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Adeno Addis

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# Individualism, Communitarianism, and the Rights of Ethnic Minorities

Adeno Addis\*

The idea that I think we need today in order to make decisions in political matters cannot be the idea of a totality, or of the unity, of a body. It can only be the idea of a multiplicity or diversity . . . in which justice is not placed under a rule of convergence but rather a rule of divergence. I believe that this is the theme that one finds constantly in present day writing under the name "minority".

—Jean-Francois Lyotard<sup>1</sup>

## I. PROLOGUE

The 1990s have begun with seemingly contradictory tendencies. On the one hand, one sees the resurgence and intensification of nationalistic and ethnic consciousness around the world, calling for the breaking up of empires, republics, and autocracies. The events in the Soviet Union,<sup>2</sup> Canada,<sup>3</sup> Ethiopia,<sup>4</sup> Sri Lanka,<sup>5</sup>

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\* Associate Professor of Law, Tulane University; Visiting Associate Professor of Law, Duke University (Fall 1991).

1 Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984), cited in IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 156 (1990).

2 As I am writing this Article, the Soviet Union seems to be disintegrating. The Baltic states—Latvia, Lithuania, and Estonia—have declared their independence and the Soviet Union, or what remains of it, has recognized the declarations. Of the remaining republics, seven have declared their independence from the center. And the indication is that more will follow that course. Those that have declared their independence are Azerbaijan, Byelorussia, Georgia, Moldavia, Uzbekistan, Kirgizia, and the Ukraine. Even though there is now an interim Union government, a very weak Union government, to which the twelve republics have agreed, there is no guarantee that the Union will continue to hold. Indeed, indications are that, for all practical purposes, the republics will continue to act as independent states. The collapse has the real prospect of leading to serious inter-ethnic conflicts, because significant minorities reside in most of the republics. In the Ukraine, for example, 22% of the entire population is Russian. In Kazakhstan it is 38%. And Kirghiz has a Russian minority that constitutes 21% of the entire population. In all the republics, except perhaps Armenia (where 93% of the population is Armenian), there are significant minorities. In addition, it is likely to lead to inter-republic disputes, because some of the republics, especially the Russian Republic, are raising the issue of redrawing borders if there is a break up of the Soviet state. 15 *U.S.S.R.: Facts and Figures* 499 (Alan P. Pollard ed., 1991).

3 In Canada, the Quebec question never seems to be resolved and has recently

and Eastern Europe<sup>6</sup> are clear examples of that tendency. In each of those countries there are movements, primarily ethnic-based, that are asserting what they see to be a right of self-determination, a right which is usually taken to mean the declaration of the independence of the territorial unit within which the ethnic group resides.

On the other hand, one also sees a tendency for political and economic union to form larger units. What is occurring in Western Europe, despite the reluctance of some political leaders in the United Kingdom, is a prime example of this phenomenon.<sup>7</sup>

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received a more intense play in the media. In a recent New York Times article, Clyde Farnsworth writes: "The newly recognized independence of Lithuania, Latvia and Estonia has been seized upon by Quebec nationalists as a point of encouragement for their own dreams of an independent Quebec. The firing up of the separatist threatens to add a new complication to Prime Minister Brian Mulroney's efforts to keep Canada united." Mr. Jacques Parizeau, the Quebec separatist leader who was a former finance minister and a professor of economics, is quoted as saying that if independence works for the three Baltic states, which have a total population of eight million as compared to seven million in Quebec, "I have the impression it will be no less difficult in Quebec." Clyde H. Farnsworth, *Quebec Separatist Hails Baltics' Independence* N.Y. TIMES, Sept. 8, 1991, at 14, col. 1.

4 Ethiopia is barely together now. Ethiopia, however, is not the only African country with inter-ethnic tension and conflict. Somalia is just about to disintegrate. Indeed, ethnic conflict is a phenomenon in many developing countries. In Asia there have been intense inter-ethnic conflicts. India and China have, for example, had serious ethnic conflicts and tension.

5 See M. L. Marasinghe, *Ethnic Politics and Constitutional Reform: The Indo-Sri Lankan Accord*, 37 INT'L & COMP. L.Q. 551 (1988). Since about 1983 Sri Lanka has been afflicted with intense and destructive ethnic conflict between the majority Sinhalese and the minority Tamil. In the last few years, the demand of the Tamils has moved from that of the establishment of an ethnically ascertained sub-state in the northern and eastern part of the island, where most Tamils live, to one of constituting the area as a separate sovereign state.

6 In Central Europe, there are similar tendencies. In Yugoslavia, for example, the Croats and the Slovenes have been attempting to secede from the federation which they believe is dominated by the Serbs. The attempt to secede has led to serious conflict and considerable destruction and there does not seem to be a solution in sight. And in Czechoslovakia, the Czechs and the Slovaks do not seem to get along well. See Celestine Bohlen, *Evolution in Europe: Ethnic Rivalries Revive in East Europe*, N.Y. TIMES, Nov. 12, 1990, at A1, col. 3. It is reported that "in 1923, 30 million out of 110 million people living in the region were considered minorities in their countries. Now, after the mass killings and migrations of World War II, the number of people counted as belonging to ethnic minorities has dropped to about 14 million, but it is still more than 10 percent of the population." *Id.*

7 To a lesser extent, there are similar movements in many parts of the world. Even though it does not have as much currency now as it did in the 1960s and 1970s, the rhetoric of African unity is still heard in the corridors of many conferences in that part of the world. In Asia, the Association of South East Asian Nations (A.S.E.A.N.) is perhaps a clear example of the desire of nations to join forces as a result of economic and other necessities.

