Expansive interpretation of the European Convention on Human Rights and the creative jurisprudence of the Strasbourg's Court

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Introduction

A sense of one's own personal identity is critical and essential to human beings. Without a sense of identity, the self can "disintegrate, be lost, obscured and vulnerable."[i] Throughout history, ideas of personality and personhood have been discussed and analyzed in many different areas of study, ranging from psychology, sociology and anthropology to law, religion and philosophy. It is the interconnection between personal identity and human rights law with which this paper is concerned. In particular, it seeks to explore how the Strasbourg's Court (the European Court of Human Rights, or the "**Court**") has over time developed different legal doctrines and standards through case laws for interpreting the European Convention on Human Rights (the "**Convention**" or the "**ECHR**"), in order to maximize protection of different spheres of personal identity.

This paper is divided into four parts. The first part discusses the relationship between personal identity and human rights law. The second part introduces basic principles of interpretation of multilateral treaties and their limitations with respect to the interpretation of the ECHR. The third part explores the three major interpretative techniques invented by the Court, namely (1) the 'living instrument' doctrine, (2) the European consensus, and (3) the 'practical and effective' doctrine. The last part examines whether the Court has maintained a fair balance between responding to contemporary demands through judicial creativity and deferring to the decisions of member States in national policy-making.

Part I: Personal identity and human rights law

Human rights are defined in the UN Human Development Report of 2000 as:

> "*the rights possessed by all persons, by virtue of their common humanity, to live a life of freedom and dignity. They give all people moral claims on their behavior of individuals and on the design of social arrangements—and are universal, inalienable and indivisible*."[ii]

Human rights law translates such universal *moral* norms of human freedom and human dignity into *legal* rights given to persons by virtue of their nature as *human beings*. These legal rights empower individuals to lay claims against those who *violate* these moral norms, which in turn enable individuals to become who they want to be and live their lives with dignity. The notion that individuals enjoy autonomy over their lives is also echoed by one of the judges of the Court, who held that an individual is inherently born to be free to "shape himself and his fate in the way that he deems best fits his personality".[iii]

The Convention, through establishing a set of rights and freedoms, mandates contracting States to give proper recognition and safeguards to different spheres of personal identity, including one's physical body, private and family life, marriage, religion, expression and formation of associations.[iv] Such protection is crucial as misrecognition of one's identity "can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted and reduced mode of being."[v] The Convention hence plays a vital role in the creation and protection of our personal identities from disintegration, damage and destruction.

Part II: The basic principles of interpretation of multilateral treaties

The Convention is a multilateral treaty, and hence is self-evidently part of public international law.[vi] Consequently, it is governed by the *Vienna Convention on the Laws of Treaties 1969* (the "**Vienna Convention**").[vii] In particular, Articles 31 to 33, which provide "general rules of interpretation," "supplementary means of interpretation," and "interpretation of treaties authenticated in two or more languages" have been found to be helpful sources of guidance to the Court.[viii] However, as van Dijk and van Hoof pointed out, "the rules of the Vienna Convention do not provide clear-cut solutions to all problems of treaty interpretation," especially when the problems arise from situations resulting from changing social norms not envisioned by the drafters of the Convention.[ix] Also, as Rudolf Bernhardt, former President of the Court elaborated, "human rights treaties [e.g. the ECHR] have a *unique* character…what was in former times considered to be part of unfettered domestic jurisdiction and within the *exclusive competence* of the

sovereign States has become the subject of *international protection and supervision.*"[x] Consequently the Court, in light of the inadequacy of the Vienna Convention and the unique character of the Convention as the collective enforcement of human rights and fundamental freedom, developed various innovative techniques of interpretation to fill in the gaps. The following will examine three such techniques commonly utilized by the Court in its creative jurisprudence.

