

# LOSING THE FREEDOM TO BE HUMAN

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## ABSTRACT

In 2019, Apple's CEO warned that contemporary business models, which are based on harvesting our personal data and monetizing everything we do online, violate our privacy and will eventually cause us "to lose the freedom to be human." Others have taken this privacy concern a step further by questioning whether these business models undermine mental autonomy, i.e., the ability to think and form opinions. The burgeoning chorus of concerns has triggered a variety of high-profile calls to explore whether international human rights law protects against intrusions on the inner sanctum of one's mind, particularly with respect to the business models of global platforms such as Amazon, Facebook, and Google.

This Article provides the first in-depth scholarly examination of the scope of the right to "hold opinions without interference," which is enshrined in Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR). Because it was generally assumed that this right to think and form opinions could not be violated, it has been overlooked to date, and there is little jurisprudence available to define its scope. In response to calls for scholarly engagement to help define this right, this Article examines the text of the ICCPR, its negotiating history, the works of respected jurists, and the views of the United Nations human rights machinery.

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The Article concludes that the right to hold opinions without interference includes protection against disclosure of one's opinions, manipulation in the forming and holding of opinions, and penalization for one's opinions. The Article assesses how contemporary business models grounded in capturing our attention, harvesting our personal information, and then monetizing that information may infringe this right. Using the corporate responsibility framework embodied in the U.N. Guiding Principles on Business and Human Rights, the Article concludes by recommending paths forward to promote respect for the right to hold opinions without interference in the digital age.

## TABLE OF CONTENTS

Introduction .....	310
I. Digital Technologies & Contemporary Business Methods and Models .....	314
A. Product Design.....	315
B. 24/7 Corporate Surveillance.....	318
C. Use of Surveillance Data.....	320
II. International Law Framework on the Right to Hold Opinions Without Interference .....	323
A. Analysis of Treaty Text .....	327
B. Negotiating History .....	331
1. ICCPR Article 19(1) Negotiations.....	332
2. Relevant UDHR Negotiations .....	337
i. The First Year of UDHR Deliberations.....	337
ii. The Second Year of UDHR Deliberations .....	342
a. The Sub-Commission on Freedom of Information and of the Press .....	342
b. U.N. Conference on Freedom of Information.....	345
c. The UDHR Drafting Committee .....	345
d. The Commission on Human Rights.....	347
e. The U.N. General Assembly.....	349
iii. Observations from the UDHR Negotiating History .....	353
C. The Writings of Jurists.....	353
D. Recommendations by the U.N. Human Rights Machinery.....	354
E. Assessment of the Scope of Freedom of Opinion .....	357
III. Contemporary Business Models, Freedom of Opinion, & Ways Forward.....	359
A. Intersection of Business Models & the Right to Hold Opinions Without Interference.....	359
1. The Right Not to Reveal Opinions .....	359
2. The Right Not to Be Manipulated.....	361
3. The Right Not to Be Penalized for Opinions .....	362
B. Recommendations for Promoting Respect for Freedom of Opinion.....	364
1. Consent & Surveillance Capitalism Business Models.....	364
2. Implementation of the UNGPs.....	366

3. Strategies for Stakeholders .....368  
Conclusion.....369

## INTRODUCTION

Reflecting on the lack of digital privacy online, Apple CEO Tim Cook told Stanford University's 2019 graduating class that "if we accept that everything in our lives can be aggregated, sold, or even leaked in the event of a hack, then we lose so much more than data. We lose the freedom to be human."<sup>1</sup> His remarks focused on how various forms of digital surveillance ingrained in our everyday activities risk chilling human flourishing.<sup>2</sup> Though Cook delivered a scathing indictment of Silicon Valley's lack of interest in taking responsibility for developing technologies and practices that undermine privacy,<sup>3</sup> his remarks indirectly shed a spotlight on a related—and potentially even more profound—human rights concern: whether contemporary business models based on the digital extraction and monetization of personal information undermine individual autonomy by infringing on the basic human ability to *think and form opinions*.<sup>4</sup>

In 2019, numerous actors called for the international community to focus on the impact that these business models have on the human freedom to think and form opinions. For example, the U.N. Secretary General's High-Level Panel on Digital Cooperation expressed solicitude that digital technologies are "forcing us to rethink our understandings of human dignity and *agency*, as

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1. Stanford University, *Stanford University Commencement 2019*, YOUTUBE (June 16, 2019), <https://www.youtube.com/watch?v=OQ6bRYJAR4o> (last visited Oct. 27, 2020).

2. *Id.* ("[When] everything you write, everything you say, every topic of curiosity, every stray thought, every impulsive purchase, every moment of frustration or weakness, every gripe or complaint, every secret shared in confidence" is being monitored and monetized, eventually people will censor themselves and "create less, . . . talk less, . . . think less.").

3. *Id.* (arguing that Silicon Valley is becoming known for claiming credit for its innovations without accepting responsibility for the harms emerging from its technologies—including privacy violations—and urging that "if you built a chaos factory, you can't dodge responsibility for the chaos").

4. In considering issues related to the digital harvesting and monetization of personal data, Professor Simon McCarthy-Jones in the Psychiatry Department at Trinity College Dublin referred to this ability to think as "mental autonomy," which he posits includes attentional agency (i.e., the ability to focus) and cognitive agency (i.e., the ability, *inter alia*, to control "goal/task-related, deliberate thought" including reflecting on initial thoughts and feelings to determine if they are in line with one's objectives and values). Simon McCarthy-Jones, *The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century*, 1 FRONTIERS IN A.I. 1, 2 (2019). The references to mental autonomy in this Article are based on this definition.

algorithms are increasingly sophisticated at *manipulating* our choices—for example, to keep our attention glued to a screen.”<sup>5</sup> Similarly, the Council of Europe’s Committee of Ministers declared that “[f]ine grained, sub-conscious and personalised levels of algorithmic persuasion may have significant effects on the cognitive autonomy of individuals and *their right to form opinions and take independent decisions*.”<sup>6</sup> Amnesty International released a report that found that “the combination of algorithmically-driven ad targeting and personalized content means that Google and Facebook’s platforms . . . can influence, *shape and modify opinions and thoughts, which risks affecting our ability to make autonomous choices*,” particularly where algorithms are designed to maximize capturing user attention.<sup>7</sup> Commentators have also raised alarm bells about the potential of these business models to undermine the freedom to think and hold opinions.<sup>8</sup>

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5. U.N. SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON DIGITAL COOPERATION, THE AGE OF DIGITAL INTERDEPENDENCE 17 (2019), <https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf> [<https://perma.cc/VYN4-2CLE>] (emphasis added). The Secretary General convened this High-Level Panel “to provide recommendations on how the international community could work together to optimise the use of digital technologies and mitigate the risks.” *Secretary-General’s High-Level Panel on Digital Cooperation: Follow-up Process*, UNITED NATIONS, <https://www.un.org/en/digital-cooperation-panel/> [<https://perma.cc/V4W7-32CB>].

6. COUNCIL OF EUROPE’S COMMITTEE OF MINISTERS, DECLARATION ON THE MANIPULATIVE CAPABILITIES OF ALGORITHMIC PROCESSES ¶ 9 (Feb. 13, 2019), [https://search.coe.int/cm/pages/result\\_details.aspx?ObjectId=090000168092dd4b](https://search.coe.int/cm/pages/result_details.aspx?ObjectId=090000168092dd4b) [<https://perma.cc/3T43-4DPE>] (emphasis added). The Council of Europe is an organization consisting of forty-seven European countries that are parties to the European Convention on Human Rights. *Who We Are*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/about-us/who-we-are> [<https://perma.cc/RZQ3-TJ2B>]. The Committee of Ministers is the decision-making body of the Council and is composed of the foreign affairs ministers of each member state. *Structure*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/about-us/who-we-are> [<https://perma.cc/RZQ3-TJ2B>].

7. AMNESTY INT’L, SURVEILLANCE GIANTS: HOW THE BUSINESS MODEL OF FACEBOOK AND GOOGLE THREATEN HUMAN RIGHTS 29–30 (2019), <https://www.amnesty.org/download/Documents/POL3014042019ENGLISH.PDF> [<https://perma.cc/2MDG-CTCN>] [hereinafter SURVEILLANCE GIANTS] (emphasis added).

8. McCarthy-Jones, *supra* note 4, at 2 (“[T]wenty-first century technological advances pose new threats to [freedom of thought]. These demand we clearly draw the contours of the right to [freedom of thought] to ensure our mental autonomy in this new landscape.”); Kate Jones, *Online Disinformation and Political Discourse: Applying a Human Rights Framework*, CHATHAM HOUSE: RESEARCH PAPER SERIES 1, 34 (Nov. 2019), <https://www.chathamhouse.org/sites/default/files/2019->

Because the companies that deploy these business models operate globally, this Article explores whether existing international law addresses this novel issue. Under international human rights law, Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to hold opinions without interference.<sup>9</sup> While international human rights protections generally apply with respect to governmental action, there is a global framework—endorsed by the U.S. government as a minimum standard for American companies<sup>10</sup>—that sets forth the international community’s expectations for corporations when their operations

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11-05-Online-Disinformation-Human-Rights.pdf [https://perma.cc/YQ6T-JXXY] (“There is now a pressing need to explore whether cyber interference in elections and other online political discourse may be breaching this right [to freedom of thought].”). Susie Alegre was the first to assess personal data harvesting as an infringement of existing human rights protections for the inner sanctum of one’s mind. See Susie Alegre, *Rethinking Freedom of Thought for the 21st Century*, 3 EUR. H.R. L. REV. 221, 233 (2017) (“Technological convenience may be both seductive and addictive, but it is time for us, both as societies and individuals, to use our freedom of thought and take concrete steps to protect it before we lose it forever.”).

9. The International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 19(1), S. Exec. Doc. E, 95-2, at 29 (1978), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (“Everyone shall have the right to hold opinions without interference.”). The ICCPR also protects the right to “freedom of thought” in a separate provision on religious freedom. See *id.* art. 18(1) (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”). This Article focuses on the right to “hold opinions without interference,” but refers to the “freedom of thought” as necessary in assessing the scope of ICCPR Article 19(1).

10. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 4 (2013), [https://photos.state.gov/libraries/korea/49271/july\\_2013/dwoa\\_USG-Approach-on-Business-and-Human-Rights-updatedJune2013.pdf](https://photos.state.gov/libraries/korea/49271/july_2013/dwoa_USG-Approach-on-Business-and-Human-Rights-updatedJune2013.pdf) [https://perma.cc/9QEX-X4YT] (“The U.S. government encourages stakeholders to treat the Guiding Principles as a ‘floor’ rather than a ‘ceiling’ for addressing issues of business and human rights, and to recognize that implementing the Guiding Principles should be a continuous process.”); U.S. DEP’T OF STATE, RESPONSIBLE BUSINESS CONDUCT: FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA 17 (2016), <https://2009-2017.state.gov/documents/organization/265918.pdf> [https://perma.cc/AWL5-8EVB] (“The U.S. government encourages businesses to treat tools like the OECD Guidelines [for Multinational Enterprises] and the U.N. Guiding Principles as a floor rather than a ceiling for implementing responsible business practices, and to recognize that implementing RBC [Responsible Business Conduct] should be a continuing process.”).

intersect with human rights issues, which is known as the U.N. Guiding Principles on Business & Human Rights (UNGPs).<sup>11</sup> Under the UNGPs, companies are expected to “respect” the human rights memorialized in key U.N. instruments in their business operations,<sup>12</sup> which means they should not only “avoid infringing on the human rights of others” but also “address adverse human rights impacts with which they are involved.”<sup>13</sup> Analyzing whether corporations meet these standards requires examining the scope of the right to hold opinions and assessing how it is implicated by contemporary business models based on the extraction and monetization of personal information.

Unfortunately, the right to hold opinions without interference has been largely overlooked over the years and there is thus little jurisprudence on its scope.<sup>14</sup> The neglect of this right may very well have been grounded in “an assumption that our inner thoughts are beyond the effective scope of state intervention.”<sup>15</sup> But developments in digital technologies are challenging any such assumption.<sup>16</sup> This

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11. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶ 1 (July 6, 2011); John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs] (stating the 31 principles that comprise the UNGPs).

12. Principle 12 of the UNGPs calls on business enterprises to respect “internationally recognized human rights,” which are defined to include the United Nation’s International Bill of Human Rights (i.e., the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights) as well as the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work. *See id.* princ. 12. The official commentary to Principle 12 states that businesses may also need to refer to additional U.N. human rights instruments but does not mention regional human rights instruments. *See id.*

13. *Id.* princ. 11. The UNGPs framework also calls on governments to engage in outreach and regulation to prevent and redress corporate infringements on human rights. *See id.* princs. 1–3.

14. *See* Alegre, *supra* note 8, at 221 (noting that this right “has received little attention in the courts and little academic analysis in international human rights law”); Jones, *supra* note 8, at 32 (“While the core human rights treaties clearly reflect this absolute freedom of the *forum internum* of the mind, it is a relatively unexplored area on which there is little jurisprudence.”); McCarthy-Jones, *supra* note 4, at 2 (“Attempts to sketch [the] contours [of the human right to think] have been negligible.”).

15. Alegre, *supra* note 8, at 221.

16. *See supra* notes 1–8 and *infra* notes 18–55 and accompanying text.

state of affairs has triggered a number of calls for scholarly engagement on the scope of this existing—but underdeveloped—international human right, including by the U.N.’s Special Rapporteur on freedom of opinion and expression, the top U.N. expert on ICCPR Article 19.<sup>17</sup>

This Article seeks to answer these calls by examining the jurisprudential underpinnings of the right to hold opinions without interference and proposing a legal assessment of its scope. In doing so, the Article will establish a much-needed legal foundation for scholars and practitioners who seek to analyze the intersection of this right and the rise of business models that collect and monetize personal data. Part I of this Article provides background on the business models that are sparking concerns about whether this human right is being eroded in the digital age. Part II examines the scope of the right by analyzing the text of the relevant treaty provisions, surveying the negotiating history related to the development of this right, and reviewing relevant interpretations by jurists and the U.N.’s human rights machinery. This Part concludes that the right to hold opinions without interference encompasses three components: the right not to (1) reveal one’s opinions, (2) be manipulated or coerced in forming or holding opinions, and (3) be penalized for one’s opinions. Part III reflects on the intersection of the right and contemporary business models and proposes recommendations for implementing the UNGP’s call for corporations to respect human rights in their operations.

## I. DIGITAL TECHNOLOGIES & CONTEMPORARY BUSINESS METHODS AND MODELS

Recently developed business methods and models have engendered growing disquietude that companies are “hacking” our

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17. See David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 26, U.N. Doc. A/73/348 (Aug. 29, 2018) [hereinafter *SR 2018 Report*] (“The novelty of the issues raised [by technological developments], coupled with the general lack of jurisprudence concerning interferences with the right of opinion, provide more questions than answers . . . Nevertheless, these questions should drive rights-oriented research into . . . AI [Artificial Intelligence]-assisted curation.”); see also Jones, *supra* note 8, at 34 (“There is now a pressing need to explore whether cyber interference in elections and other online political discourse may be breaching this right [to hold opinions].”).

brains<sup>18</sup> and adversely affecting our ability to think.<sup>19</sup> Technological developments have enabled a world of “information abundance” that has, alongside heightened corporate competition for users’ attention,<sup>20</sup> unleashed a “global project of industrialized persuasion, [which is] . . . the dominant business model and design logic of the internet.”<sup>21</sup> Among the corporate practices that have drawn criticism in this regard are three interconnected facets of the race for user attention: (1) designing products to maximize user engagement, (2) leveraging that engagement to extract personal data 24/7, and (3) using and selling that data to deploy highly particularized, targeted information to individuals in order to affect their behavior. This Part seeks to elucidate each of these angles.

### A. Product Design

In the last few years, several former tech insiders have come forward to share how social media, mobile phones, apps, and other products are intentionally designed to create compulsive and addictive behavior in users. For example, in a revealing *60 Minutes* interview with Anderson Cooper in 2017, former Google product manager Tristan Harris explained that because companies are competing to capture your attention to attract advertising dollars, they deploy “a whole playbook of techniques . . . to get you using the product for as long as possible. . . . [T]hey are shaping the thoughts and feelings and actions of people. They are programming people.”<sup>22</sup>

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18. See Anderson Cooper, *What is “Brain Hacking”? Tech Insiders on Why You Should Care*, CBS NEWS: 60 MINUTES (Apr. 9, 2017), <https://www.cbsnews.com/news/brain-hacking-tech-insiders-60-minutes/> [<https://perma.cc/UJ7E-NZ6J>] [hereinafter *What Is “Brain Hacking”?*] (noting that some tech insiders are recognizing “that the companies responsible for programming your phones are working hard to get you and your family to feel the need to check it constantly” and “[s]ome programmers call [this] ‘brain hacking’”).

19. The ability to think has also been referred to as the *forum internum* or “the inner space of your mind.” Alegre, *supra* note 8, at 221.

20. JAMES WILLIAMS, *STAND OUT OF OUR LIGHT: FREEDOM AND RESISTANCE IN THE ATTENTION ECONOMY* 15 (Cambridge Univ. Press 2018).

21. *Id.* at 88. Former Google employee James Williams goes on to say that, in this regard, “the competition for attention and the ‘persuasion’ of users ultimately amounts to a project of the *manipulation* of the will.” *Id.* (emphasis added).

22. *What Is “Brain Hacking”?*, *supra* note 18. Tristan Harris is the Co-Founder and President of the Center for Humane Technology, which seeks to prevent “human downgrading” from choices to design technology in ways that harm individuals. *About Us: Our Team*, CTR. FOR HUMANE TECH., [hereinafter *About Us*] <https://humanetech.com/about-us/#team> [<https://perma.cc/JFG4-JD5H>];

Those design techniques include features such as gaining followers on social media, getting “likes” for posts, or keeping up a “streak” in Snapchat.<sup>23</sup> Harris highlighted that such design decisions were selected based on scientific evidence of how human addiction is caused.<sup>24</sup>

In the same interview, Anderson Cooper spoke with Ramsay Brown, who studied neuroscience before co-founding Dopamine Labs, a company that creates code to prompt user engagement with a

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Rachel Lerman, *Q&A: Ex-Googler Harris on How Tech “Downgrades” Humans*, ABC NEWS (Apr. 10, 2019), <https://abcnews.go.com/Technology/wireStory/q-a-googler-harris-tech-downgrades-humans-64899036> [https://perma.cc/5DA5-JVHV]. Previously, he studied the psychology of persuasion at Stanford University’s Persuasive Technology Lab and was the CEO of a company that was acquired by Google. *About Us*, *supra*. He has testified about his concerns before the U.S. House Committee on Energy and Commerce. *See Hearing on “Americans at Risk: Manipulation and Deception in the Digital Age,”* HOUSE COMM. ON ENERGY & COM. (Jan. 8, 2020), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-americans-at-risk-manipulation-and-deception-in-the-digital> [https://perma.cc/9L5F-EYJS]. He has also testified before a U.S. Senate Subcommittee about the harms of persuasive technologies. *See Optimizing for Engagement: Understanding the Use of Persuasive Technology on Internet Platforms*, S. SUBCOMM. ON COM., SCI. & TRANSP. (June 25, 2019), <https://www.commerce.senate.gov/2019/6/optimizing-for-engagement-understanding-the-use-of-persuasive-technology-on-internet-platforms> [https://perma.cc/AD6E-VM62].

23. *What Is “Brain Hacking”?*, *supra* note 18.