What one observes is, therefore, a resurgence of ethnic consciousness and separatism along with developments that seem to recognize the economic and technological imperatives of the late twentieth century: the interdependent nature of the lives of nations and communities.

Which tendency will dominate the international political life of the decade is hard to predict. Indeed, a prediction may not be possible, much less advisable, given the nature of international politics in the last year or two. One thing is certain: neither tendency is likely to disappear from the political landscape, and ethnic consciousness and conflict are likely to intensify.

When one observes inter-ethnic conflict raging from South Asia to Africa, and from North America to Southern Europe, one is tempted to think that this decade might be defined partially by inter-ethnic conflicts. The topic of this symposium is, therefore, one that is likely to be central to the intellectual and political concerns of this decade, especially given what the demise of totalitarianism seems to have ushered into the Soviet Union and Eastern Europe: the old ethnic rivalries.<sup>8</sup>

This political tendency to destabilize the center, and, hence, the currently accepted form of union, has an intellectual analogue in current theorization within the humanities and the social sciences. An intellectual orientation loosely referred to as postmodernism<sup>9</sup> has, in the last few years, been challenging what

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8 The Soviet Union and Eastern Europe used to make the claim that in their socialist order, ethnic differences had been transcended and hence had been rendered politically irrelevant. Unfortunately, as recent events clearly demonstrated, it was politics itself, not ethnic differences, that was made irrelevant in those societies. The leaders of those societies mistook the silence resulting from political disengagement for a transformative harmony.

9 For a leading theorist of postmodernism, see JEAN-FRANCOIS LYOTARD, *supra* note 1. Lyotard describes postmodernism as a rejection of grand narratives and totalizing thoughts and the accentuating of diversity, locality, specificity, and contingency. Because of technological and informational transformations, Lyotard believes that we have entered an era where knowledge is constantly changing, where our concepts of ourselves and of others are unstable, and where a teleological view of history can no longer anchor the meaning of our existence and our relationship with the social and physical world. Indeed, for Lyotard, the master narrative of the Enlightenment, the narrative of mastery and liberation, has been nothing less than a discourse of terror and forced consensus. There are others, however, who have a different reading of the postmodern. Perhaps the most prominent is Frederic Jameson. Jameson, uneasy about what he senses to be a nihilistic tendency in the above reading of postmodernism, gives a different account. For Jameson, postmodernism is the "cultural logic" of the latest stage of capitalism. Seeing it this way allows Jameson to hold onto his grand narrative, Marxism. While Lyotard wants to resist all those claims that hold themselves out as complete stories of the human con-

it believes to be the dominant mode of understanding, i.e., modernism or the Enlightenment: the idea of a "universal" (foundational) narrative against which all stories may be judged for their validity, and the notion that liberation and progress can be understood in the image of a spiral where there is continual convergence among groups and where differences are ultimately transcended.

While the political movement is about decentering the idea of territorial unity, or at least weakening the territorial center, the intellectual movement is intent on decentering the notion of the master narrative that supposedly defines that unity or center and determines the hierarchy within it. The two are tied by two common themes. Both see the notion of unity and convergence to be tyrannical and exclusionary, and both celebrate the politics of difference.<sup>10</sup> In both its political and intellectual dimensions, decentering has attracted members of minority groups, people who are traditionally considered at the margins of societies. This is because decentering offers the possibility that the voice of the Other (of minorities) will not remain consigned to the margins of social and political existence and that the center which has consigned them to the periphery will not be the reference point.

Both the political and intellectual movements are, therefore, struggling to find conceptual and institutional ways by which those who are defined to be different by the dominant culture, and consequently marked out to be marginal in the social and political life of the polity, will be able to actively participate in the formation and reformation of the social and political space they inhabit. The issue of the rights of ethnic minorities is one that attempts to deal with those conceptual and institutional questions.

## II. INTRODUCTION

This Article is about the concept of ethnic rights, a concept which is currently widely invoked in political and legal discourse in

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dition, and while he sees them as coercive and terroristic, Jameson claims that postmodernism simply requires us to employ Marxism, the totalizing theory of history and society, in a social and technological environment with new social formations and social space. FREDERIC JAMESON, *POSTMODERNISM: OR THE CULTURAL LOGIC OF CAPITALISM* (1991).

<sup>10</sup> By the phrase "the politics of difference," I mean a form of politics that views group differences in a positive light and attends to, rather than represses, those differences. It is the rejection of teleological self-confidence, and the notions of impartial competence and the omniscient center. See generally, IRIS M. YOUNG, *supra* note 1.

both the national and international domains. The clarity of the concept has, unfortunately, not matched its popularity. Indeed, some might say that its popularity is inversely related to its clarity and even its usefulness. The purpose of this Article is to inquire into the various meanings that are ascribed to the phrase in order to see which one is descriptively plausible, normatively defensible, and institutionally enforceable. The claim of this Article is that the phrase as traditionally understood—as a short hand for individual rights—is either superfluous or incapable of being given institutional meaning.

This Article further argues that the only plausible way to understand the notion of ethnic rights is to conceive of it as being a right of a group. Cultural rights are the best example of such a right.

The notion of a cultural right becomes necessary because of the existence of cultural domination.<sup>11</sup> The dominant cultural understanding and experience of a society tends to universalize itself as the inevitable norm for social life, marking the culture of the marginal as the “Other,” either to be excluded or “normalized.” To say that cultural rights become necessary because of the existence of cultural domination is to make the point that both culture and rights are not essentialist, but relational concepts. They are, as I shall argue later, processes through which identities and political paradoxes are negotiated.