Part III: Three major interpretative techniques invented by the Court

The first doctrine, the "living instrument" doctrine, is a tool of interpretation which provides the Court with the necessary degree of flexibility to ensure the realization of rights guaranteed by the Convention and the Protocols.[xi] It was first introduced in the famous case of *Tyrer v United Kingdom* (1979), which concerned the violation of Article 3 by the Isle of Man government.[xii] The Court held that,

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

The Court has since used the terms "living," "evolutive" and "dynamic" interchangeably when invoking the "living instrument" doctrine. For example in *Stafford v United Kingdom* (2002), the Court held that, "a failure by the Court to maintain a *dynamic and evolutive approach* would risk rendering it a bar to reform or improvement."[xiv] The "living instrument" doctrine allows the Court to update the application of Convention rights to reflect the increasingly high standard being required in the area of the protection of human rights and fundamental liberties. As Rozakis has argued, the rudimentary nature of ECHR provisions and the age of the instrument have acted as the main driving forces behind such evolutional interpretation.[xv] In updating the application of the Convention, the Court could either refer to the development in the domestic sphere within the respondent State,[xvi] or legal developments occurring outside the respondent State at the international level.[xvii] The Court could even depart from the assessments of its previous decisions if it considers that changing circumstances render departure necessary. A perfect example is *Christine Goodwin v United Kingdom* (2002), a case concerning the extent of the obligations upon States to recognize the new

personalities of post-operative transsexuals.[xviii] Despite the fact that several previous judgments of the Court had found that Britain's refusal to accord legal recognition to such individuals' new personalities had not breached Article 8 of the ECHR (right to respect for private life), the *Christine Goodwin* Court unanimously held that at the time of its decision, there was "clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals," and hence ruled that Britain had violated its Article 8 obligation.[xix]

The "living/evolutive instrument" doctrine has been applied to interpret both *substantive* and *procedural* provisions of the Convention. On one hand, the Court utilized the doctrine to find certain police ill-treatments of claimants sufficiently severe to constitute torture under Article 3 in *Tyrer v United Kingdom* (1979)[xx] and *Selmouni v France* (1999),[xxi] and to read into Article 11 a negative right of association (i.e. a right to not be compelled to be a member of association) in *Sigurdur A Sigurjonsson v Iceland* (1993).[xxii] On the other hand, in *Loizidou v Turkey (Preliminary Objections)* (1995), the Court stated that such approach "is not confined to the substantive provisions of the Convention, but also applies to those provisions…which govern the operation of the Convention's enforcement machinery."[xxiii] Furthermore, the doctrine has been used by the Court to extend the coverage of the Convention to not only member States, but also institutions of the European Union. In *Matthews v United Kingdom* (1999), the Court opined that "the mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention" and that the European Parliament being a "common constitutional or parliamentary structure established by member States" under the Convention means that the Court must take it into account in interpreting the Convention and its protocols.[xxiv]

The second technique, which is often used concurrently with the "living instrument" doctrine, is the concept of European consensus. European consensus can be seen as a form of majoritarian activism, which refers to the disposition of judges to produce rulings that reflect outcomes that States might adopt under majoritarian, as opposed to unanimous, decision rules.[xxv] In the context of the Strasbourg's Court, it may be defined as the Court's tendency to rule on the basis of a general agreement among the majority of member States of the Council of Europe about certain rules and principles identified through comparative research of

national and international law and practice.[xxvi] Some commentators approach European consensus and the "living/evolutive instrument" doctrine as almost mutually exclusive: that the Court can either defer to the solutions adopted at the national level or deploy the evolutive interpretation.[xxvii] However, this view is mistaken as the Court has in various cases laws and recently in *A, B. and C. v. Ireland* (2010) explained that European consensus is deployed to *justify* its dynamic interpretation of the Convention.[xxviii] It is not a sign of *stability* but rather an instrument which supports and legitimizes *changes*. European consensus possesses legitimizing potential because it is based on the decisions that are made by democratically elected bodies in member States, and hence provides a basis for the Court's preference or disfavor of certain state policies or measures.[xxix] European consensus is also approached as a mediator between dynamic interpretation and the margin of appreciation, which will be discussed in more details in part III of this paper.[xxx]

