at 1292 (discussing structure of management as factor in investment contract analysis).

261. See generally Ribstein, Futures, supra note 258 (providing discussion of differences and similarities between LLPs and LLCs).

262. See id. at 321-27 (discussing differences between LLPs and LLCs).

263. See supra Part II.A (discussing development and interpretation of Howey’s "efforts of others" test).

264. See supra notes 48-55 and accompanying text (discussing liberal interpretation of "efforts of others" test).
Howey's test, courts developed presumptions that general partnership interests are not securities and that limited partnership interests are securities. Modern partnership law removes the foundation upon which courts based these presumptions. RUPA permits the partnership agreement to change or to eliminate most of the default partnership rules thereby creating partners that have little or no power to participate meaningfully in firm management. RULPA permits limited partners to become more active in firm management without sacrificing limited liability. Formal categories now mask economic realities and diminish the appropriateness of form-based distinctions.

This Note proposes that with regard to general, limited, and limited liability partnerships, courts should diminish the importance of formal categories when conducting an investment contract analysis. In doing so, courts should apply the proposed modified Williamson test as discussed above in Part IV. Under the modified Williamson test, a general, limited, or limited liability partnership interest might be a security if the investor can establish that: (1) the partnership agreement leaves so little power in the hands of the partner that the partner cannot adequately protect his interest in the partnership, or (2) the partner has so little knowledge or experience with the partnership's business that he is incapable of intelligently exercising his partnership powers, or (3) the partner is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot reasonably replace the manager or otherwise exercise meaningful partnership powers, or (4) the partnership is so large and the partner's interest is so small that he effectively has no influence over essential managerial functions. By implementing this test and by placing economic substance over formal categories, courts can more readily achieve the purposes of federal securities law.

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265. See Williamson v. Tucker, 645 F.2d 404, 422 (5th Cir. 1981) (suggesting that general partnership interests presumptively are not securities); SEC v. Murphy, 626 F.2d 633, 640-41 (9th Cir. 1980) (suggesting that limited partnership interests presumptively are securities).

266. See supra Parts III.A-B (discussing flexibility of RUPA and RULPA).

267. See RUPA (1996) § 103(a) (providing general rule that partnership agreement may modify or eliminate default rules provided in RUPA). See supra Part III.A for detailed discussion of freedom to contract provided in RUPA.

268. See supra Part III.B (discussing changes in limited partnership law that allow limited partners to exercise control over partnership affairs without incurring personal liability).

269. See supra Part IV.B (discussing application of modified Williamson test).