The political responses of dominant groups (regimes) to ethnic minorities have usually taken one of three forms. I shall refer to these responses as total negation, assimilation, and pluralism. Under the first response, regimes see minorities as a negation of the majority, culturally or otherwise. There are only two things one can do to that which is seen to be a total negation of oneself. One can either totally annihilate it—the most prominent example is Hitler’s attempt to exterminate the Jews—or move it away from one’s physical environment. The expulsion of a group from the political unit is an example of the latter.

The second response, assimilation, is currently perhaps the most common response to ethnic differences. Here, the object is to transform minority groups into some version of the majority. To assimilate means to mold, to the extent possible, the minority

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11 “Concern for humanization leads at once to the recognition of dehumanization, not only as an ontological possibility but as an historical reality.” PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 27 (1970).

in the image of the dominant group, by requiring the minority to learn the language of the majority, to follow the cultural practices of the majority, and generally to adjust its social practices and rituals to conform to those of the majority.

Neither of the above two responses takes the notion of cultural rights for minorities seriously. The first sees minorities as a negation of the majority and hence not deserving any right. The second sees minorities and their cultures as poor imitations or extensions of the majority and its culture. Assimilation is imperialism with a seemingly kinder face. It is imperialist for a number of reasons. The standards according to which the minorities are "normalized," though considered to be neutral and universal, are, in fact, culturally and experientially specific standards of the dominant group. Moreover, the process of assimilation allows the dominant group to simultaneously universalize itself and particularize the Other. And any resistance to the process by the Other is often defined as abnormal.<sup>12</sup>

The third response, which I have referred to as pluralism, holds that differences are to be celebrated rather than feared. In this response, development and democracy are not seen to be incompatible with the acknowledgement and celebration of differences. Actually, there are two kinds of pluralism. The first could be referred to as paternalistic (or complacent) pluralism. The second might be called critical pluralism. In both of its dimensions, pluralism attempts to provide certain rights for its minorities. There is, however, a difference between the two in why and how those rights are conferred.

Paternalistic pluralism "protects" the culture of minorities as the Other. Here, the toleration of the culture of ethnic minorities is motivated by a desire to save a particular group and its cultural practices from the majority's own actions which threaten to annihilate the minority. Under this model, the minority group cannot engage, and is not regarded as capable of engaging, the majority in a creative and constant dialogue. And the structure and resources that will enable such a dialogue are denied this group. What governments have done to indigenous peoples in Australia, Canada, New Zealand, and the United States is a good example of this. Indigenous peoples in these countries are treated in the same way one would treat a "vanishing species of nonhuman fauna . . . ." <sup>13</sup> They are to be preserved as Another, rather than to

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12 See IRIS M. YOUNG, *supra* note 1, at 163-68.

13 Pierre L. van den Berghe, *Protection of Ethnic Minorities: A Critical Appraisal*, in PRO-

be engaged as partners in the creation and recreation of the social world that both inhabit. Pluralism of the paternalistic kind is as dehumanizing as negation itself, for it is based on the assumption that the minority has little to impart to the majority and cannot therefore be regarded as a partner in dialogue.

What I have elected to refer to as "critical pluralism" does more than "protect" the minority. In fact, it is not even comfortable with the notion of protection. Rather, it is committed to doing two things. First, it actively intervenes to provide the resources that will enable the minority culture to flourish. But that alone is not sufficient. It is also committed to developing institutional structures that will enable the majority to open itself up to the minority, to accept the minority as a dialogue partner. Put simply, critical pluralism will adhere simultaneously to the politics of difference and dialogue. Indeed, the politics of difference is an essential condition for dialogue. When the dominant group engages the oppressed in a dialogue it is acknowledging two things. First, it assumes that the dialogue partner cannot be understood either as an imitation of or deviation from the dominant culture. One does not engage a deviant in a dialogue. Rather, one seeks to heal the deviant, either medically or with divine guidance. Healing, by its very nature, is one-directional. Second, the dominant group sees its experience and culture not as universal and neutral, but as specific and located in the same way it sees the marginal cultures to be.<sup>14</sup>

I shall argue in this Article that critical pluralism provides the best model for understanding the notion of minority cultural rights, and that an ideal of politics in a heterogeneous public must be the affirmation of group differences while simultaneously linking those groups in a process of institutional dialogue. Critical pluralism acknowledges the pervasiveness and importance of social groups in our lives<sup>15</sup> and the exclusionary consequences when

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TECTION OF MINORITIES: COMPARATIVE PERSPECTIVES 343 (Roger G. Wirsing ed. 1981).

14 Antonio Faundez, in a dialogue with Paulo Freire, correctly observed: "We learn only if we accept that others are different—otherwise, for example, dialogue is impossible. Dialogue can only take place when we accept that others are different and can teach us something we do not already know." PAULO FREIRE & ANTONIO FAUNDEZ, *LEARNING TO QUESTION: A PEDAGOGY OF LIBERATION*, 26 (1989).