24. *See id.* James Williams (who won Google’s highest award for employees when he worked there) has also spoken out with similar concerns. *See Greg Epstein, The Adversarial Persuasion Machine: A Conversation with James Williams*, TECH CRUNCH (Mar. 13, 2019), <https://techcrunch.com/2019/03/13/the-adversarial-persuasion-machine-a-conversation-with-james-williams/> [https://perma.cc/VM32-YEBE]. In his book, Williams explains:

One major aim of . . . persuasive design is to keep users coming back to a product repeatedly, which requires the creation of habits. . . . [A] four-stage model for hooking users . . . consists of a trigger, an action, a variable reward, and the user’s ‘investment’ in the product (e.g., time or money). The key element here is the variable reward. When you randomize the reward schedule for a given action, it increases the number of times a person is likely to take that action. This is the underlying dynamic at work behind the high engagement users have with ‘infinite’ scrolling feeds . . . such as Facebook’s News Feed or Twitter’s Stream. . . . [T]his effect is often referred to as the ‘slot machine’ effect . . . . Variable reward scheduling is also the engine of compulsive, and sometimes addictive, habits of usage that many users struggle to control.

WILLIAMS, *supra* note 20, at 34–35.

variety of tech products.<sup>25</sup> Brown noted that users of social media, mobile phones, and apps are “part of a controlled set of experiments that are happening in real time across you and millions of other people . . . You’re guinea pigs.”<sup>26</sup> By using advanced machine learning, Ramsay explained, companies maximize user engagement with (and “addiction” to) their products.<sup>27</sup> Algorithms, for example, find the peak moment to deliver digital rewards (such as notifications of “likes” for posts) to each user that will “trigger your brain to make you want more.”<sup>28</sup> Brown noted that his company tried to place a habit breaking app in Apple’s App Store, but it was rejected because “[t]hey did not want us to give out this thing that was gonna make people less stuck on their phones.”<sup>29</sup>

Other tech insiders have also come forward with similar information about product design. For example, in 2017 Sean Parker, Facebook’s former founding president, shared insights about how tech products are intentionally designed to “hook” users.<sup>30</sup> He recounted that during Facebook’s early days, the company focused on the following question: “How do we consume as much of your time and conscious attention as possible?”<sup>31</sup> This mindset led to the creation of the “like” button, which provides users “a little dopamine hit” and encourages more posting.<sup>32</sup> He stated, “It’s a social-validation feedback loop . . . exactly the kind of thing that a hacker like myself would come up with, because you’re exploiting a vulnerability in

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25. See *What Is “Brain Hacking”?*, *supra* note 18.

26. *Id.*

27. *Id.*

28. *Id.* In Brown’s words, “There’s some algorithm somewhere that predicted, hey, for this user right now who is experimental subject 79B3 in experiment 231, we think we can see an improvement in his behavior if you give [the variable reward] to him in this burst instead of that burst.” *Id.*

29. *Id.* Brown also explained to a tech journal, “We crafted [our artificial intelligence software] to learn something about the structure of how human motivation works. It is now gathering enough data on its own to make meaningful observations to *change* human behavior.” Jonathan Shieber, *Meet the Tech Company that Wants to Make You Even More Addicted to Your Phone*, TECH CRUNCH (Sept. 8, 2017), <https://techcrunch.com/2017/09/08/meet-the-tech-company-that-wants-to-make-you-even-more-addicted-to-your-phone/> [<https://perma.cc/2SUE-R299>] (emphasis added).

30. Olivia Solon, *Ex-Facebook President Sean Parker: Site Made to Exploit Human Vulnerability*, THE GUARDIAN (Nov. 9, 2017), <https://www.theguardian.com/technology/2017/nov/09/facebook-sean-parker-vulnerability-brain-psychology> [<https://perma.cc/W856-9W7G>].

31. *Id.*

32. *Id.*

human psychology.”<sup>33</sup> Virtual reality pioneer Jaron Lanier has described the use of variable rewards by tech companies in the following way:

The algorithm is trying to capture the perfect parameters for *manipulating* a brain, while the brain, in order to seek out deeper meaning, is changing in response to the algorithm’s experiments . . . . Because the stimuli from the algorithm doesn’t mean anything, because they genuinely are random, the brain isn’t responding to anything real, but to a fiction. That process—of becoming hooked on an elusive mirage—is addiction.<sup>34</sup>

Similarly, in 2019, an early Facebook adviser and investor publicly revealed that in order “[t]o maximize both engagement and revenues . . . startups [in the early 2000s] focused their technology on the weakest elements of human psychology. They set out to create habits, evolved habits into addictions, and laid the groundwork for giant fortunes.”<sup>35</sup>

#### B. 24/7 Corporate Surveillance

Harvard Business School Professor Emerita Shoshana Zuboff has explained that the concept of “surveillance capitalism” emerged between 2002 and 2018.<sup>36</sup> In this new economic system, “wealth is largely derived from surveillance.”<sup>37</sup> Digital technology has enabled companies “to measure—at the level of individual users—people’s behaviors (e.g. page views), intentions (e.g. search queries), contexts (e.g. physical locations), interests (e.g. inferences from users’

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33. *Id.*

34. Zoe Williams, *Ten Arguments for Deleting Your Social Media Accounts Right Now* by Jaron Lanier—Review, THE GUARDIAN (May 30, 2018), <https://www.theguardian.com/books/2018/may/30/ten-arguments-deleting-your-social-media-accounts-right-now-jaron-lanier> [https://perma.cc/9K4K-RDY2] (emphasis added).

35. ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE 43 (2019). He went on to say that “[t]o make its advertising valuable, Facebook needs to gain and hold user attention, which it does with behavior modification techniques that promote addiction, according to a growing body of evidence.” *Id.* at 63. He noted that “[b]ehavior modification and addiction would play a giant role in the Facebook story, but . . . would remain unknown to me until 2017.” *Id.*

36. See Shoshana Zuboff, “We Make Them Dance”: *Surveillance Capitalism, the Rise of Instrumentarian Power, and the Threat to Human Rights*, in HUM. RTS. IN THE AGE OF PLATFORMS 3, 6 (Rikke Frank Jørgensen ed., 2019).

37. *Id.* at 7.

browsing behavior), unique identifiers (e.g. device IDs or emails of logged-in users), and more.”<sup>38</sup> Professor Zuboff explained that such a vast accumulation of data about the human experience has empowered companies to predict human behavior,<sup>39</sup> which has great value to a number of parties, including commercial advertisers, governments, and political operatives.<sup>40</sup>

Google pioneered the business model of extracting and monetizing data when it was under pressure from investors to increase its profitability in the early 2000s.<sup>41</sup> Shortly thereafter, Facebook adopted a similar model.<sup>42</sup> This business model of harvesting and monetizing individual data then “quickly became the

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38. WILLIAMS, *supra* note 20, at 31. As Professor McCarthy-Jones notes, “[h]umans bleed data. For the longest time, it seeped into the earth where it fell or was washed away by the tides of time. Now new technologies capture and store it indefinitely.” McCarthy-Jones, *supra* note 4, at 2; *see also* BENNETT CYPHERS & GENNIE GEBHART, ELECTRONIC FRONTIER FOUND., BEHIND THE ONE-WAY MIRROR: A DEEP DIVE INTO THE TECHNOLOGY OF CORPORATE SURVEILLANCE 5 (2019), <https://www.eff.org/wp/behind-the-one-way-mirror> [<https://perma.cc/L527-UGUJ>] (explaining that there is a “slow, steady, relentless accumulation of relatively mundane data points about how we live our lives,” which “includes things like browsing history, app usage, purchases, and geolocation data,” and “can be combined into an exceptionally revealing whole”).

39. *See* Zuboff, *supra* note 36, at 10–17. As Tristan Harris has explained, the vast accumulation of user data and related powerful algorithmic processing allow companies like Facebook to know you so well that they can predict and influence your next decision. *See* Lerman, *supra* note 22 (“Facebook wakes up a voodoo doll-like version of you in a supercomputer. The voodoo doll of you is based on all the clicks you’ve ever made . . . [A]s this becomes a better and more accurate model of you, [Facebook] know[s] you better than you know yourself.”).

40. SURVEILLANCE GIANTS, *supra* note 7, at 6 (“Advertisers were the original beneficiaries of [the collected personal data], but once created, the companies’ data vaults served as an irresistible temptation for governments as well . . .”). Amnesty International notes that “[t]he starkest and most visible example of how Facebook and Google’s capabilities to target people at a granular level can be misused is in the context of political campaigning.” *Id.* at 31.

41. *See* Zuboff, *supra* note 36, at 9–11.

42. *See id.* at 9–10. Both companies’ revenues are generated primarily from advertising, and their business models are similar: (1) develop attractive digital products that extract user data, (2) use artificial intelligence systems to predict interests and behavior, and (3) sell the information derived from their data vaults to interested parties. *See* SURVEILLANCE GIANTS, *supra* note 7, at 10. The need to extract data to fuel ever-improving prediction systems has meant that companies collect data not only from user interactions on a platform but also by merging data across platforms as well as acquiring other companies. *See id.* at 14. The companies also acquire metadata (i.e., data about data), which—when aggregated and analyzed—provides key information for predicting human behavior and preferences. *See id.* at 16.

default mode for most Internet businesses, startups, and apps.”<sup>43</sup> Professor Zuboff noted that such surveillance methods were developed “largely through unilateral operations designed to evade individual awareness and thus bypass individual decision rights.”<sup>44</sup> It is therefore unsurprising that the public’s general lack of understanding about how surveillance capitalism works has become a matter of concern.<sup>45</sup>

### C. Use of Surveillance Data

Concerns related to user data have arisen not only because of the way that companies acquire that data but also because of how they use it. For example, in its overview of Google’s and Facebook’s immense data troves, Amnesty International highlighted that collected data is primarily used to deliver targeted advertising and maximize user engagement.<sup>46</sup> Amnesty International’s report

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43. Zuboff, *supra* note 36, at 8. Professor Zuboff notes that the surveillance capitalism business model is now implemented by a wide range of companies “including insurance, retail, health care, finance, entertainment, education, transportation, and more . . . . Nearly every product or service that begins with the word ‘smart’ or ‘personalized,’ every Internet-enabled device, every ‘digital assistant,’ operates as a supply-chain interface for the unobstructed flow of behavioral data.” *Id.* at 9; *see also* CYPHERS & GEBHART, *supra* note 38, at 1 (“Trackers are hiding in nearly every corner of today’s Internet . . . . The average web page shares data with dozens of third-parties. The average mobile app does the same, and many apps collect highly sensitive information like location and call records even when they’re not in use.”).

44. Zuboff, *supra* note 36, at 12.

45. A 2019 Pew survey found that 74% of U.S. Facebook users did not understand how much of their data was being harvested in order to target them with particularized advertising. Geoffrey A. Fowler, *Facebook Will Now Show You Exactly How It Stalks You—Even When You’re Not Using Facebook*, WASH. POST (Jan. 28, 2020), <https://www.washingtonpost.com/technology/2020/01/28/off-facebook-activity-page/> (on file with the *Columbia Human Rights Law Review*). Commentators are troubled by the general lack of understanding about the pervasiveness of surveillance capitalism. *See, e.g.*, Alegre, *supra* note 8, at 226 (arguing that it has become “less clear which thoughts we are offering to the outside world and which are being extracted without our knowledge or understanding,” and that people “may not be aware of the level of information about their inner thoughts that can be extracted”); Jones, *supra* note 8, at 8 (“Most people are not aware of digital platforms and political campaigners’ knowledge (and assumptions) about them, nor of the rapidly increasing scale on which data is shared, traded and used to develop personal profiles. Nor are they easily able to find out.”).

46. *See* SURVEILLANCE GIANTS, *supra* note 7, at 29. Targeted advertising “allows advertisers to reach users based on demographics, psychographics, and other traits. Behavioral advertising is a subset of targeted advertising that

highlighted that “as each individual engages with their own highly personalized experience of the internet, uniquely tailored to them based on algorithmically-driven inferences and profiling,” society faces a “door wide open to abuse by manipulating people at scale.”<sup>47</sup>

Apropos the issue of targeted advertising, the context of political ads and elections has raised particular apprehension about potential abuses. Ellen Weintraub, a Commissioner on the U.S. Federal Election Commission, has argued that “microtargeting” should be severely limited for election ads.<sup>48</sup> In her view, microtargeting increases the risk of disinformation harms by showing susceptible individuals political ads that the rest of society does not see.<sup>49</sup> If microtargeting were prohibited, she argues, disinformation risks would decrease because “[m]alicious advertisers, foreign and domestic, would be less likely to say to an entire state what they have been willing to say to a small audience targeted for its susceptibility.”<sup>50</sup> Beyond deploying the data vaults for political advertising, observers have raised concerns that companies could use

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leverages data about users’ past behavior in order to personalize ads.” CYPHERS & GEBHART, *supra* note 38, at 45; *see also* NATHALIE MARÉCHAL & ELLERY ROBERTS BIDDLE, RANKING DIGITAL RIGHTS, IT’S NOT JUST THE CONTENT, IT’S THE BUSINESS MODEL: DEMOCRACY’S ONLINE SPEECH CHALLENGE 25 (2020), <https://www.newamerica.org/oti/reports/its-not-just-content-its-business-model/> [<https://perma.cc/F3GJ-RZRZ>] (“Online targeted advertising . . . is personalized based on what advertisers and ad networks know (or think they know) about each person, based on the thick digital dossiers they compile about each of us.”).

47. SURVEILLANCE GIANTS, *supra* note 7, at 31.

48. *See* Ellen Weintraub, *Don’t Abolish Political Ads on Social Media. Stop Microtargeting*, WASH. POST (Nov. 1, 2019), <https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/> (on file with the *Columbia Human Rights Law Review*).

49. *Id.*

50. *Id.* Professor Siva Vaidhyanathan has also urged companies to stop microtargeting political ads for similar reasons. *See* Siva Vaidhyanathan, *The Real Reason Facebook Won’t Fact Check Political Ads*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/2019/11/02/opinion/facebook-zuckerberg-political-ads.html> (on file with the *Columbia Human Rights Law Review*) (advocating that Congress should “restrict the targeting of political ads in any medium to the level of the electoral district of the race. Tailoring messages for [particular groups] would still be legal . . . . But people not in those groups would see those tailored messages as well and could learn more about their candidates”). Commissioner Weintraub has also posited that limiting microtargeting could diminish divisive political ads because they would need to “appeal to a wider audience.” Weintraub, *supra* note 48.

microtargeting to manipulate people through various forms of social engineering.<sup>51</sup>

With regard to maximizing user engagement on platforms, questions have emerged about how targeted platform content affects users, particularly whether opaque algorithms promote “abusive, discriminatory, or hateful content.”<sup>52</sup> Given the human tendency to focus on “sensationalist or incendiary content,” platform “recommendation engines” can serve their users such content to keep them on the platform.<sup>53</sup> The Wall Street Journal revealed that an *internal* Facebook briefing for senior executives in 2018 cautioned that “[o]ur algorithms exploit the human brain’s attraction to divisiveness. . . . If left unchecked . . . [Facebook would promote] more and more divisive content in an effort to gain user attention and increase time on the platform.”<sup>54</sup> YouTube’s recommendation engine

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51. Amnesty International’s report highlights that Google Ads has been used to encourage suicidal individuals to contact help and to deradicalize potential terrorists. SURVEILLANCE GIANTS, *supra* note 7, at 31. While these may be valuable societal objectives, the use of accumulated data in these efforts displays their potential for improper manipulation of users. *See id.*

52. *Id.* at 34.

53. *Id.*

54. Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL ST. J. (May 26, 2020), <https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499> (on file with the *Columbia Human Rights Law Review*) (“Many of [Facebook’s] own experts appeared to agree [that Facebook was promoting divisiveness] and to believe Facebook could mitigate many of the problems. The company chose not to.”). A 2016 presentation disclosed that “64% of all extremist group joins are due to our recommendation tools . . . . Our recommendation systems grow the problem.” *Id.* Facebook employees working on such issues had discovered that “[b]ad behavior came disproportionately from a small pool of hyperpartisan users.” *Id.* Previously, a 2012 study, which revealed that Facebook could “alter the emotional state of users by manipulating their news feeds,” fueled concerns about corporations’ power to manipulate users by showing them personalized content. Alegre, *supra* note 8, at 227.

A leading digital rights group has also raised concerns about how recommendation engines, which are based on data troves, work:

[A]lgorithmic systems can drive the reach of a message by targeting it to people who are most likely to share it, and thus influence the viewpoints of thousands or even millions of people. As a society, we are facing a problem stemming not just from the existence of disinformation and violent or hateful speech on social media, but from the systems that make such speech spread to so many people. We know that when a piece of content goes viral, it may not be propelled by genuine user interest alone. Virality is often driven by corporate algorithms

has likewise garnered significant press coverage for promoting toxic content.<sup>55</sup> And users' lack of understanding about how persuasive technologies target them has heightened concerns about the impact of recommendation engines.

Given corporate methods based on (1) technological products designed to "hook" users, (2) constant digital surveillance, and (3) the deployment of data troves to target advertising and recommendations, it is not surprising that a growing chorus of stakeholders question whether this combination of practices adversely affect mental autonomy.<sup>56</sup> The next Part analyzes the scope of the international law right to hold opinions without interference in order to assess whether the surveillance capitalism business model undermines this right.

## II. INTERNATIONAL LAW FRAMEWORK ON THE RIGHT TO HOLD OPINIONS WITHOUT INTERFERENCE

This Part examines the scope of ICCPR Article 19(1)'s right to hold opinions without interference. Several commentators have taken the position that the right in international law to think and hold opinions consists of three prongs: the right not to (1) reveal one's opinions, (2) have one's opinions manipulated, and (3) be penalized for one's opinions.<sup>57</sup> In coming to this conclusion, commentators relied

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designed to prioritize views or clicks, in order to raise the visibility of content that appears to inspire user interest.

MARÉCHAL & BIDDLE, *supra* note 46, at 9.

55. See, e.g., Max Fisher & Amanda Taub, *How YouTube Radicalized Brazil*, N.Y. TIMES (Aug. 11, 2019), <https://www.nytimes.com/2019/08/11/world/americas/youtube-brazil.html> (on file with the *Columbia Human Rights Law Review*) (reporting that "YouTube's search and recommendation system appears to have systematically diverted users to far-right and conspiracy channels in Brazil"); Zeynep Tufekci, *YouTube, The Great Radicalizer*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html> (on file with the *Columbia Human Rights Law Review*) (reviewing results of YouTube's search engines before the 2016 U.S. election and noting that the company's "algorithm seems to have concluded that people are drawn to content that is more extreme than what they started with — or to incendiary content in general"). James Williams notes that such business practices magnify "moral outrage in a way that moralizes political division, it clears the way for the tribalistic impulse to claim for one's own group the mantle of representing the 'real' or 'true' will of the people as a whole." WILLIAMS, *supra* note 20, at 76–77.