The Court has applied the European consensus standard extensively in relation to a broad variety of rights ranging from right to life,[xxxi] prohibition of torture,[xxxii] right to liberty and security,[xxxiii] fair trial,[xxxiv] to property rights,[xxxv] right to education[xxxvi] and voting rights.[xxxvii]

The third technique is the "practical and effective" doctrine, which seeks to ensure that the Convention rights and freedoms are interpreted and applied in a manner that renders these rights *practical and effective*, not *theoretical and illusory*.[xxxviii] The doctrine originated in *Marckx v Belgium* (1979),[xxxix] which concerned the violation of Article 8 (right to one's family life). The Court held that Article 8 does not merely compel the States to abstain from arbitrary interference of such right, but also impose *positive obligations* on the part of the States to respect such right.[xl] It is thus clear that the major function of the "practical and effective" doctrine is to prevent member States from only paying lip service to their Convention duties by empty formal measures of compliance. The bulk of the cases invoking the "practical and effective" doctrine concerned substantive due process rights of claimants. For example in *Airey v Ireland* (1979)[xli] and *Artico v Italy* (1980),[xlii] the Court mandated States to provide effective legal representation to claimants under Article 6 (right to a fair trial) in both civil and criminal proceedings. The Court rejected the State's contention that mere *nomination or assignment* of a legal counsel, as opposed to *practical assistance*, is sufficient to discharge the State's duty.[xliii] Similarly in *P C & S v United Kingdom* (2002), the Court held that in cases of a highly complex (and sometimes emotive) nature, and concerning

important interests (e.g. family and privacy rights), the principles of effective access to court and fairness required that claimants should receive the assistance of a lawyer. Apart from guaranteeing claimants effective legal assistance, the Court has read into many of the articles rights to effective official investigations of States' actions. For example in *McCann and Others v United Kingdom* (1995)[xliv] and recently in Al-*Skeini and Others v. the United Kingdom* (2011)[xlv] and *El-Masri v. The Former Yugoslav Republic of Macedonia* (2011),[xlvi] the Court held that a general legal prohibition of arbitrary killing by agents of the State under Article 3 (right to life) would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities.[xlvii] The *El-Masri* Court went even further to hold that such inadequate investigation also effectively violated Article 13 (right to truth) owed to *El-Masri*, his family, victims of similar crimes and the general public. In addition, a practical and effective reading of the Convention enabled the *El-Masri* Court to hold Macedonia "directly responsible" for the ill treatment of the claimant carried out by the US Central Intelligence Agency (a *substantive* violation of rights as opposed to a *procedural* violation of rights) on the basis that Macedonia "actively facilitated" and "failed to take any measures that might have been necessary to prevent it from occurring."[xlviii]

On the other hand, the Court has used the "practical and effective" doctrine in requiring member States to adopt measures even in the sphere of the relations of individuals between themselves. In *X and Y v Netherlands* (1985), Y, a victim of sexual assault who was mentally handicapped, had no legal capacity to appeal against the prosecution's decision not to press charges.[xlix] The Court found that Y's impossibility of instituting criminal proceedings against the perpetrator of the sexual assault constituted a violation of Article 8 (right to respect for private and family life) by the Netherlands because the government failed to adopt measures to ensure that all individuals have effective means to vindicate their right to privacy.[l] Later *Plattform "Ärzte für das Leben" v. Austria* (1988) cited *X and Y v Netherlands* (1985) to hold that "genuine, effective freedom of peaceful assembly under Article 11 cannot be reduced to a mere duty on the part of the State not to interfere…[l]ike Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals."[li] In a recent case *Dink v. Turkey* (2010), the Court went even

further to hold that States are required to create a favorable environment for participation in public debate for everyone and to enable the expression of ideas and opinions without fear.[lii]

Part IV: Balance between judicial activism and margin of appreciation

As we have seen, the various creative doctrines have enabled the Court to update and expand the interpretation of a number of Convention articles in varied situations. A legitimate concern then naturally arises as to whether the Court has failed to pay sufficient deference to the intention of the member States, and hence exceeded its judicial authority.