15 "We are born into certain groups, others we choose, and still others choose us. Life not subject to the call of groupness is as difficult for us to imagine as life not subject to the individuating call of personhood or to the sociating call of sociality." Ronald R. Garet, *Communitality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1070 (1983).



one denies their existence. Still, it is also conscious of the contingent nature of these groups, whose very meaning and structure could be transformed in the process of genuine institutional dialogue.<sup>16</sup> Group identities are contingent in the sense that differences (identities) are established relationally. This means that what sorts of relationships establish differences, and who gets to define those relationships, matters. A different form of relationship, and hence a different process of naming differences, will give rise to a different form of identity, emphasizing one (or one group) rather than another (or another group) of the multiple factors that can potentially constitute an identity.<sup>17</sup>

### III. WHAT DOES ETHNIC RIGHT MEAN?

Just over a decade ago, Michael Walzer, who has invested a great deal of his energy and his considerable intellect over the years to understanding the nature and institutional implications of pluralism,<sup>18</sup> observed: "The practical meaning of ethnic pluralism . . . is still being hammered out, in the various arenas of political and social life. Little theoretical justification exists for any particular outcome."<sup>19</sup> One could substitute the word "rights" for "pluralism" and one would be justified in making a similar claim. Indeed, one is justified in making a more radical claim in relation to ethnic rights. Not only is the practical meaning of ethnic rights contested and contestable, but so is its conceptual coherence.

Given the ease with which the phrase "ethnic rights" is currently invoked, and the numerous and urgent political questions that invoke it, it is surprising that the concept could even be thought to be less than clear. But it is. Even though most countries are multi-ethnic and, therefore, political communities are not coextensive with cultural communities, the paradigm for most influential political theories of the current era has become the political community. Even though it is Yugoslavia rather than Iceland, India rather than Japan, that typically represent the nature of the current nation state, it is surprisingly the latter of each of the pairs that has formed the basis for political theorization, both

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16 See generally WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* (1991); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); IRIS YOUNG, *supra* note 1.

17 See W. CONNOLLY, *supra* note 16, at 171-84.

18 See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

19 Michael Walzer, *Pluralism in Political Perspective*, in *THE POLITICS OF ETHNICITY* 13 (Stephen Thornstrom ed. 1982).

on the domestic and international level. True, as I have noted earlier and as I shall argue later, political actors and jurists have had to pay attention to, and deal with, the issue of ethnic plurality. In most circumstances, however, they do so with the background of a theoretical and conceptual void.

A. *Ethnic Rights as Rights of Political Divorce: The Case of Secession*

One relatively clear situation where the notion of ethnic rights is invoked is secession, or, as it has come to be known in some circles, political divorce. This specific understanding of ethnic rights will suggest that an ethnic minority has the right to leave an established political unit so as to constitute itself as a new unit. The right is one of freeing oneself as a group from the jurisdiction of a political unit. This imparts a fairly clear sense of the term, if that is in fact the meaning we want to ascribe to it. But to agree that the term in the above sense has descriptive clarity is not to have made the point about its normative plausibility, nor its consistency with current international law.<sup>20</sup>

In international legal discourse, secession is regarded as a topic which lies in the outer periphery of the discipline,<sup>21</sup> and

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20 "Because secessionist movements call for international recognition of the states they seek to create, they necessarily concern the world community. The right to secede is a matter of international law." Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).

21 To be sure, there are some people within the international legal community who have been arguing that article I, paragraph 2 of the U.N. Charter, which lists as part of the purposes of the United Nations "the principle of equal rights and self-determination of peoples," can plausibly be read to include the right to secede. See B. Weston, et al. *Basic Documents in International Law and Order* 16 (2nd ed. 1990). Those that hold such a view believe that their argument gets added support from various General Assembly (GA) resolutions, which repeat and emphasize the importance of the principle of self-determination in current international social and political existence. Those that are usually relied upon include Res. 2625, 1514, and 1541(XV). *Id.* at 108, 343. Two things should be said about the position of the advocates of secession. First, the very GA resolutions they cite to support their argument declare that self-determination cannot be understood in a way that is inconsistent with another important principle of international law: territorial integrity. Res. 1514, for example, provides: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." *Id.* at 344. Given that, it seems rather unpersuasive to claim that self-determination must be read expansively so as to include the right to secede. Second, not only is this claim not on secure ground in terms of positive international law, but, more importantly, its advocates have not made a convincing moral argument in support of secession. Indeed, what is remarkable about the literature advocating the right to secede is its tendency to simply list a number of arguments which are not necessarily compatible with each other.

thus is seen mainly as the concern of allied and adjacent areas of intellectual life. The general mood among international lawyers and legal scholars is that positive international law does not recognize the right to secede. If positive international law is not comfortable with secession, political philosophy has not even taken it seriously. To be sure, there are some exceptions. Allen Buchanan, in a recent and very thoughtful article, has gone some way to redress this puzzling neglect.<sup>22</sup>

After exploring the various normative theories of secession and possible objections to them, Buchanan concludes: "There is a moral right to secede, but it is a qualified right."<sup>23</sup> But what is the *source* of that moral right, qualified or otherwise? The most commonly invoked justification is what Buchanan refers to as "rectificatory justice."<sup>24</sup> The source of the right is the fact that the particular unit within which the ethnic minority resides "was unjustly incorporated into the larger unit from which its members wish to secede."<sup>25</sup> The justification is similar to the argument that one has the right to property that has been forcibly taken from one. This is probably the least controversial justification for secession.

Buchanan believes that there is another justification, one he refers to as the "discriminatory redistribution"<sup>26</sup> principle. This principle holds that when a government systematically disadvantages one group, while benefiting another through economic and regulatory policies "in morally arbitrary ways,"<sup>27</sup> the disadvantaged group has a moral right to leave the union. Buchanan believes this is precisely the moral justification for the secession of the thirteen American colonies from the British Empire in North America.