56. See *supra* notes 5–8 and accompanying text.

57. For example, Susie Alegre concludes: "What can be gleaned from the international law framework is that the right has three key elements: the right not to reveal one's thoughts or opinions; the right not to have one's thoughts or

on a treatise that interprets a regional treaty—the European Convention on Human Rights (ECHR)—rather than the ICCPR.<sup>58</sup>

While it may be informative to consider developments in regional human rights bodies, a treatise that interprets the ECHR provides an insufficient basis for interpreting ICCPR Article 19(1).<sup>59</sup>

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opinions manipulated; and the right not to be penalised for one's thoughts." Alegre, *supra* note 8, at 225. She focuses her analysis primarily on "freedom of thought," though she says it is "connected to the corresponding right to freedom of expression and opinion" and at times refers to both concepts as the same right, e.g., "the right to freedom of thought and opinion." *Id.* at 221–24. (As noted *supra* note 9, the right to hold opinions is in ICCPR's Article 19 on freedom of expression and the right to freedom of thought is in ICCPR Article 18, which covers religious freedom.) Kate Jones states that "freedom of thought entails a right not to have one's opinion unknowingly manipulated or involuntarily influenced, fundamentally linked with the concept of human agency. . . . It also entails a right not to reveal one's thoughts or opinions, and not to be penalized for one's thoughts." Jones, *supra* note 8, at 34. Jones uses the phrase "freedom of thought" as "a convenient shorthand for [both] the right to freedom of thought and the right to hold opinions without interference." *Id.* at 32, n.108. Professor McCarthy-Jones also takes the position that there are "three elements of the right[:] the rights not to reveal one's thoughts, not to be penalized for one's thoughts, and not to have one's thoughts manipulated." McCarthy-Jones, *supra* note 4, at 1. But his analysis appears to focus exclusively on freedom of thought rather than the right to hold opinions. *See id.* at 5.

58. See Alegre, *supra* note 8, at 225 (citing Ben Vermeulen, *Freedom of Thought, Conscience, and Religion (Article 9)*, in *THEORY & PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 752 (2006)); Jones, *supra* note 8, at 34 (citing Alegre's article, which cites to Vermeulen's chapter); McCarthy-Jones, *supra* note 4, at 5 ("A useful way to frame an exploration of the limited case law and scholarly writing on [this right] is through Vermeulen's (2006) non-binding commentary on Article 9 of the ECHR.").

59. Moreover, the analysis of the ECHR right to freedom of thought in the treatise cited to by these commentators is quite limited, likely because of the lack of jurisprudence on this topic. *See generally* Ben Vermeulen, *Freedom of Thought, Conscience, and Religion (Article 9)*, in *THEORY & PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 751, 752 (2006) (discussing the scope of freedom of thought under the ECHR). The main authority for the treatise's observations on the scope of freedom of thought is a short footnote on the negotiating history of the ECHR and a 1996 case from the European Commission on Human Rights. *Id.* The footnote states that freedom of thought was included in the ECHR to protect against problematic means of interrogation by police or judicial authorities that removed control of intellectual faculties or conscience from a suspect or criminal. *Id.* at n.2 (translated from French). In the 1996 case, the Commission stated that the ECHR's protection for freedom of thought, conscience, and religion "affords protection against religious indoctrination by the State. [It] primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*." *C.J., J.J., & E.J. v. Poland*, Appl. 23380/40, D&R 84-A Eur. Ct. H. R. ¶ 3 (1996). Despite the European Commission's potentially narrow

The ICCPR and ECHR are different treaties, and different bodies monitor the implementation of each.<sup>60</sup> The U.N. human rights machinery and the European Court of Human Rights (ECtHR) often interpret their respective treaties differently—even if the rights are phrased similarly. For example, in his 2019 annual report to the U.N. General Assembly, the U.N. Special Rapporteur highlighted that the ECtHR takes a significantly narrower approach to freedom of expression by, *inter alia*, condoning the criminalization of blasphemy and atrocity denial (while the U.N. human rights system does not).<sup>61</sup> The Special Rapporteur also underlined that the ECtHR is less protective of speech than the U.N. system in other ways, including its penchant for treating serious hate speech cases as inadmissible as an “abuse” of the right to speak rather than analyzing whether governments have met their burden of proving that the restrictions are permissible.<sup>62</sup> In addition, he called attention to the fact that the U.N. Human Rights Committee “has specifically rejected the European Court’s margin of appreciation doctrine,” which gives deference to governments; instead, the U.N. system requires governments to prove with particularity why any speech restrictions

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view that freedom of thought pertains primarily to “personal beliefs and religious creeds,” the treatise later notes that the ECHR’s right to freedom of thought and its right to hold opinions “can hardly be distinguished.” Arjen van Rijn, *Freedom of Expression (Article 10)*, in *THEORY & PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 773, 778 (2006).

60. For the ECHR, the European Court of Human Rights (ECtHR) issues legally binding opinions about the scope of the treaty. See *European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature* Nov. 4, 1950, arts. 19–46, Euro. T. S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]. With respect to the ICCPR, the U.N. Human Rights Committee—a body of independent experts elected by the treaty’s State Parties—issues recommendations on implementation of the treaty. See ICCPR, *supra* note 9, arts. 28–47. In addition, the U.N. human rights machinery includes special independent experts—generally designated as special rapporteurs—who provide guidance to all U.N. members on international human rights standards. *Special Procedures of the Human Rights Council*, OFF. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx> [<https://perma.cc/X3QB-25HS>].

61. David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 26, U.N. Doc. A/74/486 (Oct. 9, 2019) [hereinafter *U.N. SR 2019 Report*] (“[T]he [ECtHR] has adopted relatively deferential attitudes towards States that continue to ban blasphemy by law on the grounds of prohibiting hate speech or continue to criminalize genocide denial, in contrast to trends observed at the global level.”).

62. *Id.*

are lawful under the ICCPR.<sup>63</sup> The ECtHR and the U.N. Human Rights Committee have also assessed the scope of the freedom of religion provisions in their respective treaties differently, with the U.N. system providing broader protection for religious liberty.<sup>64</sup>

Given the differences between the U.N. and ECtHR approaches to the fundamental freedoms of expression and religion, this Part conducts an independent analysis of the ICCPR to determine whether its Article 19(1) encompasses the proposed three-pronged approach for defining the scope of the right to hold opinions without interference. This Part begins by analyzing the text of the treaty and proceeds by reviewing the relevant portions of the negotiating history, the works of jurists, and the recommended interpretations of the U.N. human rights machinery. This Part concludes that ICCPR Article 19(1) does indeed encompass three components: the right not to (1) reveal opinions, (2) have one's process of opinion formation overtaken, coerced or manipulated, and (3) be penalized for holding opinions.

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63. *Id.* ¶ 27. The Special Rapporteur's report was not exhaustive in listing the differences between the U.N. and European approaches to freedom of expression. For example, under the ICCPR, governments may only restrict speech if, *inter alia*, the restriction constitutes "the least intrusive means" of achieving a legitimate public purpose. *See, e.g.*, U.N. Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34, ¶ 34 (Sept. 12, 2011) [hereinafter GC 34] (stating that speech restrictions must be "the least intrusive instrument amongst those which might achieve their protective function"); David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 7, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018) (stating that governments "must demonstrate that the restriction imposes the least burden on the exercise of the right and actually protects, or is likely to protect, the legitimate State interest at issue"). By contrast, the ECtHR has generally not espoused a least intrusive means test in assessing speech restrictions. *See* JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMACY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 129 (2009) (addressing the ECtHR's "general rejection of the least/less onerous means-test" in assessing violations of freedom of expression).

64. *See* Stephanie Berry, *The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religion by Wearing a Burqa*, EURO. J. INT'L L.: TALK! (Jan. 3, 2019), <https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/> [<https://perma.cc/22TJ-2P9Q>] (discussing how the U.N. Human Rights Committee found that France's burqa ban violates the ICCPR's protection of religious freedom, while the ECtHR held that the burqa ban does not violate the ECHR's provisions on religious freedom).

### A. Analysis of Treaty Text

The ICCPR entered into force in 1976 and has 173 State Parties, including the United States.<sup>65</sup> Under the Vienna Convention on the Law of Treaties, the first step in interpreting a treaty is to consider the agreement's phrasing "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>66</sup> The full text of ICCPR Article 19 reads as follows:

1. Everyone shall have the *right to hold opinions without interference*.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are *provided by law* and are *necessary*:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>67</sup>

A plain reading of this text reveals a key distinction between the "right to hold opinions without interference" and the "right to freedom of expression." Article 19(1)'s right to hold opinions without interference is absolute: the text does not permit any limitations of the right. The absolute nature of that right is in stark contrast with the related—but different—right to freedom of expression, which appears in Article 19(2) and 19(3).<sup>68</sup> Freedom of expression can be limited when a government proves that a restriction is (1) provided by law (e.g., not vague), (2) imposed for a legitimate public interest

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65. See *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en) [https://perma.cc/REB4-DFF7].

66. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, at 340 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

67. ICCPR, *supra* note 9, art. 19 (first three emphases added).

68. *Id.* art. 19(2)–(3).

reason (e.g., the rights or reputations of others, national security, public order, health or morals), and (3) necessary to achieve that objective (which means, *inter alia*, the restriction is the least intrusive means to achieve the public interest goal).<sup>69</sup> Thus, before an opinion is expressed, the thinking inside your mind is protected. But to what extent is it protected? And from what, or whom?

Notably, the right to hold opinions without interference is absolute not only in the sense that it is exempted from any governmental restrictions under Article 19(3), but also in that it is to be enjoyed “without interference.”<sup>70</sup> If the right already cannot be subject to any governmental limitations, what does the phrase “without interference” add to this right? Perhaps this phrase reinforces the broadness of the right to control the inner sanctum of one’s mind. It would certainly appear that being penalized for having an opinion would contradict a right to hold opinions “without interference.”<sup>71</sup> Similarly, forcing disclosure of an opinion would

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69. *Id.* art. 19(3). The interpretations of “provided by law” and “necessary” reflect the U.N. Human Rights Committee’s guidance. See GC 34, *supra* note 63, ¶¶ 22, 25, 33. By contrast, it is worth noting that the text of ECHR treats the freedom to hold opinions as a subset of the freedom of expression, and therefore potentially subjects the freedom to hold opinions to the same limitations as those that may be imposed on freedom of expression. See ECHR, *supra* note 60, art. 10(1) (“Everyone has the right to freedom of expression. This right shall *include* freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”) (emphasis added); see also *id.* art. 10(2) (“The exercise of these freedoms [of opinion and expression] . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society [to protect legitimate public interest goals.]”).

70. ICCPR, *supra* note 9, art. 19(1).

71. For a definition of “penalized,” see, e.g., *Penalize Definition*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/penalize> [<https://perma.cc/LNP6-EP5S>] (defining “penalize” as punishing someone or treating someone “in a way that gives them a disadvantage”); *Penalize Definitions and Synonyms*, MACMILLAN DICTIONARY, <https://www.macmillandictionary.com/us/dictionary/american/penalize> [<https://perma.cc/7GDE-JAZK>] (defining “penalize,” *inter alia*, as punishment for violation of law or “to treat someone in an unfair way and make them have a disadvantage”); *Definition of ‘Penalize,’* COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/penalize> [<https://perma.cc/RB3W-S4YH>] (stating that “[i]f a person or group is penalized for something, they are made to suffer in some way because of it”).

It should also be noted that ICCPR Article 2 prohibits State Parties from discriminating, including because of “political or other opinion,” when they provide the civil and political rights guaranteed by the treaty. ICCPR, *supra* note 9, art. 2. Similarly, ICCPR Article 26 requires equal protection of the law for all and forbids discrimination based on, *inter alia*, “political or other opinion.” *Id.* art.

appear to undermine one's right to hold the opinion "without interference." Moreover, from a review of basic dictionary definitions of "interference,"<sup>72</sup> the phrase "without interference" also seems to suggest that the right to think and develop opinions is to be enjoyed without deliberate and nonconsensual attempts to influence the inner space of one's mind. Broadly speaking, all advertising, advocacy, and other efforts to persuade could be said to "interfere" with opinion formation, but they could not be reasonably viewed as infringing on human rights. Therefore, it may be that deliberate efforts to influence through non-consensual means violate this right when they rise to the level of either overwhelming mental autonomy<sup>73</sup> or manipulating one's reasoning. In other words, both overwhelming human will and manipulating human reasoning would infringe the right to be free from any "interference" when forming and holding opinions.

A review of other related provisions in the ICCPR sheds some (but not much) additional light on the scope of the right to hold opinions without interference. For example, ICCPR Article 18's religious freedom protections include the "right to freedom of thought,"<sup>74</sup> which appears to be similar to the right to hold opinions without interference. Under Article 18, the "right to freedom of thought, conscience, and religion" is absolute,<sup>75</sup> but manifestations of one's "religion or beliefs" can be subject to governmental limitations if

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26. Given that discrimination on the basis of opinion is already prohibited in the ICCPR, one may infer that the Article 19(1) right to hold opinions encompasses broader protections than a ban on discrimination for holding opinions.

72. See, e.g., *Interference Definitions and Synonyms*, MACMILLAN DICTIONARY, <https://www.macmillandictionary.com/us/dictionary/american/interference> [<https://perma.cc/648N-M2J9>] (defining "interference" as "the process of deliberately becoming involved in a situation and trying to influence the way that it develops, although you have no right to do this"); *Definition of 'Interference'*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/interference> [<https://perma.cc/ZZ33-PWZG>] (defining "interference by a person or group" as "their unwanted or unnecessary involvement in something").

73. See *supra* note 4 for the definition of "mental autonomy" used throughout this Article.

74. ICCPR, *supra* note 9, art. 18.

75. ICCPR Article 18(1) provides that "[e]veryone shall have the right to freedom of thought, conscience and religion," including the "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." *Id.* art. 18(1). Article 18 goes on to say that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." *Id.* art. 18(2).

certain requirements are met.<sup>76</sup> The ICCPR provides that Article 18 rights may not be derogated in times of public emergency, but Article 19 rights can.<sup>77</sup> Even after reviewing this additional text it remains difficult to discern how the scope of “freedom of thought” differs from that of “the right to hold opinions without interference.” However, because both provisions appear in sequential articles in the same treaty, a reasonable observation suggests that they are not simply duplicative. Whereas freedom of thought may be concerned with the types of beliefs and thinking associated with the adoption of religious or personal philosophical tenets, the right to hold opinions seems to apply to views on any subject, as ICCPR Article 19 is not limited to any particular topic.

Protections for the right to privacy further elucidate the scope of the right to hold opinions without interference. ICCPR Article 17(1) provides that “[n]o one shall be subjected to arbitrary or unlawful *interference* with his privacy, family, home or correspondence, nor to

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76. ICCPR Article 18 contains a limitations clause that is phrased in similar terms as the permissible limitations on freedom of expression, which were discussed above. *See supra* note 69 and accompanying text. In particular, Article 18 states that “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are *prescribed by law* and are *necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” *Id.* art. 18(3) (emphasis added). It should be noted that the ECHR religious freedom article contains very similar phrasing. ECHR Article 9 provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ECHR, *supra* note 60, art. 9. That said, the religious freedom provisions in the ICCPR and ECHR have been interpreted differently. *See supra* note 64.

77. *See* ICCPR, *supra* note 9, art. 4(1)–(2) (“In time of public emergency . . . , the States Parties . . . may take measures derogating from their obligations . . . No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”). By contrast, the text of the ECHR allows for derogations of both its religious freedom and freedom of expression articles. *See* ECHR, *supra* note 60, art. 15(1)–(2) (“In time of . . . public emergency . . . any High Contracting Party may take measures derogating from its obligations . . . No derogation from Article 2 . . . or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”).

unlawful attacks on his honour and reputation.”<sup>78</sup> Interestingly, besides the article that guarantees the right to hold opinions, the privacy article is the only other one in the treaty that uses the word “interference.” In the privacy provision, however, the treaty qualifies “interference” with the words “arbitrary or unlawful.” In other words, the right to privacy itself can be subject to interference when that interference is lawful and non-arbitrary. Article 19(1)’s right to hold opinions without interference, on the contrary, contains no such limitation. As a result, it is reasonable to infer particular breadth to this right as any form of interference is prohibited. While the comparison of these two articles does not otherwise reveal a clear scope for Article 19(1), it does reinforce the idea that the right to hold opinions is so profound and so intimately tied to human dignity that it may not be abridged by any means or balanced against other societal equities.

In sum, while a textual analysis of ICCPR Article 19(1) does not provide a clear definition of the contours of the right to hold opinions without interference, some preliminary observations are in order. First, the right to hold opinions—unlike freedom of expression—may not be subject to governmental restriction. Second, unlike any other right in the treaty, the right to hold opinions is to be enjoyed “without interference” of any kind. The phrasing of this right indicates that deliberate efforts to influence opinions through non-consensual means would constitute a violation if they overwhelm mental autonomy or result in manipulation. Moreover, forcing individuals to reveal their opinions or penalizing them for particular opinions would appear to be an illicit “interference” with the right. Third, the right to hold opinions appears related to the “freedom of thought,” which the ICCPR protects in the immediately preceding article on religious freedom. These two rights are likely not merely redundant, as the right to hold opinions covers thinking on any topic and appears to be broader in scope. Despite these preliminary observations, the precise scope of the right to hold opinions without interference would benefit from further clarification.

## B. Negotiating History

Because the examination of the treaty text leaves some ambiguity concerning the precise scope of the right to hold opinions

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78. ICCPR, *supra* note 9, art. 17(1) (emphasis added). The rest of the privacy provision states that “[e]veryone has the right to protection of the law against such interference or attacks.” *Id.* art. 17(2).

without interference, it is permissible to review the negotiating history of ICCPR Article 19(1) for purposes of clarification.<sup>79</sup> Section II.B.1 analyzes the relevant meetings that took place during the ICCPR negotiations, which occurred from 1946 to 1966.<sup>80</sup> Given that negotiations on ICCPR Article 19(1) were intricately linked to the negotiation and adoption of the 1948 Universal Declaration of Human Rights (“UDHR”), Section II.B.2 analyzes this declaration’s negotiation history with respect to the right to hold opinions.

### 1. ICCPR Article 19(1) Negotiations<sup>81</sup>

The U.N. negotiations on ICCPR Article 19(1)’s right to hold opinions without interference focused in large part on whether (1) it was necessary to include this right in the treaty, (2) this right should be treated differently from the right to free expression, and (3) individuals’ ability to hold opinions should be protected from interference by both governmental authorities and the private sector. For example, the United States and the United Kingdom took the position that it was unnecessary to include a reference to “freedom of thought” in an article protecting the right to free expression because the group had already agreed to include “freedom of thought” in the treaty’s religious liberty provision.<sup>82</sup> Uruguay disagreed with such assertions, arguing that “freedom of thought” had a different meaning in the context of an article on the right to free expression than in the

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79. Under the Vienna Convention on the Law of Treaties, it is permissible to resort to the “preparatory work of the treaty” if an analysis of the text leaves its meaning “ambiguous or obscure.” Vienna Convention, *supra* note 66, art. 32(a).

80. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 141–42 (2d ed. 2012).

81. Section II.B.1’s overview of the U.N. deliberations relies on the leading compilation of documents from the ICCPR’s negotiating history. *See* MARC J. BOSSUYT, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 378–80 (1987). This Section focuses on the records that the compilation lists as specifically relevant to the negotiation of ICCPR Article 19(1) after the adoption of the UDHR. *See id.* Although there were some deliberations about the text of the ICCPR before the UDHR was adopted, they do not illuminate the scope of the right to hold opinions without interference. *See id.* at 373–76.