Commentators have identified key issues regarding the legitimacy of the court in adopting the various interpretation techniques. Firstly, they argue that the use of the doctrines by the Court may enable the Court to take up a legislative role and bypass the sovereign consent and intent of the member States.[liii] Secondly, the flexibility afforded by the doctrines may destroy consistency in case precedents, legal certainty, and predictability, and hence undermine the legitimacy of the Court's case laws.[liv] Thirdly, since the Court is to set universal human rights standards and fulfill the role of external guardian against State violations, resorting to European consensus in deciding cases will defeat such purpose and turn the Court into a mere rubber-stamping machine.[lv]

However, this paper takes a different view and argues that the Court has *not* exceeded its authority because it has been exercising its creative jurisprudence with great caution and control.

Firstly, where States have signaled their intention to extend Convention rights or freedoms by means of additional Protocols, the Court would not transgress into these areas through its expansive reading of the Convention. For example in *Soering v United Kingdom* (1988),[lvi] the Court held that the issue of whether the imposition of the death penalty should be classified as *per se* an inhuman and degrading punishment was covered by Protocol 6, under which member States agreed to adopt the normal method of amendment of the text to introduce a new obligation which allowed each State to choose the moment when to abolish capital punishment.[lvii] Accordingly, the Court refrained from interpreting Article 3 as generally prohibiting death penalty in all member States.

Secondly, the use of European consensus when applying the "living instrument" doctrine greatly limits the possibility of arbitrary interpretation by the Court. For example, regarding the legal recognition of transsexuals, the Court initially in *Rees v United Kingdom* (1986) deferred to the domestic authorities to "keep under review," and later in *Sheffield and Horsham v. the United Kingdom* (1998) expressed that transsexualism raised "complex scientific, legal, moral and social issues, in respect of which there was no generally shared approach among the Contracting States". It was not until 2002 that the Court in *Christine Goodwin v United Kingdom* eventually ruled against the British government on the basis of a continuing and mature trend towards social acceptance and legal recognition of gender reassignment in Europe and the world evidenced in various research and studies submitted to the Court.

Thirdly, the Court has been extremely deferential to member States in controversial and sensitive policy areas. For example in *Schalk and Kopf v. Austria* (2010), the Court declined to read a right for same-sex couples to marry into Article 12 of the ECHR (right to marry), holding that the issue must be left to regulation at national level.[lviii] The Court observed that in this area "it must not rush to substitute its own judgment in place of that of the national authorities."[lix] Further evidence of the Court's judicial restraint can be found in the approach of the Court to the recognition of environmental human rights under the Convention. In *Hatton and others v United Kingdom* (2002), the Court held that, "environmental protection should be taken into consideration by Governments in acting within their margin of appreciation and by the Court in its review of that margin, but *it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights*."[lx]

Fourthly, regarding the use of the "practical and effective" principle, the Court has been careful not to offer a general theory of positive obligations upon member States that may pose undue burdens to them. For example, when articulating States' duty to protect freedom of peaceful assembly, the Court has expressly acknowledged that States cannot guarantee this in all circumstances and that their obligation is confined to taking "reasonable and appropriate measures".[lxi] Similarly, with respect to States' duty to carry out effective official investigations under Article 3 (right to life), the Court has stated that States remain "free to choose the means" by which it will discharge its legal obligation,[lxii] and that such duty is "not an obligation of result, but of means",[lxiii] thereby recognizing that a State may have provided adequate

resources for an investigation to be characterized as effective even if it was unable to result in the identification or punishment of persons responsible for an unlawful killing.[lxiv]

Conclusion

In light of changing ethical standards and technological progresses, the jurisprudence of the Court has rightly recognized that the Convention should be an instrument of development and improvement rather than an "end game" treaty which froze the state of affairs that existed 60 years ago.[lxv] It has accordingly created and utilized appropriate methods of treaty interpretation to apply a number of its substantive and procedural provisions effectively. Through the use of European consensus, coupled with the Court's deferential attitude in sensitive areas of policy making and areas where intentions of the member States are clearly stated, e.g. under protocols, the Court has generally struck a fair balance between judicial innovation and respect for the ultimate policy-making role of member States.