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22 "Given the practical urgency and theoretical interest of the topic, the lack of a normative theory of secession—and even of any serious discussion of secession—in the central works of political philosophy is puzzling." Allen Buchanan, *Toward a Theory of Secession*, 101 *ETHICS* 322, 323 (1991). In a recent essay, Lea Brilmayer has joined the effort. Brilmayer, *supra* note 20.

23 "Two of the chief qualifications are (a) that secession be consistent with the requirements of distributive justice as they apply to the resources the secessionists appropriate, and (b) that secession not deprive third parties (in particular children and later decedents of the secessionists) of their fundamental rights and liberties." Buchanan, *supra* note 22, at 342.

24 *Id.* at 329.

25 *Id.*

26 *Id.* at 330-332.

27 *Id.* at 330.

Would either of the above justifications support the desire of ethnic minorities to relieve themselves from the jurisdiction of existing political units? The answer will be in the affirmative if the group can satisfy the conditions for the rectificatory argument. Today, however, many ethnic groups will not be able to meet those conditions. It is not in the clear colonial situations that the right to secede is being invoked today since that situation is relatively uncommon.<sup>28</sup> In any case, in those circumstances the process will be referred to as decolonization.

Most of the circumstances within which the issue of secession arises today are of the kind where there is allegedly discriminatory redistribution, either of material goods or intangibles. Would such a situation justify secession of an ethnic minority? It is not quite clear. While it might be true that political legitimacy is a function of the state exercising power in a way that does not exploit one group for the benefit of another, a recognition of that principle does not automatically and unarguably lead to the conclusion that the exploited group thus has the right to secede. A further argument has to be made as to why the particular group is entitled to the particular territory it now wants to reconstitute as a new political unit.<sup>29</sup>

If secession is what the notion of "the rights of ethnic minorities" is meant to refer to, then I think we need to do a great deal more work to find normative justifications that are simultaneously relevant to the current political conditions that have given rise to the demand for secession, and are sensitive to the legitimate concern of the larger political units<sup>30</sup> from which the ethnic minority is attempting to secede.

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28 Hong Kong and New Caledonia are two of the few remaining formal colonies. The former is a British colony which is to revert to the People's Republic of China in 1997, while the latter remains a French colony. See THE TIMES ATLAS OF THE WORLD ix-xiii (1990).

29 See Brilmayer, *supra* note 20, at 192 ("My thesis is that every separatist movement is built upon a claim to territory, usually based on an historical grievance, and that without a normatively sound claim to territory, self-determination arguments do not form a plausible basis for secession.").

30 Take Ethiopia as an example. Its northern province, Eritrea, is almost ready to secede. If the entire territory that is now identified as Eritrea is allowed to form the new sovereign state of Eritrea, then Ethiopia would have lost its access to the sea. Now, even if one assumes that Eritrea has, in every other respect, the right to secede, should not the economic and security interests of Ethiopia that will be adversely affected by loss of access to the sea, become legitimate interests which, if not attended to, might justifiably lead to unilateral action on the side of Ethiopia as a form of self-defense?

In any case, even if normatively justifiable secession might not in and of itself provide the solution to the practical problem of inter-ethnic conflicts and domination. This is because in most cases, there will always be ethnic minorities in any political unit regardless of the size of the constituted unit. Moreover, there will be times when the interest of majorities and minorities will not converge. Thus, for example, an independent Eritrea, if there were to be one, would itself have to contend with ethnic minorities within its borders. So will the newly independent nations of Latvia<sup>31</sup> and Estonia,<sup>32</sup> or Croatia,<sup>33</sup> or northern and eastern Sri Lanka.<sup>34</sup>

The redrawing of political boundaries to create larger or smaller units might therefore only reproduce the issue at a larger or smaller level, rather than solving it. It would be like dividing up a crystal. When a crystal is cut into smaller pieces, those small pieces reproduce the same (molecular) structure as the original; the size, not the structure, has changed.<sup>35</sup> So it will also be in dividing up nations or political units to solve the problem of inter-ethnic conflicts or tensions. The size of the domain in which conflicts take place, rather than the sources of the conflict, would have been diminished. The seemingly perfect inter-ethnic solidarity that is inscribed through a common alien oppressor is likely to be ruptured by the emergence of a new form of oppression and exclusion, at times even more intense and much deeper than the

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31 In Latvia 34% of the population is Russian. Latvians constitute only 52%. The remaining 14% is made up of ethnic minorities from the other republics of the Soviet Union. See Pollard, *supra* note 2, at 499.

32 Estonia will, for example, have to deal with 30% ethnic Russians and another 8% of ethnic minorities from the rest of the Union, largely from the Ukraine. Indeed, the problem of ethnic diversity defines almost all Soviet republics and independence of any of the remaining republics will not resolve the question of the right of ethnic minorities, nor resolve the problem of ethnic conflict and competition. *Id.*

33 There is an intense conflict between the Croats who want independence for Croatia and ethnic Serbs residing in Croatia who want to remain a part of the Yugoslav federation. An independent Croatia, if there is to be one, would have to deal with an ethnic minority within its borders.

34 The Tamil want an independent state consisting of the northern and eastern part of the island. Suppose that actually came about. The new state will still have to deal with the Moor (Muslim) community, which constitutes 30% of the population of the eastern province of Sri Lanka, and a Sinhalese community which amounts to 23% of the population. See Marasinghe, *supra* note 5, at 567 n.97. The Tamil population of the eastern province is therefore only 43%, although the northern province is nearly 95%. *Id.* at 570. The point is that political divorce of a given territorial unit is not necessarily going to bring about social and political peace, either to the new unit or the larger unit from which the new unit emerged.