82. U.N. ESCOR, Comm’n on H.R., 162d mtg. ¶¶ 6, 28, U.N. Doc. E/CN.4/SR.162 (Apr. 28, 1950). In its statement, the United States appeared to use “freedom of thought” and “freedom to hold opinions” interchangeably. *See id.* ¶ 6.

context of religious liberty.<sup>83</sup> As the discussions progressed, the United States acknowledged that there was a difference between the “freedom of thought” (in the religious freedom provision) and the “freedom to hold opinions” (in the freedom of expression provision), but was willing to delete the freedom to hold opinions from the free expression article as Lebanon believed it was superfluous.<sup>84</sup>

In a subsequent meeting, momentum began to grow towards including a right to hold opinions in the ICCPR’s draft article on freedom of expression. France argued for the inclusion of freedom of opinion, noting that it was different from the reference to freedom of thought in the treaty’s religious liberty provision, which was principally concerned with freedom of conscience and religion.<sup>85</sup> Because the UDHR already protected freedom of opinion, China took the position that (1) the ICCPR should not contain fewer rights than the UDHR and (2) “freedom of thought” in the religious liberty article was not as broad as the “right to hold opinions” in an article on free expression.<sup>86</sup> China was not alone in citing to the UDHR as an

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83. Unfortunately, the record of the meeting does not indicate that Uruguay elaborated on the distinction between the freedoms of thought and opinion. *Id.* ¶¶ 35–37.

84. The record of the meeting does not indicate that the United States elaborated on the distinction between the freedoms of thought and opinion. *Id.* ¶ 38. Lebanon took the position that the freedom to hold opinions was implicitly incorporated in the right to freedom of expression. *Id.*

85. U.N. ESCOR, Comm’n on H.R., 6th Sess., 164th mtg. ¶¶ 16–17, U.N. Doc. E/CN.4/SR.164 (May 1, 1950). France stated that it disagreed with the Belgian view that freedom of opinion was duplicative of freedom of thought. *Id.* Uruguay also continued to argue that the freedoms of thought and opinion were different, and both should be retained in the ICCPR. *Id.* ¶¶ 14, 29–30. Similarly, India favored including both in the ICCPR because there was a “fundamental” difference between the two rights (though the U.N. record of the negotiations does not include India’s view of what those differences were). *Id.* ¶¶ 35–36. That said, in subsequent negotiations, India took the position that freedom of opinion should be removed from the freedom of expression article and dealt with in the religious liberty article with freedom of thought. U.N. ESCOR, Comm’n on H.R., 8th Sess., 322d mtg. at 4, U.N. Doc. E/CN.4/SR.322 (June 17, 1952). Australia supported a reference to freedom of opinion even if it was redundant with the Covenant’s prior reference to freedom of thought in the religious liberty article. U.N. ESCOR, Comm’n on H.R., 6th Sess., 164th mtg. ¶ 24, U.N. Doc. E/CN.4/SR.164 (May 1, 1950).

86. U.N. ESCOR, Comm’n on H.R., 6th Sess., 164th mtg. ¶¶ 8, 12, 19, U.N. Doc. E/CN.4/SR.164 (May 1, 1950). Article 19 of the UDHR states that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” G.A. Res. 217 (III) A,

important precedent. More than half of the delegates at the meeting referred to the UDHR in their deliberations on the draft text that would become ICCPR Article 19.<sup>87</sup>

States that had previously spoken out against inclusion of the right to hold opinions without interference began to eloquently explain its merits. For instance, the U.K. argued that the freedoms of “thought” and “opinion” constitute different rights; because freedom of thought pertained only to religious opinion, it would not be duplicative to include freedom of opinion in the ICCPR article on freedom of expression.<sup>88</sup> In refuting Belgian claims that opinion could not be controlled, the U.K. explained that “[i]n totalitarian countries, opinions were definitely controlled by careful restriction of the sources of information.”<sup>89</sup> The U.K. also noted that an interference with freedom of opinion could occur before an opinion had been formulated.<sup>90</sup> France stated that while this right only covers opinions that are not expressed, it was important to include freedom of opinion because often people are persecuted for opinions they are assumed to have.<sup>91</sup>

As more delegations favored including a right to freedom of opinion, the idea that this right should not be subjected to the same limitations as would be applicable to freedom of expression gained momentum,<sup>92</sup> though not all delegates agreed.<sup>93</sup> China proposed

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Universal Declaration of Human Rights, art. 19, 5 (Dec. 10, 1948) [hereinafter UDHR].

87. U.N. ESCOR, Comm’n on H.R., 6th Sess., 164th mtg. ¶¶ 8, 12, 14, 19–21, 23–24, 33, 35, 42, 47, 50, 54–56, 62, U.N. Doc. E/CN.4/SR.164 (May 1, 1950).

88. *Id.* ¶ 31.

89. *Id.* ¶ 32. It should be noted that Chile joined Belgium by taking the position that “it was impossible to interfere with freedom of opinion or to prevent an individual from forming opinions.” *Id.* ¶ 21.

90. *Id.* ¶ 34. Later in the negotiating process, the U.K. seemed to weaken slightly in its support for the right to hold opinions. *See, e.g.*, U.N. ESCOR, Comm’n on H.R., 6th Sess., 167th mtg. ¶ 62, U.N. Doc. E/CN.4/SR.167 (May 5, 1950) (noting that freedom of opinion would be hard to enforce in practice); U.N. ESCOR, Comm’n on H.R., 8th Sess., 320th mtg. at 4, U.N. Doc. E/CN.4/SR.320 (June 18, 1952) (proposing an amendment—which was not accepted—that would have deleted the right to hold opinions as a separate sub-paragraph in Article 19 and instead placed it in the same sub-paragraph as freedom of expression, which would have subjected both rights to potential limitations).

91. U.N. ESCOR, Comm’n on H.R., 6th Sess., 164th mtg. ¶ 27, U.N. Doc. E/CN.4/SR.164 (May 1, 1950).

92. France believed that freedom of opinion and freedom of expression should be covered in separate articles as they were different in nature. *Id.* Lebanon continued to believe that reference to freedom of opinion was unnecessary but noted that—if others disagreed—the topics of opinion and

keeping the freedoms of opinion and expression in the same article and creating a new sub-paragraph for the freedom of opinion that would not be subject to the limitations applicable to freedom of expression.<sup>94</sup> That sub-paragraph, which was adopted by nine votes in favor, two against, and four abstentions, was phrased as follows: “Everyone shall have the right to freedom of opinion without interference.”<sup>95</sup>

It should also be noted that there was significant debate about whether the rights in ICCPR Article 19 would only protect individuals from governmental intrusions or also require governments to protect against infringements by private actors. The United States and the U.K. were the most vociferous nations in favor of limiting these rights to cases involving state action.<sup>96</sup> France and

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expression should be separated in the covenant and treated differently. *Id.* ¶¶ 25–26. Uruguay agreed that the freedoms of opinion and expression should be treated separately. *Id.* ¶¶ 29–30. The Philippines believed that treating the freedoms of opinion and expression differently helped clarify the scope of protection for opinions. *Id.* ¶ 38.

93. For example, India was not in favor of separating the freedoms of opinion and expression into two articles or two sub-paragraphs within one article “because separation of the two ideas seemed unnecessary.” *Id.* ¶ 40.

94. *Id.* ¶ 37. France agreed to have both freedoms in different sub-paragraphs within the same article so long as it was clear that the permissible limitations applied only to the freedom of expression and not to the freedom of opinion, which was absolute. *Id.* ¶ 39.

95. *Id.* ¶ 64. The formulation of the right to “freedom of” opinion without interference was later changed to the right to “hold” opinions without interference. *See* U.N. ESCOR, Comm’n on H.R., 6th Sess., 200th mtg. at 3, U.N. Doc. E/CN.4/SR.200 (June 5, 1950) (noting that the Commission on Human Rights adopted the U.K.’s suggestion to phrase this right as “[e]veryone shall have the right to hold opinions without interference”); Rep. of the Third Comm., *Draft International Covenants on Human Rights*, ¶ 34, U.N. Doc. A/5000 (Dec. 5, 1961) (commemorating that the Third Committee of the General Assembly unanimously adopted the Commission’s proposed text for ICCPR Article 19(1)). The meeting records from the 1950s state that “it became clear that freedom of opinion . . . was purely a private matter, belonging as it did to the realm of the mind . . . [I]t was generally agreed that no law could regulate his opinion and no power could dictate what opinion he should or should not entertain.” U.N. GAOR, 10th Sess., ¶ 120, U.N. Doc. A/2929 (July 1, 1955). Those records also show that, although discussions continued about the difference between freedom of thought and freedom of expression, they did so at an abstract level that did not illuminate any distinctions in a concrete fashion. *Id.* ¶ 123 (noting that one delegate thought the two rights were very close in meaning and another explained they were complementary but not mutually exclusive).

96. *See, e.g.*, U.N. ESCOR, Comm’n on H.R., 6th Sess., 160th mtg. ¶¶ 27, 36, U.N. Doc. E.CN.4/SR.160 (Apr. 27, 1950) (summarizing U.S. arguments that “covering private infringements . . . would create complications and give rise to

Lebanon made the case that this provision should cover both governmental and private interference.<sup>97</sup> Ultimately, attempts to narrow the article to solely governmental intrusions failed.<sup>98</sup>

Review of the records of the key negotiations on ICCPR Article 19(1) reveals four themes. First, there was significant debate about whether “freedom of thought” (in the draft religious liberty article) and “freedom of opinion” (proposed to be in the freedom of expression article) protected the same right.<sup>99</sup> The majority eventually decided that these rights were not duplicative, with France and the U.K. arguing that freedom of thought pertained to the realm of religious liberty matters.<sup>100</sup> Second, although the deliberations did not delve into the precise contours of this right, a few states provided some texture to the scope of the right to hold opinions. They noted that governments had improperly controlled opinions through their curation of information, explained that the right could be undermined before an opinion had been formed, and highlighted that individuals had been persecuted merely for suspected opinions that they had not even publicly expressed.<sup>101</sup> Third, attempts to limit this article solely to cases of state action failed, thus commemorating the majority view that governments should regulate against private sector interferences.<sup>102</sup> Fourth, the negotiators repeatedly referred to the importance of the UDHR and its impact on their deliberations on this article.<sup>103</sup> The next Section

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many unpredictable situations” and U.K. views that such private infringements “could be controlled in other ways” that did not require treaty coverage); U.N. ESCOR, Comm’n on H.R., 6th Sess., 165th mtg. ¶¶ 15–16, U.N. Doc. E.CN.4/SR.165 (May 2, 1950) (commemorating U.S. and U.K. views that acknowledged the potential for private interferences with freedom of information but it “would be difficult to expose or prevent them”).

97. See, e.g., U.N. ESCOR, Comm’n on H.R., 6th Sess., 160th mtg. ¶ 45, U.N. Doc. E.CN.4/SR.160 (Apr. 27, 1950) (noting French arguments that governments were not the only ones “which might interfere with freedom of information; various groups of citizens might jeopardize that right unless the Government provided ample safeguards”); U.N. ESCOR, Comm’n on H.R., 6th Sess., 165th mtg. ¶ 14, U.N. Doc. E.CN.4/SR.165 (May 2, 1950) (summarizing Lebanon’s agreement with the French position).

98. U.N. ESCOR, Comm’n on H.R., 6th Sess., 165th mtg. ¶ 17, U.N. Doc. E.CN.4/SR.165 (May 2, 1950) (noting the French amendment to delete U.S.-proposed language that would limit the article to governmental interference passed with eight votes in favor, five against, and one abstention).

99. See *supra* notes 82–84 and accompanying text.

100. See *supra* notes 85–88 and accompanying text.

101. See *supra* notes 89–91 and accompanying text.

102. See *supra* notes 96–98 and accompanying text.

103. See *supra* notes 86–87 and accompanying text.

therefore explores whether the UDHR negotiating history can further clarify the scope of the right to hold opinions.

## 2. Relevant UDHR Negotiations

In June 1946, the U.N. charged the Commission on Human Rights—a body composed of one representative from each of the eighteen U.N. member states—with developing an international bill of human rights, which would eventually be comprised of the UDHR and two treaties (including the ICCPR).<sup>104</sup> The UDHR was negotiated and adopted within two years.<sup>105</sup> UDHR Article 19 provides that “[e]veryone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>106</sup> This Section analyzes the Declaration’s negotiating history with respect to freedom of opinion to assess if it illuminates the scope of this right.

### i. The First Year of UDHR Deliberations<sup>107</sup>

At its first session in early 1947, the Commission elected Eleanor Roosevelt—the U.S. representative—as the body’s chair and determined that a Drafting Committee (including the chair) would

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104. *Drafting of the Universal Declaration of Human Rights: Economic and Social Council—2nd Session*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/ecosoc/2> [https://perma.cc/6FCW-5UFL] [hereinafter *Drafting UDHR—2nd Session*]; ALSTON & GOODMAN, *supra* note 80, at 141 (describing the Commission’s first meeting in 1947 and the decision to first adopt a draft Declaration as opposed to a legally binding instrument).

105. ALSTON & GOODMAN, *supra* note 80, at 141.

106. UDHR, *supra* note 86, art. 19. Not only are the freedoms of opinion and expression combined into one right (and one sentence) in the UDHR, but all rights in the UDHR are subject to the general limitations clause, which states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

*Id.* art. 29(2).

107. Section II.B.2.i’s summary of the UDHR negotiating history focuses on the scope of the right to hold opinions without interference and is based on the U.N. Research Guides, which provide the relevant summary records of the deliberations for this declaration. See *Drafting the Universal Declaration of Human Rights: Economic and Social Council—2nd Session*, *supra* note 104.

develop a first draft of the UDHR.<sup>108</sup> The U.N. Secretariat prepared a preliminary draft of an international bill of human rights for state representatives to consider.<sup>109</sup> The Secretariat's draft contained four separate articles involving the right to hold opinions and freedom of expression.<sup>110</sup> Specifically, the draft combined the rights to hold opinions and to express oneself into one sentence: "Every one has the right to form, to hold, to receive and to impart opinions."<sup>111</sup> All rights in the preliminary draft were bounded by a broadly phrased limitations clause, which stated that "[i]n the exercise of his rights every one is limited by the rights of others and by the just requirements of the State and of the United Nations."<sup>112</sup> Although the Secretariat's proposal did not mention "freedom of thought" in the religious liberty provision, it did state that "[t]here shall be freedom of conscience and belief and of private and public religious worship."<sup>113</sup>

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108. *Drafting of the Universal Declaration of Human Rights: Commission on Human Rights—1st Session*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/chr/1> [<https://perma.cc/X52D-C6MK>] [hereinafter *Drafting UDHR—1st Session*] (noting that the Chinese and Lebanese delegates would also serve on the Drafting Committee). After participants expressed concern that the Drafting Committee was too small, the Chair decided to expand the group to include Australia, the United Kingdom, Chile, France, and the USSR. *Drafting of the Universal Declaration of Human Rights: Economic & Social Council—4th Session*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/ecosoc/4> [<https://perma.cc/9CBS-WNP7>].

109. *Drafting of the Universal Declaration of Human Rights: Drafting Committee—1st Session*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/draftingcommittee/1> [<https://perma.cc/K7QT-X5CR>]. States also submitted proposals for consideration by the Drafting Committee. *Id.*

States also submitted proposals for consideration by the Drafting Committee. *Id.*

110. See U.N. ESCOR, Comm'n on H.R., U.N. Doc. E/CN.4/AC.1/3, arts. 15–18 (June 4, 1947).

111. *Id.* art. 15. The other three articles that addressed these topics were Articles 16, 17, and 18. Draft Article 16 stated that "[t]here shall be free and equal access to all sources of information both within and beyond the borders of the State." *Id.* art. 16. Draft Article 17 stated that "[s]ubject only to the laws governing slander and libel, there shall be freedom of speech and of expression by any means whatsoever, and there shall be reasonable access to all channels of communication. Censorship shall not be permitted." *Id.* art. 17. Draft Article 18 included an additional limitation on expression: "There exists a duty towards society to present information and news in a fair and impartial manner." *Id.* art. 18.

112. *Id.* art. 2.

113. *Id.* art. 14.

While a review of the U.N. records reveals little in terms of the actual debate, the records do show how the phrasing of the right to hold opinions evolved during the first year of the UDHR drafting process. In June 1947, the Commission's Drafting Committee tasked a working group with developing a new draft declaration.<sup>114</sup> The working group's freedom of opinion proposal read as follows: "No one can be molested by reason of his opinions, even if he has derived them from sources beyond the borders of the State. Everyone is free to change, hold or impart his opinion, or to receive and discuss the opinions of others."<sup>115</sup> Though the first sentence dealt solely with the right to hold opinions and even strengthened the Secretariat's draft by prohibiting any molestation (i.e., interference) with the right, the second sentence tracked the Secretariat's suggestion to combine the right to "hold" opinions with the right to "impart" them, which falls into the category of freedom of expression.<sup>116</sup> While all the rights in the draft UDHR continued to be subject to a general limitations

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114. *Drafting UDHR—1st Session*, *supra* note 109 (noting that the working group comprised the representatives from France, Lebanon, the United Kingdom, and the United States).

115. U.N. ESCOR, Comm'n on H.R., U.N. Doc. E/CN.4/AC.1/W.2/Rev.1, art. 21 (June 18, 1947). It should be noted that the Working Group had tasked the French delegate with drafting these proposed texts. *See Drafting of the Universal Declaration of Human Rights: Drafting Committee—1st Session*, *supra* note 109; *see also* U.N. ESCOR, Comm'n on H.R., U.N. Doc. E/CN.4/AC.1/W.2/Rev.1, at 1 (June 18, 1947) (noting the proposals were "suggestions submitted by the representative of France"). The Drafting Committee briefly discussed this provision. *See, e.g.*, U.N. ESCOR, Comm'n on H.R., 1st Sess., 8th mtg. at 13, U.N. Doc. E/CN.4/AC.1/SR.8 (June 20, 1947) (noting the U.S. delegation suggested that the provision should be modified because the original French version translated awkwardly into English).

116. The next article in the draft focused exclusively on the right to freedom of expression:

There shall be freedom of expression either by word, in writing, in the press, in books or by visual, auditive or other means; provided however that the author, editor, publisher, printer, etc. shall be responsible for the abuse of this right if in so doing they have committed slander or libel or have failed to present information and news in a fair and impartial manner.

U.N. ESCOR, Comm'n on H.R., U.N. Doc. E/CN.4/AC.1/W.2/Rev.1, at 4 (June 18, 1947). The meeting records note little discussion of this provision. *See, e.g.*, U.N. ESCOR, Comm'n on Hum. Rts., 1st Sess., 8th mtg. at 13–14, U.N. Doc. E/CN.4/AC.1/SR.8 (June 20, 1947) (noting the U.S. delegate's recommendation that the limitations on freedom of expression should be narrowed as well as the French delegate's view that responsibilities in the exercise of the right should be included).

clause,<sup>117</sup> the new religious liberty clause encompassed “freedom of thought.”<sup>118</sup>

After further deliberations the French delegate revised the draft declaration, which resulted in slight changes to the freedom of opinion provision and a shortening of the article on expression, but other key articles remained the same.<sup>119</sup> At the end of its first session, the Drafting Committee transmitted to the Commission on Human Rights a draft declaration that made additional changes to the freedom of opinion and freedom of expression provisions.<sup>120</sup> However,

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117. U.N. ESCOR, Comm’n on H.R., U.N. Doc. E/CN.4/AC.1/W.1, at 2 (June 18, 1947) (“In the exercise of his rights, everyone is limited by the rights of others.”). This updated limitations clause narrowed the Secretariat’s original phrasing, which allowed limiting rights for the amorphous reasons of the “just requirements” of governments and the U.N. *See supra* note 112 art. 2.