[i] Marshall, J. *Personal freedom through human rights law?: autonomy, identity and integrity under the European Convention on Human Rights*. (Brill, 2009) p. 1

[ii] United Nations. Development Programme. *Human Development Report: Human rights and human development.* (Oxford University Press, 2000) p. 16.

[iii] *Cossey v the UK* (Application no. 10843/84) Judgment 27 September 1990 Series A No. 184, 24-25 per Judge Martens.

[iv] See section 1 "Rights and freedoms" of the European Convention on Human Rights.

[v] Charles Taylor, "The Politics of recognition" in A Gutmann (ed) *Multiculturalism and the Politics of Recognition* (Princeton NJ: Princeton University Press 1994) at p 25.

[vi] Wildhaber, L. (2007). The European convention on human rights and international law. *International and comparative law quarterly*, *56*(2), 217-231, p. 220.

[vii] 155 UNTS 331. See Sinclair, I. M. (1984). *The Vienna Convention on the law of treaties*. Manchester, UK: Manchester University Press, 128-129; Mowbray, A. (2005). The Creativity of the European Court of Human Rights. *Human Rights Law Review*, *5*(1), 57-79, p. 58.

[viii] Ost, F., 'The Original Canons of Interpretation of the European Court of Human Rights', in Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Dordrecht: Martinus Nijhoff, 1992) p. 288.

[ix] Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). *Theory and practice of the European Convention on Human Rights*. (Boston: Martinus Nijhoff Publishers) p. 72.

[x] Bernhardt, R., 'Thoughts on the Interpretation of Human-Rights Treaties', in Matscher and Petzold (eds), *Protecting Human Rights: The European Dimension* (Koln: Carl Heymanns Verlag, 1988) p. 65-66. Also in *Soering v United Kingdom*, 07 July 1989, § 87, Series A no. 161.

[xi] *Christine Goodwin v.the United Kingdom* [GC], no. 28957/95 35, § 74, ECHR 2002-VI.

[xii] The Court, after rejecting the Isle of Man government's defense that the punishment administered by a police officer on a 16-year-old who was subject to judicial corporal punishment was acceptable to inhabitants of the island, held that such punishment amounted to 'degrading punishment' under Article 3 of the ECHR.

[xiii] 25 April 1978, § 31, Series A no. 26.

[xiv] no. 46295/99, § 68, ECHR 2002-IV.

[xv] Rozakis, C. (2005). *The European Judge as Comparativist,* 80 Tulane Law Review 257, pp. 260-261.

[xvi] *Tyrer v United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Stafford v United Kingdom* [GC] no. 46295/99, § 68-69, ECHR 2002-IV.

[xvii] *Christine Goodwin v United Kingdom* [GC] no. 28957/95, § 57, ECHR 2002-VI. In *Christine,* the human rights group "Liberty" had been given permission to submit a written brief which disclosed that, *inter alia,* legal recognition of gender reassignment was provided in Singapore, Canada, South Africa, Israel, Australia, and New Zealand.

[xviii] [GC] no. 28957/95, ECHR 2002-VI.

[xix] [GC] no. 28957/95, § 85, ECHR 2002-VI.

[xx] 25 April 1978, Series A no. 26.

[xxi] [GC] no. 25803/94, ECHR 1999-V.

[xxii] 30 June 1993, Series A no. 264.

[xxiii] 23 March 1995, § 71, Series A no. 310.

[xxiv] [GC] no. 24833/94, § 39, ECHR 1999-I.

[xxv] Sweet, A. S., & Brunell, T. L. (2013). Trustee Courts and the Judicialization of International Regimes. *Trustee*, *1*(1), 61-88, p. 63.

[xxvi] Dzehtsiarou, K. (2011). Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights. *Public Law*, 534-553, p. 537.