35 See 1 BRAG, THE CRYSTALLINE STATE: A GENERAL SURVEY 1-4 (1955) referred to in J. M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 2 (1986).

one from which the new political unit is attempting to escape. This means that we will still have to grapple with the institutional and conceptual question of how ethnic minorities can participate fully in their polities, newly redrawn or otherwise.

Also, the day might be late for a wholesale redrawing of political maps around the world, without causing political chaos. The political map of most of the Third World would have to be redrawn. For example, in contemporary Africa, "partly as a function of the arbitrary boundaries inherited from colonial rule, partly as a function of the more recent movements of people"<sup>36</sup> across national boundaries, there are minority ethnic groups in most of the member countries.<sup>37</sup> It is not uncommon to find some ethnic units residing in two or more nation-states. Given such a political reality, the idea that we will deal effectively with the problem of ethnic minorities simply by redrawing political boundaries might be as unrealistic as it is dangerous. It is unrealistic for the reasons I have just mentioned. It is also dangerous precisely because the balkanization of nations might lead to even more chronic conflicts among and within countries, and certainly will reduce substantially these countries' capacity for sustained economic development by dividing up their material and human resources.<sup>38</sup> Under current

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36 M. G. Smith, *Pluralism, Race and Ethnicity in Selected African Countries*, in THEORIES OF RACE AND ETHNIC RELATIONS 193 (1986).

37 "[T]he Third World state is usually an historically derived heterogeneous collectivity thrown together by the processes of colonialism and welded together by the bitter struggles of nationalist anti-colonialism. . . . [As a result,] both ethnic and racial factors feature prominently in any attempts to achieve these goals." MARSHALL W. MURPHREE, *Ethnicity and Third World Development: Political and Academic Context*, in THEORIES OF RACE AND ETHNIC RELATIONS 157 (David Mason & John Rex eds., 1986). Indeed, it is not only the Third World that is multi-ethnic. There are very few countries that do not have ethnic minorities within their borders.

38 An argument could be made that the break up of current political entities will not lead to permanent balkanization and hence to chronic conflict and economic ruin. It could be argued that those entities that break apart are likely to reconstitute themselves, but through an arrangement that would be more acceptable to all parties. The argument here is based on the assumption that economic and political imperatives will invariably bring entities together, and that for the union to last, it must be based on a voluntary and just association. For this to happen, in many instances current arrangements must be allowed, or even encouraged and supported, to dissolve themselves. I agree that for a political or economic union to last it must be based on a just and voluntary association. But I am not quite sure of the validity of the assumption that political units which have been allowed to disintegrate will, because of political and economic imperatives, ultimately reconstitute themselves. That assumption neglects the fact that once an entity is established, there will be external and internal factors that are likely to put important constraints on the capacity of that entity to gravitate towards forming some sort of union with other units. Externally, there could be neighbors which might see the union of that

political conditions, the notion of ethnic rights cannot be, therefore, taken to mean simply the rights of groups to secede from the center, for in most situations that is unlikely to be philosophically defensible and institutionally sensible. And it certainly will not resolve the political and institutional problems that led to political divorce.

*B. Ethnic Rights as Rights of Movement: The Case of Group Emigration*

There might be another sense in which we use the notion of rights of ethnic minorities: the right of ethnic minorities to remove themselves from the jurisdiction of the state by emigrating from the larger political unit.<sup>39</sup> While the right to secede challenges the very jurisdiction of the state over a particular ethnic minority and the territory it occupies, the right here is one of being able to exit. This, however, seems to be a very thin right. In any case, this does not seem to be the sense in which we use the term rights of ethnic minorities at this point. Furthermore, if the goal is one of emigration, then the rhetoric of ethnic rights seems to be wholly unnecessary to achieve it. The traditional liberal argument for free movement of individuals, regardless of ethnic affiliation, seems sufficient. Indeed, that is how current international law defends the right to emigrate.<sup>40</sup> The notion of ethnic rights

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unit with another to be an economic and political threat, and will therefore work to undermine, either explicitly or implicitly, any attempt at such a union. Internally, the status quo is likely to be defended by powerful interests who see their fate to be linked significantly with its fate. And the law of inertia, as well as the nature of the distribution of power, tell us that changing the status quo is not an easy thing, even when it is clear that the status quo is not functioning well from the point of view of the general welfare of the political unit.

Lest I be misunderstood, I am not claiming that there are no circumstances at this moment in time that would justify the total separation of an ethnic unit (a secession) from a given territorial unit. Indeed, in some circumstances that might not only be justified, but it might be required for the very well-being of the ethnic unit. So, my argument here is not to foreclose the possibility of secession, but rather to suggest that more than a mere identification of an ethnic unit in a given territorial unit and a complaint by that unit must be required before secession is advocated as a solution to the problem of inter-ethnic conflict. Otherwise, we shall be locked into a never-ending claim for secession.

39 A good example is the desire of Ethiopian and Soviet Jews to go to Israel.

40 Article 13(2) of the Universal Declaration of Human Rights provides: "Every one has the right to leave any country, including his own, and to return to his country." G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948). Article 12(2) of the International Covenant on Civil and Political Rights provides for the same right, except that in the case of the Covenant, the state is given the right (under 12 (3)) to restrict the right if it is "necessary to protect national security, public order, public health or morals or the rights and freedoms of others." G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52 (1966).

in this sense, as I shall show in the next section, seems either superfluous or totally devoid of meaning.