118. *See* U.N. ESCOR, Comm’n on H.R., U.N. Doc. E/CN.4/AC.1/W.2/Rev.1, at 3 (June 18, 1947) (“The individual freedom of conscience, belief and thought is an absolute and sacred right.”). The *practice* of religious beliefs, however, was subject to limitation. *See id.* (“The practice of a private or public worship and the manifestations of opposite convictions can be subject only to such limitations as are necessary to protect public order, morals and the rights and freedoms of others.”).

119. *See* U.N. ESCOR, Comm’n on H.R., U.N. Doc. E/CN.4/AC.1/W.2/Rev.2 (June 20, 1947). The draft provision on freedom of opinion (Article 21) continued to contain some overlap with the phrasing of freedom of expression: “No one can be molested by reason of his opinions. Everyone is free to *hold* or *impart* his opinion, or to *receive* the opinions of others, and to seek information from sources wherever situated.” *Id.* art. 21. (emphasis added). The draft freedom of expression provision (Article 22) was shortened substantially as follows: “There shall be freedom of expression either by word, in writing, in the press, in books or by visual, auditive or other means; provided however that the user of those means shall be responsible for the *abuse* of this right.” *Id.* art. 22. (emphasis added). The same general limitations clause and protection for freedom of thought continued to appear in this updated draft. *See id.* arts. 4, 20. The summary records of the negotiations on this version of the draft declaration merely note that discussion on the freedoms of opinion and expression had happened in an informal context. U.N. ESCOR, Comm’n on H.R., 1st Sess., 14th mtg. at 2, U.N. Doc. E/CN.4/AC.1/SR.14 (July 3, 1947) (noting the Chair explained that “Articles 21–26 had been discussed at an informal meeting”).

120. Drafting Comm. on an Int’l Bill of H.R., Rep. of the Drafting Comm. to the Comm’n on H.R., 1st Sess. ¶ 17, U.N. Doc. E/CN.4/21 (July 1, 1947). In addition to submitting texts that had garnered the most support, this draft also included alternate texts if a delegation insisted on its inclusion. *Id.* The proposal that garnered the most support on freedom of opinion stated the following: “Everyone is free to *hold* or *impart* his opinion, or to receive and seek information and the opinion of others from sources wherever situated.” *Id.* at 78 (emphasis added). This updated text removed the ban on non-interference/molestation and continued to combine freedom of opinion with freedom of expression. The freedom of expression provision was revised to read as follows: “There shall be freedom of

this draft explicitly noted that the freedom of expression provision “would need to be considered by the Sub-Commission on Freedom of Information and of the Press for possible inclusion in the . . . Declaration and would have to be elaborated further.”<sup>121</sup> When the Commission on Human Rights met in December 1947, it “decided not to elaborate a final text on [the freedom of opinion or expression articles] until it had before it the views of the Sub-Commission on Freedom of Information and of the Press and of the United Nations Conference on Freedom of Information.”<sup>122</sup>

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expression either by word, in writing, in the press, in books or by visual, auditive or other means. There shall be equal access to all channels of communication.” *Id.* Notably, this revised version removed text that prevented “abuse” of free speech. *See supra* note 119 art. 22. With respect to the proposals that had garnered the most support, the phrasing of the protection of freedom of thought read as follows: “Individual freedom of thought and conscience, to hold or change beliefs, is an absolute and sacred right.” U.N. ESCOR, Comm’n on H.R., 1st Sess. at 77, U.N. Doc. E/CN.4/21. The general limitations clause did not change. *See id.* at 73.

121. *Id.* at 78. The Sub-Commission on Freedom of Information and the Press was a temporary U.N. body formed to bring expertise and advice about how norms on free expression should develop in the new U.N. system. *See* Economic and Social Council Res. 9(II), ¶ 8 (June 21, 1946) (authorizing the Commission to establish the Sub-Commission for the purpose of examining “what rights, obligations, and practices should be included in the concept of freedom of information, and to report to the Commission on Human Rights on any issues that may arise from such examination”).

122. Comm’n on H.R., Rep. to the Econ. & Soc. Council on the Second Session of the Comm’n at 17, U.N. Doc. E/600(SUPP), (Dec. 17, 1947). Before adopting its final report, the Commission had tasked a Working Group to continue working on the draft declaration transmitted by the Drafting Committee. *Id.* ¶ 16. Although the Working Group stated that neither of the Drafting Committee’s proposed articles on the freedoms of opinion or expression had been discussed, its final report commemorated a version of the freedom of opinion article (Article 21) that was different from the one adopted by the Drafting Committee. *See* Comm’n on H.R., Rep. of the Working Group on the Declaration on Human Rights, 2nd Sess. at 11, U.N. Doc E/CN.4/57 (Dec. 10, 1947). The Working Group’s final report noted Article 21 as “[e]veryone is free to express and impart opinions, or to receive and seek information and the opinion of others from sources wherever situated. No person may be interfered with on account of his opinions.” *Id.* Unlike the Drafting Committee’s version of Article 21 (*see supra* note 115), this version seemed to remove freedom of opinion from the first sentence by deleting the concept of “holding” opinions and only focusing on imparting/expressing opinions, but it did include a new sentence that captured the topic of freedom of opinion by forbidding interference with opinions. The Commission’s final report from its session also captured this altered version of the freedom of opinion provision. *See* Comm’n on H.R., Rep. on the Second 2nd Sess., at 17 UN Doc. E/600(SUPP) (Dec. 17, 1947). The freedom of expression provision in the Commission’s final report remained the same: “There shall be freedom of expression either by word, in

## ii. The Second Year of UDHR Deliberations

By the time the UDHR Drafting Committee reconvened in May 1948,<sup>123</sup> it had received a recommended text on the freedoms of opinion and expression from the U.N. Conference on Freedom of Information.<sup>124</sup> The version submitted by the U.N. Conference had endorsed the formulation advanced by the Sub-Commission on Freedom of Information and of the Press.<sup>125</sup> This Section begins by examining the negotiation history of this text at both the Sub-Commission and U.N. Conference before returning to deliberations by the UDHR Drafting Committee.

### a. The Sub-Commission on Freedom of Information and of the Press<sup>126</sup>

In January 1948, the Sub-Commission on Freedom of Information and of the Press began its deliberations to propose text on the freedoms of opinion and expression.<sup>127</sup> After initial discussion that included reflecting on the freedom of opinion and expression texts included in the Commission on Human Rights' latest report,<sup>128</sup> the Chair asked the delegates to consider a U.K. proposal that would have combined the freedoms of opinion and expression into one sentence: "Every man has the right to freedom of opinion and expression and to freedom to seek and collect the information of others from sources wherever situated."<sup>129</sup> Harvard Law School Professor Zechariah Chafee, the U.S. delegate, urged his colleagues to adopt language recognizing the right "to hold" opinions because "[a]

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writing, in the press, in books or by visual, auditive or other means. There shall be equal access to all channels of communication." *Id.*

123. See *Drafting of the Universal Declaration of Human Rights: Drafting Committee on International Bill of Human Rights—2nd Session*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/draftingcommittee/2> [https://perma.cc/S7EJ-DUM8].

124. See U.N. ESCOR, FINAL ACT OF THE UN CONFERENCE ON FREEDOM OF EXPRESSION, U.N. Doc. E/CONF.6/79, U.N. Sales No. 1948.XIV.2 (Apr. 22, 1948).

125. Comm'n on H.R., Rep. of the Second Session of the Sub-Commission on Freedom of Information and the Press, ¶ 12, U.N. Doc. E/CN.4/80 (Feb. 6, 1948).

126. Section II.B.2.ii.a—b's examination of the deliberations at the Sub-Commission and U.N. conference are based primarily on a leading scholarly compilation of relevant records relating to the UDHR negotiations. See WILLIAM A. SCHABAS, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PREPARATOIRES* (Cambridge Univ. Press 2013).

127. See *id.* at 1367–68.

128. See *supra* note 122 and accompanying text.

129. SCHABAS, *supra* note 126, at 1369–71.

man might . . . be compelled to express an opinion because of moral pressure or even physical threat.”<sup>130</sup> As an example, Professor Chafee referenced how “Congressional Committees had compelled American citizens to state their view of communism under penalty of contempt.”<sup>131</sup>

Though Professor Chafee’s suggestion to make clear that individuals had the right to “hold” opinions (as well as to express them) was initially adopted,<sup>132</sup> the drafting committee tasked with proposing text to the Sub-Commission subsequently removed the language.<sup>133</sup> But when the Sub-Commission reconvened, Chafee once again convinced his colleagues to include the proposed language.<sup>134</sup>

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130. *Id.* at 1371.

131. *Id.* The memoir of the first Director of the U.N. Human Rights Division also highlighted Professor Chafee’s special contribution to the development of freedom of opinion as a separate right. JOHN THOMAS HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 51 (1994) (noting how Professor Chafee cited persuasively to Congressional coercion of American citizens to reveal their “intimate opinions” in making his case to strengthen the phrasing of freedom of opinion). Professor Chafee was a groundbreaking scholar in the field of freedom of expression and has been credited with influencing the U.S. Supreme Court’s First Amendment jurisprudence with his writings. ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 31 (2007) (explaining how Chafee’s writings influenced Supreme Court Justice Oliver Wendell Holmes’ thinking on free speech issues).

Unfortunately, Professor Chafee was also persecuted for his stance on freedom of expression. For example, Harvard investigated allegations that his free speech writings “rendered him unfit as a law school professor.” Peter H. Irons, “Fighting Fair”: *Zechariah Chafee, Jr., the Department of Justice, and the “Trial at the Harvard Club,”* 94 *HARV. L. REV.* 1205, 1205–06 (1981). In addition, having assumed Chafee’s free speech views meant he was a communist sympathizer, Senator Joe McCarthy listed him as one of a handful of men who were “dangerous to America.” DONALD L. SMITH, *ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW* 262 (1986). It is not surprising that Professor Chafee believed that the “inclination of men who obtain the power to govern is to use that power for the purpose of controlling not only the actions but the thoughts of men.” *ZECHARIAH CHAFEE, THE INQUIRING MIND* 227 (1928).

132. *See* SCHABAS, *supra* note 126, at 1371. The delegate from Uruguay also commented that it was “necessary to ensure freedom both to hold and to impart opinions. The individual should be free not to express his thoughts, and he should not be obliged to express an opinion contrary to his conscience.” *Id.*

133. *Id.* at 1373 (identifying the drafting committee’s two proposed texts, neither of which recognized a right to “hold” opinions).

134. *See id.* at 1374–79. During these deliberations, the U.K. representative stated that he thought the concept of communicating opinions encompassed the right to hold opinions and thus explicit mention of holding opinions may not be necessary. *Id.* The Canadian and French representatives

Professor Chafee also argued that the phrasing of this freedom should state that individuals should be able to hold opinions “without interference.”<sup>135</sup> The U.K. representative eventually agreed with Chafee’s suggestions and proposed the following phrasing: “Everyone shall have the right to freedom of *thought* and communication: this shall include freedom to *hold opinions without interference*; and to seek, receive and impart information and ideas by any means and regardless of frontiers.”<sup>136</sup>

Professor Chafee suggested that the word “thought” should be deleted from the draft UDHR’s religious freedom article because it was now contained in the article on the freedoms of opinion and expression.<sup>137</sup> The Sub-Commission ultimately adopted the UK’s revised text, but with the word “communication” changed to “expression”: “Everyone shall have the right to freedom of thought and expression; this shall include freedom to hold opinions without interference; and to seek[,] receive and impart information and ideas by any means and regardless of frontiers.”<sup>138</sup> The Sub-Commission also included a recommendation to the Commission on Human Rights either to delete the word “thought” in the religious liberty article or to change “thought” to “opinion” in the article concerning the freedoms of opinion and expression.<sup>139</sup>

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agreed with this reasoning. *Id.* at 1376, 1378. However, the UNESCO representative (with whom the delegate of Panama agreed) argued that the freedoms of opinion and expression were different concepts and should be treated accordingly. *Id.* at 1375–76. That said, their understanding of freedom of opinion may have been different from Professor Chafee’s as the UNESCO representative argued freedom of expression involved the sharing of “objective knowledge of facts” and freedom of opinion involved sharing one’s personal views. *Id.* at 1375. Representatives of the Soviet Union and its allies sought to limit the freedoms of expression and opinion. *See id.* at 1375–76 (noting the Czechoslovakian delegate argued that the “greatest crimes in history had been committed in the name of liberty” and the USSR delegate urged that “it was necessary to set limitations to the liberty of the press if it were used as a vehicle of war propaganda and exhortation to revenge”).

135. *Id.* at 1376.

136. *Id.* at 1379 (emphasis added).

137. *Id.* In response to Professor Chafee’s concern, the Canadian representative “pointed out that . . . the word ‘thought’ had been used instead of ‘opinion’ for reasons of style” as the proposed draft already used the word “opinion” in the same sentence. *Id.* The U.K. delegate “agreed that it would be more logical to include the idea of freedom of thought in Article 17 [which covered the freedoms of opinion and expression] and to concentrate on freedom of conscience in Article 16 [which covered religious liberty].” *Id.*

138. *Id.* at 1392.

139. *See id.*

### b. U.N. Conference on Freedom of Information

A few months later, in April 1948, the U.N. Conference on Freedom of Information essentially adopted the Sub-Commission's proposal on the freedoms of opinion and expression and formally recommended the text to the Commission on Human Rights.<sup>140</sup> Though the records of the deliberations at this conference do not shed further light on the scope of freedom of opinion,<sup>141</sup> the Soviet Union and its allies continued protesting the breadth of the draft opinion/expression article.<sup>142</sup> While the Conference's proposed formulation would eventually find its way into the final version of the UDHR with only a few modifications—e.g., the word “means” was changed to “media”<sup>143</sup>—the road to adopting the article on the freedoms of opinion and expression was not straightforward.

### c. The UDHR Drafting Committee<sup>144</sup>

When the UDHR Drafting Committee reconvened in May 1948, Chair Eleanor Roosevelt suggested transmitting the U.N. Conference's recommended text on the freedoms of opinion and

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140. See U.N. Conf. on Freedom of Info., *Final Act of the United Nations Conference on Freedom of Information*, Annex B, at 19, U.N. Doc. E/CONF.6/79 (Apr. 22, 1948). It should be noted that the U.N. Conference's recommended text did make a change to the Sub-Commission's proposal: the word “right” was added after “this.” See *id.* (noting the proposal as follows: “Everyone shall have the right to freedom of thought and expression; this *right* shall include freedom to hold opinions without interference and to seek, receive and impart information and ideas by any means and regardless of frontiers.” (emphasis added)). Also, a comma appears to have been added after “seek.” Compare *id.* with *supra* note 138 and accompanying text.

141. See SCHABAS, *supra* note 126, at 1398–1420.

142. For example, the USSR argued that the proposal on this topic should have been rejected in favor of its recommendation, which would have, *inter alia*, limited expression when it is used “to advocate fascism or aggression, or to spread false news, or with the object of provoking enmity between nations.” *Id.* at 1418–19.

143. For the final UDHR text, see UDHR, *supra* note 86, art. 19 (“Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

144. Section II.B.2.ii.c's summary of the negotiating history for the UDHR is based on the U.N. Research Guides, which provide the relevant summary records of the deliberations for this declaration. See DAG HAMMARSKJÖLD LIBRARY, *Drafting of the Universal Declaration of Human Rights: Drafting Committee—2nd Session*, <http://research.un.org/en/undhr/draftingcommittee/2> [https://perma.cc/QC57-UX4A].

expression to the Commission on Human Rights.<sup>145</sup> The Soviet delegate insisted that his delegation's draft also be forwarded, and it was transmitted along with all other texts drafted "in connection" with the articles on the freedoms of opinion and expression.<sup>146</sup> The Drafting Committee's draft UDHR continued to contain a general limitations clause on all rights<sup>147</sup> and provided for freedom of thought in the religious liberty article.<sup>148</sup>

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145. U.N. ESCOR, Comm'n on H.R., Drafting Committee, 2nd Sess. Rep. of the Drafting Committee to the Comm'n on Human Rights, UN Doc. E/CN.4/AC.1/SR.40, at 21-22 (June 11, 1948). The Drafting Committee's final report notes that all of its debates are contained the summary records: E/CN.4/AC.1/SR.20-44. U.N. ESCOR, Comm'n on H.R., Drafting Committee, 2nd Sess. 40th mtg. ¶ 9, UN Doc E/CN.4/95 (May 21, 1948). Examination of those summary records did not reveal substantive discussion of freedom of opinion.

146. U.N. ESCOR, Comm'n on H.R., Drafting Committee, 2nd Sess., UN Doc. E/CN.4/AC.1/SR.40, at 22 (June 11, 1948). The Soviet proposal dropped freedom of opinion, inserted numerous limitations on freedom of expression, and required governmental funding of the press. The proposal stated the following:

In accordance with the principles of democracy and in the interests of strengthening international co-operation and world peace, every person shall be guaranteed by law the right to the free expression of his opinions and, in particular, to freedom of speech and of the press, freedom of assembly and freedom of artistic representation. The use of freedom of speech and of the press for the purposes of propagating Fascism and aggression or of inciting to war between nations shall not be tolerated. In order to ensure the right of the free expression of opinion for large sections of the peoples and for their organizations, State assistance and co-operation shall be given in providing the material resources (premises, printing presses, paper, and the like) necessary for the publication of democratic organs of the press.

U.N. ESCOR, Comm'n on H.R., Drafting Committee, 2nd Sess., UN Doc. E/CN.4/95, at 8 (May 21, 1948).

147. See U.N. ESCOR, Comm'n on H.R., Drafting Committee, 2nd Sess., UN Doc. E/CN.4/95, at 5 (May 21, 1948) (noting that the committee "did not have time to consider" the limitations article). The general limitations clause read as follows: "In the exercise of his rights everyone is limited by the rights of others and by the just requirements of the democratic State. The individual owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom." *Id.*

148. The religious freedom article stated, in relevant part, "[i]ndividual freedom of thought and conscience, to hold and change beliefs, is an absolute and sacred right." *Id.* at 8. However, there was a note after this provision that stated the USSR had proposed to replace this article with language that limited even freedom of thought by referring to domestic laws and concepts of morality: "Every person shall have the right to freedom of thought and freedom to practice religious

d. The Commission on Human Rights<sup>149</sup>

In its 1948 session, the Commission on Human Rights deliberated over the various articles in the draft UDHR.<sup>150</sup> Several of the discussions focused on freedom of opinion as well as freedom of thought. For example, Lebanon's proposal to remove "freedom of thought" from the religious freedom article set off protests that this phrase was necessary to protect the rights of atheists.<sup>151</sup> France criticized its deletion on broader grounds, viewing the right as foundational for the enjoyment of other rights.<sup>152</sup> Yet others took the position that because "freedom of thought" and "freedom of opinion" were interchangeable, it may not have been necessary to reference both.<sup>153</sup> Chair Eleanor Roosevelt suggested voting on whether the

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observances in accordance with the laws of the country and the dictates of public morality." *Id.*

149. Section II.B.2.ii.d's summary of the negotiating history for the UDHR is based on the U.N. Research Guides, which provide the relevant summary records (E/CN.4/SR.46–81) of the deliberations for this declaration. DAG HAMMARSKJÖLD LIBRARY, *Drafting of the Universal Declaration of Human Rights: Commission on Human Rights—3rd Session*, <http://research.un.org/en/undhr/chr/3> [<https://perma.cc/8S6L-P46R>] [hereinafter *Drafting UDHR—3rd Session*].