[xxvii] Dzehtsiarou, K. (2011). European Consensus and the Evolutive Interpretation of the European Convention on Human Rights. *German LJ*, 12, 1730-1745, p. 1736.

[xxviii] [GC] no. 25579/05, § 234, ECHR 2010.

[xxix] Dzehtsiarou, K. (2011). European Consensus and the Evolutive Interpretation of the European Convention on Human Rights. *German LJ*, 12, 1730-1745, p. 1734.

[xxx] Alexander Morawa, *The Common European Approach, International Trends, and the Evolution of Human Rights Law. A Comment on Goodwin and/Iv. the United Kingdom,* 3 German Law Journal (GLJ) (2002), available at http://www.germanlawiournal.com/index.php?pageID=11&artID=172 (last accessed: 20 April 2014).

[xxxi] *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII.

[xxxii] *Selmouni v France* [GC], no. 25803/94, § 96-100, ECHR 1999-V.

[xxxiii] *Stafford v United Kingdom* [GC], no. 46295/99, § 68-69, ECHR 2002-IV.

[xxxiv] *Micallef v. Malta* [GC], no. 17056/06, § 78, ECHR 2010.

[xxxv] *Mazurek v. France* [GC], no. 34406/97, § 31, ECHR 2000-II.

[xxxvi] *D.H. and others v. the Czech Republic* [GC], no. 57325/00, § 181, ECHR 2007-IV.

[xxxvii] *Hirst v. the United Kingdom (No. 2)* [GC], no. 74025/01, § 81, ECHR 2005-IX.

[xxxviii] *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §134, ECHR 2012.

[xxxix] 13 June 1979, Series A no. 31.

[xl] 13 June 1979, § 31-32, Series A no. 31.

[xli] 9 October 1979, § 26-28, Series A no. 32.

[xlii] 13 May 1980, § 33-34, Series A no. 37.

[xliii] Ibid.

[xliv] 27 September 1995, § 161, Series A no. 324.

[xlv] [GC], no. 55721/07, § 181-182, ECHR 2011.

[xlvi] [GC], no. 39630/09, § 189-190, ECHR 2012.

[xlvii] *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 191, ECHR 2012.

[xlviii] [GC], no. 39630/09, § 211, ECHR 2012.

[xlix] 26 March 1985, Series A no. 91.

[l] 26 March 1985, § 23, Series A no. 91.

[li] 21 June 1988, § 32, Series A no. 139.

[lii] [GC], no. 2668/07, § 137, ECHR 2011.

[liii] See *Golder v. the United Kingdom*, 18 Eur. Ct. H.R. (ser. A, 1975). Separate opinion of Judge Fitzmaurice, at para. 30.

[liv] See Gribnau, J. L. M. (2002). Legitimacy of the Judiciary. *Electronic Journal of Comparative Law*, 6(4), 1-20.

[lv] See Benvenisti, E. (1998). Margin of appreciation, consensus, and universal standards. *NYUJ International Law & Politics*, 31, 843.

[lvi] 07 July 1989, § 87, Series A no. 161.

[lvii] Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty 1983, ETS 114.

[lviii] [GC], no. 30141/04, § 49-51, ECHR 2010.

[lix] Ibid.

[lx] [GC], no. 36022/97, § 122, ECHR 2003-VIII.

[lxi] *Plattform "Ärzte für das Leben" v. Austria* (1988) [GC], no. 2668/07, § 31, ECHR 2011. See also Mowbray, A. (2005). The Creativity of the European Court of Human Rights. *Human Rights Law Review*, 5(1), 57-79, p. 78.

[lxii] Al-*Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 181, ECHR 2011.

[lxiii] *McKerr v United Kingdom* [GC], no. 28883/95, § 96, ECHR 2001-III.

[lxiv] Mowbray, A. (2005). The Creativity of the European Court of Human Rights. *Human Rights Law Review*, 5(1), 57-79, p. 78.

[lxv] Jared Wessel, *Relational Contract Theory and Treaty interpretation: End-Game Treaties v. Dynamic Interpretation, 60 Annual Survey of American Law*, 149 (2004).

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