Perhaps it is meant to refer to exactly the opposite of the above situation. Perhaps it is meant to make it impermissible for political units and regimes who see ethnic minorities as a negation of the majority, culturally or otherwise, to institutionally implement that vision. One of the responses of these political regimes to minorities has been to physically remove those minorities.<sup>41</sup> In that regard, deportation, expulsion, or forced removal from one part of the country to another are the obvious examples. If the discourse of the rights of ethnic minorities is meant to make these practices impermissible, then it is a clear and straightforward case. Indeed, one does not even need the notion of ethnic rights in order to argue against forced removals and deportations. Rather, the much more secure concept of individual rights suffices. In fact, there is a national and international consensus that the above response is morally unacceptable.<sup>42</sup>

### *C. Ethnic Rights as Individual Rights: The Case of the Dominant Paradigm*

If the rights of ethnic minorities encompasses neither secession nor emigration, then what does it encompass? It obviously concerns the rights of ethnic minorities who remain, for one reason or another, as part of a territorial (political) entity.

I take it that this is where the organizers and editors of the symposium want me to start, and, unfortunately, this is precisely where it gets muddy. It gets muddy both conceptually and in an institutional sense. Conceptually, one is not sure what the nature of the right is and who the bearers of this right are. Institutionally, it is not always clear how these rights could be given expression and what the implication of such institutionalization would be to

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41 Another response to that which is seen to be a negation of one's self, is, of course, to totally annihilate it. As I pointed out earlier, what Hitler's Germany attempted to do to the Jews is perhaps the most prominent example of this measure. But annihilation does not take only physical form. At times it assumes a psychological dimension. Slavery, for example, is psychological annihilation. It is a social death where the slave's personhood is totally negated.

42 Article 13(1) of the Universal Declaration of Human Rights declares that "every one has the right to freedom of movement and residence within the borders of each State." G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). The same right is reproduced in article 12(1) of the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976).



the general structure of the larger polity. Is the notion of ethnic rights one of individual rights of members of the ethnic group, or is it a right of the group? If it is the former, then do we need to use the phrase "rights of ethnic minorities" at all? If it is the latter, then what is the nature of that right and how does it express itself in institutional terms?

These are some of the questions we must confront, since lack of clarity in our response to these questions has had an enormously negative impact in two senses. First, the declaration of the existence of such a right has not usually been accompanied with visible institutional implementation. Part of the reason is undoubtedly the lack of clarity about the nature of the right to be conferred and protected. Second, there has been official and popular apprehension, even hostility, toward such rights. Perhaps a clarification of the nature of the right and of its institutional implication might reduce the level of anxiety both among officials and the dominant majority.

### 1. Ethnic Rights: The Individualist Challenge

The dominant perspective, "the individualist perspective" as I shall refer to it, holds that the notion of ethnic rights, if it is not meant to refer to secession, can ultimately be understood only as individual rights. The individualist seeks to persuade us of the conceptual plausibility and practical desirability of this position with two alternative arguments. The first, which for convenience sake we might refer to as "methodological individualism," contends that, since the individual is the ultimate agent of action, it is only to that agent a moral right could attach.<sup>43</sup> Groups here are seen

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43 As Daniel Bell put it: "The principle of equal opportunity derives from a fundamental tenet of classical liberalism: that the individual—and not the family, the community or the state—is the basic unit to society." Daniel Bell, *Meritocracy and Equality*, 29 PUBLIC INTEREST 40 (Fall 1972). The individualist does not deny that the law could constitute a group and confer rights on that group. Indeed, there are numerous entities which form part of the set of institutions that define what we loosely refer to as the liberal order. Entities like the corporation, even the state (or State), are legally constituted and rights are conferred on them. The individualist will have no objection to speaking about groups and group rights if the reference is to those entities. Mark Tushnet refers to these entities as "artificial groups." Mark Tushnet, *Law and Group Rights: Federalism as a Model*, in LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM? 281 (Leslie Green & Allan C. Hutchinson eds., 1989). See also MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY OF BUREAUCRATIC SOCIETY (1986); MICHAEL McDONALD, *The Personless Paradigm*, 37 U. TORONTO L. J. 212 (1987). The resistance from the individualist to group rights arises when the groups in question are what can be referred to as "natural groups," whose rights are seen to be moral rights in need

merely as collections of individual agents, aggregations of the constituent parts. To the methodological individualist, the concept of group rights is "a metaphysical absurdity." Only individuals can have rights, for only they can be treated justly or unjustly.<sup>44</sup> Methodological individualism tends, therefore, to be hostile to the notion and rhetoric of ethnic rights.<sup>45</sup>

The second, "consequential individualism" as I shall call it, might concede the possibility of the conceptual coherence of the notion of group rights, and is not necessarily hostile to the rhetoric of ethnic rights. But it sees the concept of group rights in strategic and temporary terms. This concept is to be deployed, not because groups are units of moral worth or because there is an intrinsic value in conferring rights on groups, but because that might be the only way to correct structural and institutional defects which are seen to be impediments to treating people as individuals.<sup>46</sup> Indeed, the recognition of group rights is seen in paradoxical terms. One took note of it so as ultimately to banish it.

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of legal recognition. It is the implication that there are irreducibly natural entities of moral worth, other than the individual person, that raises the concern of the individualist. So, when I talk about the hostility of the individualist towards group rights I mean to refer to the conferring of legal rights on "natural groups" whose claims are seen to be moral claims.

44 Robert Paul Wolff describes the individualist position this way: "Manifestly, all suffering is someone's suffering, all joy someone's joy and only an individual agent can have a right or a duty." Robert Paul Wolff, *The Concept of Social Justice*, in *FROM CONTRACT TO COMMUNITY: POLITICAL THEORY AT THE CROSSROADS* 68 (Fred R. Dallmayr ed. 1978).