150. *Id.*

151. U.N. ESCOR, Comm'n on H.R. 60th mtg. at 9–10, UN Doc. E/CN.4/SR.60 (June 23, 1948). The USSR opposed dropping freedom of thought from this provision and stated that "[s]cience had a right to protection on the same terms as religion. Out of respect for the heroes and martyrs of science, those words should not be deleted." *Id.* at 10. Lebanon immediately replied that it "had not mentioned freedom of thought simply because that right was provided for under [the next article, which covered the freedoms of opinion and expression]." *Id.* The USSR later repeated its concern that freedom of thought was important to protect the rights of atheists, and that the religious freedom article was not solely about religious beliefs. *See id.* at 12.

152. *Id.* at 10. The French delegate, for example, argued that freedom of thought "was the basis and origin of all other rights." *Id.* He noted that inner thoughts should not be restricted whereas freedom of expression could properly be restricted. *See id.*

153. *See id.* at 11–13. The Chinese delegate stated the religious freedom article should not deal with freedom of thought because that right was covered in subsequent provisions on the freedoms of opinion and expression. *Id.* at 11. Uruguay seemed to believe the freedoms of thought and opinion were interchangeable and proposed that the declaration's freedom of opinion article precede the freedom of religion article. *Id.* at 12. The Philippines also seemed to take the position that "freedom of thought" and "freedom of opinion" were interchangeable and proposed mentioning the concept only in the religious freedom article. *See id.* at 13. The U.K. representative stated that it was unnecessary to include any mention of "freedom of thought" in the religious

“freedom of thought” should appear in the freedom of religion or another article, but ultimately formed a sub-committee to submit a proposal based on the discussion.<sup>154</sup>

The sub-committee proposed placing freedom of “thought” in the religious freedom article and freedom of “opinion” in the subsequent article on freedom of expression.<sup>155</sup> The Commission adopted this proposal, but the official record does not contain a discussion of the difference between “freedom of thought” and “freedom of opinion.”<sup>156</sup> Although subsequent discussions on the freedom of opinion article did not elaborate on any additional distinction between the freedoms of thought and opinion,<sup>157</sup> the Chair emphasized that freedom of opinion means the “right to form any opinion.”<sup>158</sup> The Commission ultimately adopted the Sub-Commission on Freedom of Information and the Press’s proposed text on the freedoms of opinion and expression with two significant changes: (1) “thought” was changed to “opinion” and (2) “means” was replaced with “media.”<sup>159</sup> Thus, at the end of the Commission’s deliberations, the relevant provision on freedom of opinion read as follows: “Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>160</sup> This right, like all others in the UDHR,

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freedom article because that article “dealt essentially with freedom of religion.” *Id.* at 12.

154. *Id.* at 13–14 (designating France, Lebanon, the U.K., and Uruguay to serve on the sub-committee). Although the French delegate argued there was a difference between freedom of thought and freedom of opinion, he proposed including freedom of thought in the religious freedom article and removing it from the subsequent article on freedom of expression. *Id.* at 13.

155. U.N. ESCOR, Comm’n on H.R., 3rd Sess., 62nd mtg at 12, UN Doc. E/CN.4/SR.62 (June 11, 1948).

156. *See id.*

157. *See* U.N. ESCOR, Comm’n on H.R., 3rd Sess., 63rd mtg. at 1–14, UN Doc. E/CN.4/SR.63 (June 22, 1948); U.N. ESCOR, Comm’n on H.R., 3rd Sess., 64th mtg. at 1–3, UN Doc. E/CN.4/SR.64, (June 22, 1948) (summarizing negotiations at the Commission on Human Rights with respect to the freedom of opinion article).

158. U.N. ESCOR, Comm’n on H.R., 3rd Sess., UN Doc. E/CN.4/SR.63, at 14 (June 22, 1948).

159. *See* U.N. ESCOR, Rep. of the 3rd Sess. of the Comm’n on H.R., UN Doc. E/800, at 12 (June 28, 1948).

160. *Id.* For reference purposes, the religious freedom article (which included freedom of thought) was phrased in the following way: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with

was subject to a revised general limitations clause.<sup>161</sup> The next substantive debate on the draft UDHR occurred at the U.N. General Assembly.

e. The U.N. General Assembly<sup>162</sup>

The U.N. General Assembly (“UNGA”) considered the Commission’s proposed draft UDHR in two stages. First, the Third Committee—a subcommittee of the UNGA that focuses on human rights—deliberated on the draft UDHR for 81 meetings during the fall of 1948.<sup>163</sup> During the meetings focused on the draft article on religious freedom, various delegations discussed their interpretations of freedom of thought.<sup>164</sup> For example, the USSR argued that freedom of thought should protect the right of atheists to not espouse religion.<sup>165</sup> The Chinese delegate took the position that freedom of

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others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” *Id.*

161. *See id.* at 13 (“In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of morality, public order and general welfare in a democratic society.”).

162. Section II.B.2.ii.e’s summary of the negotiating history for the UDHR is based on the U.N. Research Guides, which provide the relevant summary records of the deliberations for this declaration. *See Drafting of the Universal Declaration of Human Rights: General Assembly 3rd Session—Third Committee*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/ga/thirdcommittee> [<https://perma.cc/GU4B-RZ8V>]; *Drafting of the Universal Declaration of Human Rights: General Assembly 3rd Session—Plenary*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/ga/plenary> [<https://perma.cc/L8MV-UTQN>].

163. *See Drafting of the Universal Declaration of Human Rights: General Assembly 3rd Session—Third Committee*, DAG HAMMARSKJÖLD LIBRARY, <http://research.un.org/en/undhr/ga/thirdcommittee> [<https://perma.cc/GU4B-RZ8V>].

164. *See, e.g.*, U.N. GAOR, 3rd Sess., 127th mtg., U.N. Doc. A/C.3/SR.127 (Nov. 9, 1948) (commemorating discussions among delegates about the meaning of freedom of thought); U.N. General Assembly, 3rd Sess., 128th mtg., U.N. Doc. A/C.3/SR.128 (Nov. 9, 1948) (same).

165. *See* U.N. GAOR, 3rd Sess., 127th mtg. at 391, U.N. Doc. A/C.3/SR.127 (Nov. 9, 1948). Reiterating the USSR position advanced at the Commission, the Soviet Union’s delegate emphasized the importance of “freedom of thought” for atheists by stating it was “necessary . . . to promote the development of modern sciences and which took account of the existence of free-thinkers whose reasoning had led them to discard all old-fashioned beliefs and religious fanaticism.” *Id.* He noted this point again when he argued that freedom of thought should cover all kinds of scientific and philosophical thoughts and lamented that the religious freedom article focused too much on religion. *Id.* at 402–03. The U.S. representative stated that “freedom of thought gave everyone the right to believe

thought already covered the concepts of freedom of conscience and religion (and that it was thus unnecessary to include the last two),<sup>166</sup> but the representative from Peru disagreed.<sup>167</sup> Syria's delegate indicated that "freedom of thought" (in the religious freedom article) and "freedom of opinion" (in the freedom of expression article) were duplicative.<sup>168</sup> In the end, the Third Committee essentially adopted the religious freedom article as recommended by the Commission.<sup>169</sup>

When the deliberations turned to the article on the freedoms of opinion and expression, there was even less discussion defining "freedom of opinion" or distinguishing it from "freedom of thought."<sup>170</sup>

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as well as not to believe, which should satisfy the representative of the USSR." *Id.* at 393.

166. *Id.* at 397–98. Nonetheless, China's delegate ultimately accepted the inclusion of thought, conscience, and religion in the religious liberty article. *Id.* Notably, Lebanon's delegate stated that the religious freedom article allowed for the development of the "inner being;" the freedoms of thought, conscience, and religion "ensured the integrity of inward beliefs and the possibility for each individual to determine his own destiny." *Id.* at 399. Furthermore, while the Netherlands's delegate did not provide a definition for freedom of thought, he did take the position that the freedom should not be subject to governmental limits: "freedom of thought was one of the essential rights of man and . . . the declaration [should] recognize and protect that freedom unreservedly." *Id.* at 397.

167. Peru's representative believed that the freedoms of thought, conscience, and religion should each be dealt with in separate articles because each covered a different concept but agreed to the Commission's proposed text in the spirit of compromise. *See id.* at 398.

168. *See id.* at 403.

169. *See* U.N. GAOR, 3rd Sess., 128th mtg. at 405–06, U.N. Doc. A/C.3/SR.128 (Nov. 9, 1948) (commemorating the voting and adoption of the religious freedom provision); U.N. GAOR, 3rd Sess., 130th mtg. at 5, U.N. Doc. A/777 (Dec. 7, 1948) (setting forth the religious freedom text as adopted). The only change was a slight translation issue with the French version of the text. *See* U.N. GAOR, 3rd Sess., 128th mtg. at 405, U.N. Doc. A/C.3/SR.128 (Nov. 9, 1948) (noting no objections to France's proposal to "substitute the word conviction for *croynance* in the French text") (emphasis added); U.N. GAOR, 3rd Sess., 127th mtg. at 397, U.N. Doc. A/C.3/SR.127 (Nov. 9, 1948) (setting forth France's proposal to modify the French version of the UDHR religious freedom provision).

170. *See generally* U.N. GAOR, 3rd Sess., 128th mtg., U.N. Doc. A/C.3/SR.128 (Nov. 9, 1948) (commemorating negotiations at the UN General Assembly's Third Committee with respect to text on the freedoms of opinion and expression); U.N. GAOR, 3rd Sess., 129th mtg., U.N. Doc. A/C.3/SR.129 (Nov. 10, 1948) (same); U.N. GAOR 3rd Sess., 130th mtg., U.N. Doc. A/C.3/SR.130 (Nov. 10, 1948) (same). The main references to "freedom of opinion" during the debate on the opinion/expression article were as follows. The representative from the Philippines noted that this article protected the right to hold opinions as well as freedom of expression, thereby appearing to recognize there were two separate rights at stake. *See* U.N. GAOR, 3rd Sess., 128th mtg. at 409, U.N. Doc.

As had been the case with the religious freedom article, much of the discussion appeared to focus on defeating proposed amendments, particularly by the USSR, that would have limited the scope of the rights.<sup>171</sup> Many delegations suggested adopting the Commission's recommendation for the freedoms of opinion and expression based on the extensive deliberations that had occurred at the U.N. Conference on Freedom of Information.<sup>172</sup> Ultimately, the Third Committee adopted the article on the freedoms of opinion and expression that had been submitted by the Commission.<sup>173</sup> As was the case with

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A/C.3/SR.128 (Nov. 9, 1948). The U.K.'s delegate disfavored separating the treatment of freedom of opinion and freedom of expression because they were "inalterably linked." *Id.* at 411. Brazil's delegate noted that "freedom of opinion and freedom of expression were in fact always the first freedoms to be attacked when democracy was being threatened. Brazil therefore attached great importance to [the article]." *Id.* at 412. Syria's delegate noted the declaration would make clear that all people are entitled to both freedom of opinion and expression. *Id.* Guatemala's delegate took the position that, because freedom of thought was in the religious freedom article, freedom of opinion did not need to be included in the freedom of expression article. *See id.* On behalf of the United States, Eleanor Roosevelt "felt that as no human rights were more fundamental than freedom of opinion and expression, it was essential that those rights should be set forth unequivocally." *Id.* at 413. Argentina's delegate commended a proposed Cuban amendment because it would clarify that this article covered the "freedom to seek and to impart information, making for the intellectual, spiritual, and professional development of the individual; and freedom of opinion and expression." U.N. GAOR, 3rd Sess., 129th mtg. at 419, UN Doc. A/C.3/SR.129 (Nov. 10, 1948). This statement seemed to highlight that freedom of opinion could encompass the spiritual matters covered in the religious freedom article. Argentina's delegate also noted that freedom of opinion "would always exist even if a stranglehold were kept on it by some external force." *Id.* Panama suggested separating freedom of opinion from freedom of expression but ultimately withdrew its proposal. U.N. GAOR, 3rd Sess., 130th mtg. at 427, U.N. Doc. A/C.3/SR.130 (Nov. 10, 1948).

171. *See, e.g.*, U.N. GAOR, 3rd Sess., 129th mtg. at 415-423, U.N. Doc. A/C.3/SR.129 (Nov. 10, 1948) (chronicling discussions of USSR amendments to the draft declaration that would have curtailed the breadth of the proposed rights); U.N. General Assembly, 3rd Sess., 130th Meeting, UN Doc. A/C.3/SR.130, at 427-28 (Nov. 10, 1948) (same).

172. *See, e.g.*, U.N. GAOR, 3rd Sess., 129th plen. mtg. at 415, U.N. Doc. A/C.3/SR.129 (Nov. 10, 1948) (noting that the French delegate called on fellow negotiators to accept the text because it emerged from negotiations at the U.N. Conference on Freedom of Information and the Commission on Human Rights); U.N. GAOR, 3rd Sess., 128th plen. mtg. at 410-11, 413, U.N. Doc. A/C.3/SR.128 (Nov. 9, 1948) (setting forth similar arguments from New Zealand, the United Kingdom, and the United States).

173. U.N. GAOR, 3rd Sess., 130th plen. mtg. at 428, U.N. Doc. A/C.3/SR.130 (Nov. 10, 1948). The final report of the Third Committee contains the full draft declaration as adopted and transmitted to the UNGA plenary. *See*

previous drafts, this version continued to be subject to a general limitations clause that was applicable to all rights in the draft declaration.<sup>174</sup>

When the UNGA considered the full draft of the UDHR in plenary meetings, the freedoms of opinion and thought were mentioned but not elaborated.<sup>175</sup> Ultimately, the UNGA adopted the UDHR with forty-eight members in favor and eight abstentions.<sup>176</sup> The text of the article on freedom of opinion did not change from the version that the Third Committee had transmitted to the full body.<sup>177</sup>

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U.N. GAOR, 3rd Sess., 130th plen. mtg. at 5, U.N. Doc. A/777 (Dec. 7, 1948) (memorializing that Article 19 provided: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."). It should be noted that the word "the" before "freedom to hold opinions" did not appear in the text as adopted though it did appear in the Commission's text. See U.N. ESCOR, Comm'n on H.R., *supra* note 160 and accompanying text.

174. See U.N. GAOR, 3rd Sess., 130th plen. mtg. at 7, U.N. Doc. A/777 (Dec. 7, 1948) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.").

175. For example, Cuba's delegate said the "declaration would mark the advent of a world in which man, freed from fear and poverty, could enjoy freedom of speech, religion, and opinion." See U.N. GAOR, 3rd Sess., 181st plen. mtg. at 877, U.N. Doc. A/PV.181 (Dec. 10, 1948). Iceland's delegate noted that the draft declaration contained principles that were also in its constitution and specifically noted in this regard the freedoms of thought, opinion, and expression. See *id.* at 878. Belgium's delegate noted that it was unfortunate that the important rights to thought and conscience appeared in the declaration after property rights. See *id.* at 879. The U.K. delegate noted that the USSR's attempts to limit freedom of opinion and expression would lead to authoritarianism. See *id.* at 884 ("[T]he majority [of delegates] felt that any limitation on the freedom of expression and opinion, no matter how noble the reason . . . would clear the path for a totalitarian regime. . . . [F]ascism had been more due to the suppression of freedom of expression than to the dissemination of lies.").

176. U.N. GAOR, 3rd Sess., 183rd plen. mtg. at 933, U.N. Doc. A/PV.183 (Dec. 10, 1948). The general limitations clause, which is applicable to all UDHR rights, did not change. Compare UDHR, *supra* note 86, art. 29(2), with *supra* note 161. The religious freedom clause, which included freedom of thought, also did not change. Compare UDHR, *supra* note 86, art. 18, with *supra* note 160.

177. Compare UDHR, *supra* note 86, art. 19, with *supra* note 173.

### iii. Observations from the UDHR Negotiating History

Upon review of the UDHR's negotiating history, two main themes emerge. First, there was ongoing debate and confusion about whether "freedom of thought" and "freedom of opinion" were duplicative rights, but ultimately both remained in the declaration. Second, Professor Chafee's successful advocacy to include "to hold" and "without interference" in the phrasing of the freedom of opinion article reveals significant insights into the intended scope of the right.<sup>178</sup> He persuaded other delegates to strengthen this right, making clear that individuals could not be compelled to reveal their opinions or be punished for them, as was happening in the U.S. Congress' attempt to root out communists. In particular, his addition of "without interference" emphasized the importance of protecting an individual's ability to think without external hindrance. That said, because all UDHR rights are subject to a general limitations clause,<sup>179</sup> the right to hold opinions without interference would not become an absolute right (i.e., one that is not subject to governmental limitation) until the adoption of the ICCPR.<sup>180</sup>

### C. The Writings of Jurists

The writings of highly distinguished jurists can also be helpful in assessing the scope of international law obligations.<sup>181</sup> In Manfred Nowak's foundational treatise on the ICCPR, he notes that ICCPR Article 19(1) regards an absolute right to "form" opinions and to "develop [them] them by way of reasoning."<sup>182</sup> Moreover, he reflects that this right "requires States parties to refrain from any interference with freedom of opinion (by indoctrination,

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178. See *supra* notes 130–36 and accompanying text (summarizing Professor Chafee's arguments to broaden the scope of freedom of opinion).

179. See UDHR, *supra* note 86, art. 29(2) (setting forth permissible limitations on UDHR rights).

180. See *supra* notes 66–70 (providing a textual analysis of the ICCPR that explains the absolute nature of freedom of opinion).

181. See, e.g., Statute of the International Court of Justice, art. 38, 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (explaining that the International Court of Justice may look to "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination" of international law obligations).

182. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 441 (1993). Of the 60 paragraphs the treatise dedicates to the freedoms of opinion and expression, only 5 focus on the freedom of opinion. See *id.* at 441–42.

'brainwashing', influencing the conscious or subconscious mind with psychoactive drugs or other means of manipulation)."<sup>183</sup> Nowak specifically focuses on improper means of changing an individual's opinion.<sup>184</sup> While he acknowledges that it may be difficult to draw a line between permissible and impermissible influences, he takes the position that a defining line should be where individuals are (1) influenced against their will or without their consent (2) through "coercion, threat or similar, unauthorized means."<sup>185</sup> Other scholars who discuss the right to hold opinions without interference often deal briefly with the right by citing to Nowak's treatise and/or the work of the U.N. human rights machinery, which is discussed in the next Section.<sup>186</sup>

#### D. Recommendations by the U.N. Human Rights Machinery

The U.N. human rights machinery has provided some guidance about the scope of the right to hold opinions without interference. In its 2011 General Comment No. 34, the U.N. Human Rights Committee recommended detailed interpretations of Article 19, but only two of the fifty-two paragraphs focused on the scope of the right to hold opinions without interference.<sup>187</sup> Of note, the Committee made clear that this right protects all forms of opinion,

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183. *Id.* at 442.

184. *See id.* at 441–42. Nowak's treatise does not deal explicitly with whether compelling an individual to reveal an opinion is prohibited or whether it is permissible to punish a person for holding an opinion. That said, his position that the right is absolute and not subject to any limitations would seem to cover both scenarios.

185. *Id.* at 442.

186. *See, e.g.*, Karl Joseph Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 216, 216–18 (Henkin ed. 1981) (noting that both "freedom of thought" and "freedom of opinion" are absolute, though "freedom of thought" may focus on religious matters whereas "freedom of opinion" may focus on civil and secular issues, but not otherwise delving into the precise parameters of freedom of opinion); SARAH JOSEPH & MELISSA CASTAN, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, COMMENTARY, AND MATERIALS 592 (Oxford Univ. Press 2013) (noting Nowak's views and concluding that infringements of this right occur "where one's opinion is somehow involuntarily influenced" before summarizing the views of the U.N. human rights machinery).

187. *See* GC 34, *supra* note 63, ¶¶ 9–10 (describing the Human Rights Committee's approach to ICCPR Art. 19(1)'s protection for freedom of opinion).

including those of a “political, scientific, historic, moral or *religious* nature,” as well as the right to change one’s opinion.<sup>188</sup>

In comparing General Comment No. 34 with the proposed three-pronged approach for assessing the scope of the right to hold opinions,<sup>189</sup> the Committee appears to agree with the first two prongs and is likely in agreement with the third prong. For example, with regard to the first prong (i.e., the right not to reveal one’s views), the Committee takes the position that the “[f]reedom to express one’s opinion necessarily includes freedom not to express one’s opinion.”<sup>190</sup> With respect to the second prong (i.e., the right not to have one’s thinking processes manipulated), the Committee states that “[a]ny form of effort to coerce the holding or not holding of any opinion is prohibited.”<sup>191</sup> While coercion is often viewed as including force or

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188. *Id.* ¶ 9 (emphasis added).

189. *See supra* note 57 and accompanying text (listing the three prongs as the right not to (1) reveal one’s opinions, (2) be manipulated in forming and holding opinions, and (3) be penalized for one’s opinions).

190. GC 34, *supra* note 63, ¶ 10.

191. *Id.* (emphasis added). As an example of this principle, the Committee cites to its decision in an individual complaint brought against South Korea. *Id.* In assessing that complaint, the Committee found that South Korea’s “ideology conversion system” for prisoners violated ICCPR Article 19(1) in conjunction with the treaty’s protections for non-discrimination because inmates were offered preferential treatment and the possibility of parole for changing their political opinions. *Kang v. Korea*, Commc’n No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999, ¶ 7.2 (Hum. Rts. Comm. 2003). The Committee has also found violations of ICCPR Article 19’s protection for freedom of opinion in other individual complaints, though those decisions do not provide significant additional texture with regard to the scope of the right to hold opinions without interference. *See, e.g.,* *Mika Mihi v. Equatorial Guinea*, Commc’n No. 414/1990, ¶ 6.8, U.N. Doc. CCPR/C/51/D/414/1990 (Hum. Rts. Comm. Aug. 10, 1994) (finding a violation of Article 19(1)–(2) when mistreatment was inflicted “primarily because of [petitioner’s] membership in, and activities for, a political party in opposition to the regime”); *Mpandanjila v. Democratic Republic of the Congo*, Commc’n No. 138/1983, ¶ 2.5 U.N. Doc. CCPR/C/27/D/138/1983 (Hum. Rts. Comm. Mar. 26, 1986) (finding a violation of Article 19 when regime opponents “suffered persecution because of their opinions”); *Mpaka-Nsusu v. Zaire*, Commc’n No. 157/1983, U.N. Doc. CCPR/C/27/D/157/1983, ¶ 10, (Hum. Rts. Comm 1986) (finding an Article 19 violation for persecution of a regime opponent for his opinions); *Muteba v. Zaire, Views*, Commc’n No. 124/1982, U.N. Doc. CCPR/C/22/D/124/1982, ¶ 12 (Hum. Rts. Comm. 1984) (finding an Article 19 violation for persecution on the basis of political opinion); *Lopez Burgos v. Uruguay, Views*, Commc’n No. 052/1979, ¶ 13, U.N. Doc. CCPR/C/13/D/52/1979 (Hum. Rts. Comm. 1981) (finding a violation of Article 19(1)–(2) with regard to persecution involving trade union membership and activities).

threats to compel certain behavior or belief,<sup>192</sup> the plain meaning of “coerce” can also mean “to dominate or control, especially by exploiting fear, anxiety, etc.”<sup>193</sup> Because the Committee uses broad language (i.e., “*any form of effort to coerce*”), it is reasonable to understand its guidance as encompassing coercion in a broad sense that would include manipulation, which concerns influence undertaken in an unfair or unscrupulous manner.<sup>194</sup> The Committee appears to commemorate the substance of the third prong (i.e., the right not to be penalized for opinions) when it says the holding of opinions must not be criminalized or used to harass, intimidate, or stigmatize individuals.<sup>195</sup>

It should also be noted that recent guidance from the U.N. Special Rapporteur also appears to support this three-pronged approach to the right to hold opinions without interference. For example, the Special Rapporteur expressed concern that online surveillance both compels disclosure of opinions and often entails punishments for opinions, which implicates the first and third prongs of this right.<sup>196</sup> In providing examples of inappropriate coercion in the formation of opinions, he cited to Nowak and highlighted “forced neurological interventions, indoctrination programmes (such as ‘re-education camps’) or threats of violence.”<sup>197</sup> The Special Rapporteur also noted that artificial intelligence “must not invisibly supplant, *manipulate* or interfere with the ability of individuals to form and hold their opinions . . . .”<sup>198</sup> This phrasing indicates that the Special

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192. See *Coerce*, DICTIONARY.COM, <https://www.dictionary.com/browse/coerce> [<https://perma.cc/MX5F-9VDU>] (providing the first two definitions of *coerce* as “to compel by force, intimidation, or authority, especially without regard for individual desire or volition” and “to bring about through the use of force or other forms of compulsion; exact”).

193. *Id.*

194. *Manipulate*, DICTIONARY.COM, <https://www.dictionary.com/browse/manipulate> [<https://perma.cc/TXWC-3K3D>] (noting that *manipulate* can mean “to manage or influence skillfully, especially in an unfair manner”).

195. See G.C. 34, *supra* note 63, ¶ 9.

196. David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 21, U.N. Doc. A/HRC/29/32 (May 22, 2015) [hereinafter *SR 2015 Report*] (“Surveillance systems, both targeted and mass, may undermine the right to form an opinion, as the fear of unwilling disclosure of online activity, such as search and browsing, likely deters individuals from accessing information, particularly where such surveillance leads to repressive outcomes.”).

197. *SR 2018 Report*, *supra* note 17, ¶ 23.

198. *Id.* ¶ 58 (emphasis added).

Rapporteur believes that Article 19(1) covers coercion, manipulation, or other improper interference with the process of developing and holding opinions.

In addition to references that support the three-pronged approach for assessing the right to hold opinions, the Special Rapporteur made several additional observations about this right. First, the Special Rapporteur endorsed Nowak's view that "[a]n essential element of the right to hold an opinion is the 'right to form an opinion and to develop this by way of *reasoning*.'"<sup>199</sup> Second, the Special Rapporteur reiterated the Committee's understanding that individuals should be free from coercion in developing a broad range of views, i.e., any "beliefs, ideologies, reactions and positions."<sup>200</sup> Third, the Special Rapporteur also noted that in the digital age, opinions are now recorded through digital means, including our search histories.<sup>201</sup> By emphasizing browsing histories and other online activities as part of the process through which individuals form and maintain opinions, the Special Rapporteur spotlighted how much of our thinking process is captured online and potentially protected by this right.

#### E. Assessment of the Scope of Freedom of Opinion

A review of the treaty text, negotiating history, writings by jurists, and interpretations by the U.N. human rights machinery substantiates that the ICCPR's Article 19(1)'s right to hold opinions without interference comprises at least three parts: the right not to (1) reveal one's opinions, (2) have one's process of forming and holding opinions manipulated, coerced, or otherwise overtaken, and (3) be penalized for one's opinions. From a textual analysis, it is evident that—unlike the rights to freedom of expression and privacy—the right to hold opinions is absolute in that it is not subject to limitation by governmental authorities unless they formally derogate from their

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199. *Id.* ¶ 23 (emphasis added) (quoting Nowak, *supra* note 182, at 441). In other words, the right to hold opinions includes the process of thinking and developing opinions. This understanding undermines potential arguments that "freedom of thought" protects the process of thinking while the right to hold opinions merely protects the right not to reveal or be punished for having an opinion.

200. *Id.*

201. *SR 2015 Report*, *supra* note 196, ¶ 20 ("Individuals regularly hold opinions digitally, saving their views and their search and browse histories, for instance, on hard drives, in the cloud, and in e-mail archives, which private and public authorities often retain for lengthy if not indefinite periods.").

treaty obligations.<sup>202</sup> Moreover, the fact that—unlike any other right in the ICCPR—the right is to be enjoyed “without interference” reinforces its breadth. Deliberate efforts at non-consensual influence that overwhelm human will, coerce or rise to the level of manipulation would constitute an illicit “interference” with the enjoyment of this right. Similarly, penalizing an individual for holding an opinion or compelling its disclosure would surely “interfere” with the right to hold the opinion. The textual analysis of this right also reveals that it protects opinions on all subjects.

The negotiating history relevant to the right to hold opinions without interference highlights that, as it first emerged in the UDHR, an animating purpose of the right was to protect against compelled disclosure of opinions or any penalty for holding opinions. Professor Chafee’s successful advocacy in achieving particularly broad phrasing for this right emphasizes the sanctity of the inner space of one’s mind, which should be free from “interference.”<sup>203</sup> In addition, during the ICCPR negotiations, supporters of this right highlighted interesting aspects of it, particularly as applied in the digital age. They argued that (1) governmental curation of information could adversely affect the formation of opinions, (2) the right could be interfered with while an opinion was being formed, and (3) individuals could be persecuted merely for being suspected of holding opinions, even before expressing them.<sup>204</sup>

A review of the works of leading jurists and the U.N. human rights machinery is consistent with the three-pronged approach to understanding the scope of the right to hold opinions without interference.<sup>205</sup> Of note, both the U.N. Human Rights Committee and the U.N. Special Rapporteur have provided specific guidance that supports viewing the right as protecting against compelled disclosure, manipulation, and penalization of opinions.<sup>206</sup> Finally, consistent with the text of ICCPR Article 19(1), both components of the U.N. human rights machinery have interpreted the right to hold opinions as covering views on all topics, including religious matters.<sup>207</sup>

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202. See *supra* notes 67–78 and accompanying text.

203. See *supra* notes 130–39 and accompanying text.

204. See *supra* notes 89–91 and accompanying text (summarizing key arguments raised by UK and French negotiators in favor of freedom of opinion during the drafting of the ICCPR).

205. See *supra* notes 182–201 and accompanying text.

206. See *supra* notes 187–198 and accompanying text.

207. See *supra* notes 188, 200 and accompanying text. This Article does not seek to draw conclusions about the scope of the related right to freedom of

### III. CONTEMPORARY BUSINESS MODELS, FREEDOM OF OPINION, & WAYS FORWARD

This Part elucidates how contemporary business models based on “surveillance capitalism” impact the right to hold opinions without interference and recommends ways that businesses can implement the UNGPs and respect human rights. Section III.A describes how these business models intersect with each of the three aspects of freedom of opinion. Section III.B analyzes how the general guidance of the UNGPs can be applied to surveillance capitalism business models to develop a path for respecting human rights, particularly the right to hold opinions.

#### A. Intersection of Business Models & the Right to Hold Opinions Without Interference

##### 1. The Right Not to Reveal Opinions

While Professor Chafee could not have foreseen the development of the Internet when advocating for international standards to protect against the compelled disclosure of views,<sup>208</sup> his concern about infringements on a sacred interior space for thinking is triggered by contemporary surveillance capitalism methods that record internal thinking processes. As discussed in Section I.B, the surveillance capitalism business model is built on amassing as much information as possible about individuals. Many companies collect and monetize a vast amount of your personal information, including your online search history and how much time you spend on a webpage.<sup>209</sup> For example, “Amazon keeps a record of everything you

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thought, which is found in the ICCPR Article 18’s religious freedom provision. *See* ICCPR, *supra* note 9. Indeed, there may very well be areas of overlap between freedom of thought and freedom of opinion, as exhibited by the (unanswered) questions that were raised during negotiations of the ICCPR and UDHR about the difference between the two rights. *See supra* notes 81–84, 137–141, 151–156, 166–170 and accompanying text. That said, taken together, the two rights reinforce protection for the inner space of one’s mind.

208. *See supra* notes 130–139 and accompanying text.

209. *See supra* notes 36–44 and accompanying text (discussing personal data harvesting by Facebook, Google, and others); *see also* Geoffrey A. Fowler, *Facebook Will Now Show You Exactly How It Stalks You—Even When You’re Not Using Facebook*, WASH. POST (Jan. 28, 2020), <https://www.washingtonpost.com/technology/2020/01/28/off-facebook-activity-page/> (on file with the *Columbia Human Rights Law Review*) (describing how Facebook not only compiles information about user behavior on its platform but also collects information about its users from partner companies by embedding tracking software in “apps,

do on a Kindle, from when you start and stop reading to when you highlight a word.”<sup>210</sup> Streaming services track and distribute “the sitcom titles [customers] prefer, the ads they do not skip, their email addresses and the serial numbers identifying the devices they use . . .”<sup>211</sup> Though Apple touts privacy for its iPhone users, hidden app trackers may harvest and transmit data.<sup>212</sup> TikTok’s data harvesting includes information about what videos its users watch (and for how long), the contents of private messages sent on its platform, and users’ location and Internet address.<sup>213</sup> Yahoo! monetizes the content of emails.<sup>214</sup> Even cars can harvest and transmit personal data.<sup>215</sup>

In a world in which access to information has been digitized, these online activities not only play a part in the process of forming opinions but also reveal opinions on various topics. This is why businesses gather the information in the first place: to understand your inner thoughts and personalize content that is targeted at you

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websites, loyalty cards and other systems” and assessing that “we’re all living in a reality TV program where the cameras are always on”).

210. Geoffrey A. Fowler, *Don’t Sell My Data! We Finally Have a Law for That.*, WASH. POST (Feb. 19, 2020), <https://www.washingtonpost.com/technology/2020/02/06/ccpa-faq/> (on file with the *Columbia Human Rights Law Review*).

211. Tiffany Hsu, *They Know What You Watched Last Night*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/business/media/streaming-data-collection-privacy.html> (on file with the *Columbia Human Rights Law Review*).

212. Geoffrey A. Fowler, *It’s the Middle of the Night. Do You Know Who Your iPhone Is Talking to?*, WASH. POST (May 28, 2019), <https://www.washingtonpost.com/technology/2019/05/28/its-middle-night-do-you-know-who-your-iphone-is-talking/> (on file with the *Columbia Human Rights Law Review*).

213. Geoffrey A. Fowler, *Is it Time to Delete TikTok? A Guide to the Rumors and the Real Privacy Risks*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/technology/2020/07/13/tiktok-privacy/> (on file with the *Columbia Human Rights Law Review*).

214. Geoffrey A. Fowler, *Everyone Hates E-mail. Buzzy New Service Hey Wants to Fix It – For a Price*, WASH. POST (July 21, 2020), [https://www.washingtonpost.com/video/technology/upgrade-with-geoffrey-fowler/everyone-hates-email-buzzy-new-service-hey-wants-to-fix-it-for-a-price/2020/07/21/c8b02f20-b66a-489d-ae8-ad78c112a24d\\_video.html?](https://www.washingtonpost.com/video/technology/upgrade-with-geoffrey-fowler/everyone-hates-email-buzzy-new-service-hey-wants-to-fix-it-for-a-price/2020/07/21/c8b02f20-b66a-489d-ae8-ad78c112a24d_video.html?) (on file with the *Columbia Human Rights Law Review*) (“Yahoo’s privacy policy makes it clear they’re using the contents of your correspondence for ads”).

215. Geoffrey A. Fowler, *How We Survive the Surveillance Apocalypse*, WASH. POST (Dec. 31, 2019), <https://www.washingtonpost.com/technology/2019/12/31/how-we-survive-surveillance-apocalypse/> (on file with the *Columbia Human Rights Law Review*) (“Just stepping out for an errand, I discovered, lets my car record where I shop, what I listen to and even how much I weigh.”).

through advertising and recommendation engines.<sup>216</sup> But consumers generally do not understand the depth and pervasiveness of disclosure of one's inner reasoning and opinions through online activities.<sup>217</sup> In sum, the web of corporate players that harvest and share consumers' inner thoughts without free, prior, and informed consent raises serious concerns that the private sector is systemically infringing the human right not to reveal opinions.

## 2. The Right Not to Be Manipulated

While the diplomats who negotiated the UDHR and ICCPR could not have anticipated the rise of surveillance capitalism business models, their arguments in favor of recognizing freedom of opinion continue to resonate with respect to potential manipulation online in the forming and holding of opinions. For example, the U.K.'s delegate argued in 1950 that governmental *curation* of information could adversely affect opinions, including as those opinions are being formed.<sup>218</sup> Similarly, civil society has warned that contemporary corporate *curation* of information through powerful platform recommendation engines and microtargeting can provide users with highly personalized online experiences, which easily risk manipulating users.<sup>219</sup> Indeed, numerous concerns have been raised about how this algorithmically-driven curation of online content can adversely impact election processes, radicalize and de-radicalize users, and affect users' emotional states especially because users do not fully understand how their data is being used to accomplish these ends.<sup>220</sup>

Additional concerns about the potential for manipulation stem from revelations of tech insiders that companies have designed their business models to undermine attentional agency, a key aspect of mental autonomy, in order to create compulsive and addictive

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216. See *supra* notes 46–55 and accompanying text.

217. See *supra* note 45 and accompanying text.

218. See *supra* note 89 and accompanying text.

219. See SURVEILLANCE GIANTS, *supra* note 7, at 31 (noting that “as each individual engages with their own highly personalised experience of the internet, uniquely tailored to them based on algorithmically-driven inferences and profiling” society faces a “door wide open to abuse by manipulating people at scale”).

220. See *supra* notes 45–55, and accompanying text (describing concerns about microtargeting election ads to susceptible individuals, the potential to engage in social engineering through microtargeting, and the lack of user understanding about how such processes work).

behavior to maximize users' time spent on platforms.<sup>221</sup> In particular, tech insiders have raised concerns that the level of corporate persuasion efforts has crossed the line from generally acceptable methods into deliberate and non-consensual endeavors that may overwhelm mental autonomy and/or manipulate individuals.<sup>222</sup> This combination of extracting extraordinary amounts of data to target individuals with highly personalized online experiences while simultaneously seeking to maximize time spent on platforms by undermining attentional agency raises sobering questions about potential private sector infringements of the second prong of freedom of opinion.

### 3. The Right Not to Be Penalized for Opinions

Professor Chafee's concern about the penalization of views held in the sacred interior space of the mind<sup>223</sup> manifests itself in the digital age when companies use the data from their surveillance to discriminate among users. As one commentator noted, the "whole point" of surveillance capitalism business models is to "treat people differently."<sup>224</sup> The system is designed to offer individuals unique online experiences built on personalized (i.e., different) content, including, for example, different advertisements and different offers for credit cards.<sup>225</sup> Reporters recently uncovered an algorithm that

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221. See *supra* notes 22–35 and accompanying text.

222. See, e.g., WILLIAMS, *supra* note 20, at 88 (noting a former Google employee turned researcher at Oxford University has reflected that corporate persuasion methods "amount[] to a project of the manipulation of the will); *What is "Brain Hacking"?*, *supra* note 22 and accompanying text (stating that a former Google design ethicist has noted that platforms are "programming people"); Zoe Williams, *supra* note 34 and accompanying text (reporting on a virtual reality pioneer's assessment that "[t]he algorithm is trying to capture the perfect parameters for *manipulating* a brain" (emphasis added)).

223. See *supra* notes 130–36 and accompanying text. During the ICCPR negotiations, the French delegate had also argued in favor of freedom of opinion based on the concern that people could be treated differently for *suspected* opinions that have not been articulated publicly. See *supra* note 91 and accompanying text.

224. Bruce Schneier, *We're Banning Facial Recognition. We're Missing the Point.*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/2020/01/20/opinion/facial-recognition-ban-privacy.html> (on file with the *Columbia Human Rights Law Review*).

225. See *id.* Along these lines, civil society has raised concerns that Netflix deployed data harvested about user behavior on its platform to provide specially tailored content based on suspected racial affiliations and views. See SPANDANA SINGH, NEW AMERICA, WHY AM I SEEING THIS? 39–41 (2020), [https://d1y8sb8igg2f8e.cloudfront.net/documents/Why\\_Am\\_I\\_Seeing\\_This\\_2020-](https://d1y8sb8igg2f8e.cloudfront.net/documents/Why_Am_I_Seeing_This_2020-)

Allstate wanted to use to update its insurance rates.<sup>226</sup> Rather than calculating rates based on a risk assessment of driving capability, the algorithm would have priced policies based on whether a particular consumer was likely to pay an even higher rate.<sup>227</sup> The reporters made the following observation about this practice:

It . . . offers a glimpse into a potential future where companies of all sorts, not just auto insurers, charge people different prices based on their behavior—or expected *willingness* to pay, as projected by algorithms that draw on the seemingly limitless troves of data collected and sold about people every day.<sup>228</sup>

Because the point of data collection and its monetization is to treat people differently based on their preferences, views, and interests, there are well-grounded concerns that the continued corporate collection and use of personal data will eventually evolve more directly into problematic differential treatment that penalizes individuals for their inner thoughts and opinions, including with respect to political and religious matters. Moreover, governments are very interested in obtaining these data troves that reveal human opinions, which further exacerbates the potential for discrimination, persecution, or punishment that would undermine the right to hold opinions without interference.<sup>229</sup>

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03-25.pdf [<https://perma.cc/D78V-U4HA>] (noting many African-American Netflix users reported “that the thumbnail images they were seeing [on Netflix] were racially and ethnically driven, and were often misrepresentative of the actual cast of the movie”).

226. See Maddy Varner & Aaron Sankin, *Suckers List: How Allstate’s Secret Auto Insurance Algorithm Squeezes Big Spenders*, THE MARKUP (Feb. 25, 2020), <https://themarkup.org/allstates-algorithm/2020/02/25/car-insurance-suckers-list> [<https://perma.cc/9BXV-RQV9>].

227. *Id.* (“We found that, despite the purported complexity of Allstate’s price-adjustment algorithm, it was actually simple: It resulted in a suckers list of Maryland customers who were big spenders and would squeeze more money out of them than others.”).

228. *Id.* (emphasis added).

229. SURVEILLANCE GIANTS, *supra* note 7, at 6 (“Advertisers were the original beneficiaries of [the collected personal data], but once created, the companies’ data vaults served as an irresistible temptation for governments as well.”).

## B. Recommendations for Promoting Respect for Freedom of Opinion

### 1. Consent & Surveillance Capitalism Business Models

Given that the surveillance capitalism ecosystem is already well-entrenched in corporate business models,<sup>230</sup> some may ask whether the easiest path forward could be for companies to give users the option to opt out of data collection and monetization and assume user consent if they do not. Any meaningful option to opt out of data collection must reflect an individual's free, prior, and informed consent. By considering these business models through the lens of the right to hold opinions without interference, several problems with an opt-out proposal immediately become apparent.

To begin with, because product designs may be aimed at creating compulsive and addictive behaviors, there are questions about whether consumers can *freely* consent to such widespread data collection.<sup>231</sup> Moreover, because the corporate web of surveillance capitalism business models connects various industries, individuals may not feel *free* to opt out of data collection if doing so requires giving up access to corporate products that have become essential for their professional and personal daily lives.<sup>232</sup> For example, under the California Consumer Protection Act (CCPA), individuals can, among other things, request that companies delete the data that has been collected on them.<sup>233</sup> But some companies take the position that

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230. See *supra* notes 38–44 and accompanying text; see also Fowler, *Don't Sell My Data!*, *supra* note 210 (noting examples of companies that collect and monetize data include AirBnB, CVS, Chipotle, Ford, Honda, Hulu, Macy's, Mastercard, PayPal, Target, Uber, UPS, Walmart, and Zillow).

231. See *supra* notes 18–35 and accompanying text.

232. See Alegre, *supra* note 8, at 226 (People “may . . . have little choice about the data they disclose as increasingly we have to exchange data to get access to basic services.”).

233. California Consumer Protection Act of 2018, CAL. CIV. CODE, § 1798.105(a) [hereinafter CCPA]. The United States lacks a comprehensive privacy law at the federal level. See Alex Pearce, *Time for a Federal Privacy Law?*, 38 SPG DEL. LAW. 6, 6 (2020) (noting “privacy has been regulated by federal and state laws that apply to the collection and sharing of personal information by organizations in *certain* sectors . . . or to *certain* types of sensitive personal information . . . and by state data-breach notification laws” (emphasis added)). Recently some states have adopted privacy laws in the face of inaction by the federal government. See *id.* at 7 (noting examples of states' privacy regulation, including that Illinois, Texas, and Washington have adopted laws regarding biometric data disclosures and Vermont, Nevada, and California have adopted laws covering data brokers). This Article focuses on the CCPA as it is considered

deleting a user's data means "totally shutting down your account," which may not be a realistic option for many users.<sup>234</sup>

Consent should be obtained *prior* to data collection, but because vast amounts of data have already been harvested and monetized, individuals should be given a convenient way to opt out of existing data collection. The path to opting out of data collection and monetization should not be an endless obstacle course that confuses or dissuades users.<sup>235</sup> For example, the CCPA gives Californians the right to receive a copy of the data a company has harvested, the right to instruct the company to not sell their data, and the right to have the company delete the data to the extent possible.<sup>236</sup> As a matter of policy, some companies have chosen to afford all Americans CCPA rights.<sup>237</sup> But to exercise these rights, individuals must contact dozens of companies and navigate each of their procedures.<sup>238</sup> In seeking to avail himself of these CCPA protections, a Washington Post reporter found that while some companies had online forms that were relatively easy to fill out and submit, many had time-consuming or peculiar procedures.<sup>239</sup> Rather than forcing individuals to fight for

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to be one of the country's most comprehensive consumer privacy laws. *Id.* at 6. While there have been some attempts to develop a privacy law in the U.S. Congress, civil society groups have warned that tech companies may seize such an opportunity to develop a federal law that pre-empts and weakens the protections afforded by state laws. See Bennett Cyphers, *Big Tech's Disingenuous Push for a Federal Privacy Law*, ELEC. FRONTIER FOUND. (Sept. 18, 2019), <https://www.eff.org/deeplinks/2019/09/big-techs-disingenuous-push-federal-privacy-law> [<https://perma.cc/8BRH-JRPS>] (raising concerns that a trade group funded by large tech companies was lobbying for a federal privacy law that "undoes stronger state laws and lets [the companies] continue business as usual").

234. Fowler, *Don't Sell My Data!*, *supra* note 210 (reporting that Facebook requires users to shut down their accounts in order to delete their data).

235. As James Williams explains, "website owners simply treat the request for [cookie] 'consent' as one more persuasive interaction, and deploy the same methods of measurement and experimentation they use to optimize their advertising-oriented design in order to manufacture users' consent." WILLIAMS, *supra* note 20, at 116.

236. See CCPA, *supra* note 233, § 1798.105(a).

237. Fowler, *Don't Sell My Data!*, *supra* note 210.

238. See *id.*

239. See *id.* The reporter noted that:

Amazon hid critical links in legal gobbledygook. Marketing data company LiveRamp asked me to submit a selfie holding my own ID, kidnap-victim style. Walmart asked for my astrological sign to confirm my identity. (Really.) And one business left me a voice mail, but the message included no return number . . . or even the name of the company. . . . Data firm Wiland even asked me for a notarized letter.

their rights by navigating numerous websites and lodging requests with dozens upon dozens of companies, good public policy necessitates a more realistic way to exercise the right to opt out.

Finally, any consent to data collection and monetization should be obtained in a fully *informed* manner. Given that the general public does not appear to understand the many ways that companies harvest and profit from data,<sup>240</sup> it is evident that obtaining informed consent will require explanations that are much clearer than existing terms of service, which are filled with legal jargon. Requests for informed consent would need to include clear, specific disclosures about the precise scope of the harvesting and uses of data as well as the impacts that such methods can have on human rights, including freedom of opinion.

## 2. Implementation of the UNGPs

Under the UNGPs, all companies should engage in human rights due diligence to assess where their operations may adversely affect human rights and develop strategies to avoid, minimize, and redress harms.<sup>241</sup> The UNGPs emphasize that companies should prioritize consideration of their most significant adverse human rights impacts.<sup>242</sup> While such human rights assessments should take place before key events, such as the launch of new business models and products or entry into new markets, companies should also monitor their human rights impacts on an ongoing basis.<sup>243</sup> Such human rights assessments should be conducted with the participation of outside stakeholders and experts<sup>244</sup> and should, to the extent possible, be made public.<sup>245</sup>

To meet the U.S. government's call to treat the UNGPs as a minimum standard,<sup>246</sup> U.S. companies should have engaged in human rights due diligence *before* launching surveillance capitalism business models. To date, none of the leading platforms have made public a human rights impact assessment of this business model.<sup>247</sup>

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*Id.*

240. *See supra* note 45.

241. *See* UNGPs, *supra* note 11, princs. 11, 13, 17.

242. *Id.* princ. 17 cmt.

243. *Id.* princ. 17.

244. *Id.* princ. 18.

245. *Id.* princ. 21.

246. *See* U.S. GOVERNMENT, *supra* note 10, at 4.

247. *See* MARÉCHAL & BIDDLE, *supra* note 46, at 22 (“Neither Facebook, Google, nor Twitter disclose any evidence that they conduct human rights due

Companies must now expeditiously conduct human rights impact assessments of their surveillance capitalism business methods that include impacts on the right to hold opinions as well as more widely known rights such as privacy and freedom of expression. This due diligence will help provide companies with important guidance about how to shift their business models to more rights-respecting models<sup>248</sup> and how to provide appropriate redress for past human rights harms.

Under the UNGPs, governments should also guide and regulate companies to respect human rights, including the right to hold opinions without interference, in their business operations.<sup>249</sup> As the Special Rapporteur has noted, governments can fulfill their role in a variety of ways, such as by encouraging and/or requiring companies “to undertake [human rights] impact assessments and audits of [artificial intelligence] technologies and ensuring effective external accountability mechanisms.”<sup>250</sup> Governments should also pass appropriate legislation that protects privacy and the right to hold opinions in the digital age and specify the terms on which individuals can provide free, prior, and informed consent with respect to the collection and monetization of personal data.<sup>251</sup> Furthermore, in order to facilitate the creation of appropriate public policy, governments should promote greater transparency with respect to

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diligence on their use of algorithmic systems or on their use of personal information to develop and train them.”).

248. For example, search engines that harvest and monetize user information could explore alternative models that are also based on advertising but without surveilling and tracking their users. See Natasha Lomas, *Pro-Privacy Search Engine DuckDuckGo Hits 30M Daily Searches, Up 50% in a Year*, TECH CRUNCH (Oct. 11, 2018), <https://techcrunch.com/2018/10/11/pro-privacy-search-engine-duckduckgo-hits-30m-daily-searches-up-50-in-a-year/> [<https://perma.cc/85EY-UETU>] (reporting that DuckDuckGo’s search engine “offers a pro-privacy alternative to Google search that does not track and profile users in order to target them with ads” and has been profitable).

249. See UNGPs, *supra* note 11, princs.1–3.

250. *SR 2018 Report*, *supra* note 17, ¶ 63.

251. See, e.g., NATHALIE MARÉCHAL, REBECCA MACKINNON & JESSICA DHEERE, NEW AMERICA, GETTING TO THE SOURCE OF INFODEMICS: IT’S THE BUSINESS MODEL 31–33 (2020), [https://d1y8sb8igg2f8e.cloudfront.net/documents/Getting\\_to\\_the\\_Source\\_of\\_Infodemics\\_Its\\_the\\_Business\\_Model\\_2020-05.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/Getting_to_the_Source_of_Infodemics_Its_the_Business_Model_2020-05.pdf) [<https://perma.cc/8HB3-ENS4>] (proposing a federal data privacy law that would, *inter alia*, limit “data collection and retention to the absolute minimum that is required to deliver the service to the end-user,” mandate that targeted advertising not be the “primary purpose” of the platform unless that is made clear to users, mandate that companies publicly disclose their data collection practices, allow users to access and delete their data, and compel companies to undergo independent privacy audits).

how artificial intelligence systems work,<sup>252</sup> including transparency about what corporate amplification systems optimize for and what factors they consider.<sup>253</sup> Again, any governmental approaches in regulating surveillance capitalism must consider impacts on the right to hold opinions without interference in addition to other human rights, including privacy and freedom of expression.

### 3. Strategies for Stakeholders

Given the wide array of companies involved in and profiting from the supply chain of harvesting and monetizing data, external stakeholders will need to recalibrate their strategies in order to motivate not only companies but also governments to address these issues.<sup>254</sup> While many groups that are involved in the corporate responsibility movement often focus on a particular industry, there needs to be greater coordination among these groups to collectively spotlight the human rights harms of surveillance capitalism. This is no longer solely a problem that involves what were once known as “Internet” or “technology” companies. In addition, corporate responsibility advocates will need to deploy digital literacy campaigns that help bolster widespread public understanding of the surveillance capitalism ecosystem and its impacts, including with respect to freedom of opinion. Public awareness and engagement will be crucial to impactful human rights advocacy, especially given how entrenched and lucrative surveillance capitalism has become. As one commentator has noted, “[p]eople can be *blasé* about their privacy in a way they may not be about their free will.”<sup>255</sup> Thus a focus on the right to hold opinions without interference may energize the public about surveillance capitalism business models in a way that the focus on privacy interests has not achieved.

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252. See *id.* at 34 (calling for transparency regulation mandating, *inter alia*, that companies “publicly explain the content-shaping algorithms that determine what user-generated content users see, and the ad-targeting systems that determine who can pay to influence them”).

253. See, e.g., MARÉCHAL & BIDDLE, *supra* note 46, at 42 (“Companies should explain how such algorithmic systems work, including what they optimize for and the variables they take into account.”). Civil society has also called for companies “to enable users to decide whether to allow these algorithms to shape their online experience, and to change the variables that influence them.” *Id.*

254. See SURVEILLANCE GIANTS, *supra* note 7, at 6 (noting governmental interest in accessing corporate data vaults).

255. Alegre, *supra* note 8, at 233.

## CONCLUSION

In 2019, a variety of high-profile warnings—including from Apple’s CEO, a distinguished U.N. report, a declaration by the Council of Europe’s foreign ministers, and Amnesty International—were issued about whether our mental autonomy is being eroded in the digital age.<sup>256</sup> These concerns emerged from contemporary business models that are based on three related tactics: (1) designing digital products to maximize time spent on platforms, (2) leveraging user engagement to continuously extract personal data, and (3) using and selling that data to target users with highly particularized information in order to affect their views and behavior. In the last few years, former tech insiders have expressed their disquietude that these business methods not only produce compulsive and addictive behavior but also pose a high risk of manipulation.<sup>257</sup>

These concerns prompted calls to assess whether international law protects mental autonomy from such business methods, which are deployed around the world. While ICCPR Article 19(1) contains an absolute right to hold opinions without interference, there has been little jurisprudence on this right because it was assumed that governments could not penetrate inside their citizens’ minds and thinking processes. Technological developments have displayed that this assumption is now unfounded. This Article provides the first in-depth scholarly examination into the jurisprudential underpinnings of this right. After reviewing the treaty text, its negotiating history, the works of jurists, and interpretations by the U.N. human rights machinery, this Article concludes that the right to hold opinions without interference comprises at least three prongs: the right not to (1) reveal one’s opinions, (2) be manipulated or coerced when forming and holding opinions, and (3) be penalized for one’s opinions.

Under the UNGPs, corporations are expected to seek to avoid infringing on human rights, including the right to hold opinions without interference, in their business operations. It is evident that business models based on surveillance capitalism risk undermining freedom of opinion’s three prongs. Without their full understanding, individuals are unwittingly revealing their inner thoughts through their daily online activities. The corporate harvesting and assessment of data is so detailed and accurate that tech insiders have noted they

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256. See *supra* notes 1–8 and accompanying text.

257. See *supra* notes 22–54 and accompanying text.

can “change” and “manipulate” behavior.<sup>258</sup> Moreover, part of the point of harvesting and monetizing user data is to differentiate among users, including through microtargeting for political or commercial motives, which raises concerns about individuals being penalized for holding particular opinions.

In offering ways forward, this Article notes a variety of problems inherent in any path that is paved with an obstacle course of hoops that individuals must jump through in order to protect their mental autonomy. Corporate harvesting and monetization of data should not take place without obtaining the free, prior, and informed consent of individuals. Given the concerns that surveillance capitalism business models have created compulsive and addictive online behavior, it is unclear how free users are to opt out of these business models, particularly if the only alternative is to forgo corporate products that are woven into the foundation of their personal lives and livelihoods. While it is too late to give “prior” consent to existing corporate data collection, a convenient way for consumers to opt out of such collection methods must be developed. The sheer amount of time that it takes to navigate the many processes for exercising the CCPA right to opt out of a myriad of corporate surveillance methods creates unfair disincentives and facilitates infringements on human rights.<sup>259</sup> Finally, assuring individuals are informed of their right to opt out of data collection will require much more transparent and understandable methods of imparting information about how companies collect and utilize data.

To act consistently with the call of the UNGPs to respect human rights, companies should have engaged in human rights due diligence *before* launching these business methods. Because companies have failed to do so, this Article argues that they should immediately launch human rights impact assessments of their surveillance capitalism based business models. In conducting these assessments, companies should consider the negative impacts not only of “well-known” human rights such as privacy and freedom of expression, but also the right to hold opinions without interference. Engaging in such impact assessments will help companies identify ways of providing redress to individuals for existing harms as well as develop new business models that can remain profitable while respecting human rights. Governments also have a responsibility under the UNGPs to encourage corporate respect for human rights

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258. See *supra* notes 21, 26–35 and accompanying text.

259. See *supra* notes 236–39 and accompanying text.

and to regulate the private sector where necessary, including with respect to the right to hold opinions without interference. Such regulation could commemorate protections for free, prior, and informed consent of individuals with regard to data collection as well as mandate greater transparency with respect to how companies collect and utilize the data.

Moreover, given the wide web of companies involved in the corporate supply chain of data extraction and monetization, external stakeholders will need to recalibrate their strategies in order to push companies and governments forward on these issues. While many groups that are involved in the corporate responsibility movement focus on one industry sector, there needs to be greater coordination among all these groups to spotlight the human rights harms of surveillance capitalism. In addition, these groups should deploy widespread digital literacy campaigns to promote public understanding of surveillance capitalism and its human rights impacts, particularly with respect to the right to hold opinions without interference, which may energize the public more than the existing focus on harm to privacy rights.

In Apple CEO Tim Cook's speech at Stanford University in which he highlighted the harms of surveillance capitalism, he stated that "it's our humanity that got us into this mess and it's our humanity that is going to have to get us out."<sup>260</sup> In order to fully address the negative impacts of surveillance capitalism business models, any governmental, corporate, or civil society responses to these business models must consider the human right to hold opinions without interference. Otherwise, we will be mindlessly giving up our right to our own minds.

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260. *Stanford University Commencement 2019, supra note 1.*