45 Nathan Glazer, who has been one of the most prominent critics of the notion of group rights in general, and of affirmative action in particular, argues:

If we are a society in which individuals are treated as individuals by public bodies, and as far as possible in private life, without regard to race and ethnicity, then we cannot get there by allowing or prescribing public actions in the opposite direction, even on a temporary basis.

Nathan Glazer, *Why Bakke Won't End Reverse Discrimination*, in *PUBLIC POLICY: ISSUES, ANALYSIS AND IDEOLOGY* (1982). See also Justice Scalia's statement in his concurrence in *City of Richmond v. J. A. Crosson Co.*, 488 U.S. 469 (1989). "The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but it was individual men and women, 'created equal,' who were discriminated against." *Id.* at 528.

46 See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107 (1976); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32-45 (1987). Consequential individualism acknowledges the existence of social groups and the differences of perspective among them. But it attributes both of these to power and social inequalities. According to this view, the differences among groups will be transcended when the social conditions that gave rise to and perpetuate those differences are overcome. However, transcending those group differences would first require taking into account the reality of those differences.

This was the guiding principle of the United States Supreme Court in the '60s and '70s when dealing with race conscious remedies. Perhaps Justice Blackmun expressed that view most eloquently in *Bakke*<sup>47</sup> when he observed, "In order to get beyond racism, we must first take account of race. There is no other way."<sup>48</sup>

Individualism, in either of its versions, is also uneasy about the practical implication of such a right to social peace and political harmony. The argument here is that to confer rights on groups is to heighten the sense of group affiliation of members and to make politics a battle between permanently warring factions. In this battle, intolerance, prejudice, and stereotyping will govern the interaction between groups and the ultimate losers will be the very groups who are supposed to be helped with the notion of rights—minorities.<sup>49</sup> Indeed, the individualist paints an unsettling picture to attract our attention to what he sees as the dangerous consequence of recognizing group rights. He invokes the image of "apartheid."<sup>50</sup>

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47 *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

48 *Id.* at 407 (separate opinion).

49 The uneasiness about the practical implication of the notion of ethnic minorities is also felt by a section of the left which sees the emphasis on ethnic identity as a recipe for political diversion and quietism. The fear is informed by the belief that ethnic consciousness will lead to ethnic division, which will weaken the possibility of alignment among, and a common action by, the politically and economically disenfranchised. Irving Howe puts it this way: "Social militancy may not always be undermined, social solidarity may not always be threatened, by ethnic or social consciousness; but too often, in the past, they have been." Irving Howe, *The Limits of Ethnicity*, THE NEW REPUBLIC, June 25, 1917, at 19.

50 Justice Kennedy of the United States Supreme Court, for one, is convinced that this is what affirmative action, or what is left of it, in the United States is leading towards. Dissenting in *Metro Broadcasting Inc., v. Federal Communications Commission*, 110 S. Ct. 2997 (1990), he observed:

The Court is all too correct that the type of reasoning employed by the Commission and Congress [that there may be important differences between the broadcasting practices of minority owners and those of their non-minority counterparts] is not novel . . . . The following statement [the official justification for apartheid], for example, would fit well among those offered to uphold the Commission's racial preference policy: 'The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development.'

110 S. Ct. at 3046 (Kennedy, J., dissenting) (citation omitted).

The symmetry Justice Kennedy manages to see in the claims and institutional manifestations of Apartheid on the one hand, and affirmative action on the other, is a false symmetry. Apartheid is based on the belief that one group is superior to another, and the system is designed to perpetuate massive disparities among groups. The homelands policy was not informed by respect for the cultures of the various black groups in the

There are, therefore, four things that define the individualist approach.<sup>51</sup> First, the approach embraces the Enlightenment's assumption of a universal, stable, and to a large extent, pre-social, individual identity. The individual so conceived is seen to be owed certain rights in virtue of her humanity regardless of the social, political, and historical conditions within which she lives. Second, individualism assumes that the only unit of our moral concern is, or should be, the individual. As John Rawls put it, the individual is the only "self-originating source of valid claims."<sup>52</sup> Therefore, groups cannot be sources of our moral concern. Third, the approach claims that it is only through the process of treating people as individuals that we will be able to show that every individual has equal moral status,<sup>53</sup> and should be treated, to use a phrase made popular by Ronald Dworkin, with respect and equal concern.<sup>54</sup> Fourth, individualism makes an empirical claim that it is only when the individual is taken as the point of departure that social harmony and peace ultimately will be ensured.

In terms of ethnic minorities, the individualist project will translate itself in the following manner. The ultimate objective of ethnic rights is seen to be one of ensuring that members of an ethnic minority are treated without discrimination in relation to members of the majority or the dominant group. That is, members of ethnic minorities have the same sort of (formal) rights and entitlements as members of other groups. The best way to

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country. Rather, it was motivated by undisguised contempt for these groups and their cultures. To compare this to affirmative action policies, whose purpose is to bring about social equality for, and active participation by, oppressed minorities in the life of the polity, is very puzzling.

51 As is obvious from the discussion in the above pages, both methodological and consequential individualism have an ethical dimension. Both hold that social relations and institutions are to be judged by the extent to which they cultivate and promote the interest and ends of the individual. In its methodological moments, individualism denies the reality of groups, while in its consequentialist moments, it contests the desirability of the concept.

52 John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. OF PHIL. 515, 543 (1980), cited in KYMLICKA, *infra* note 65, at 140.

53 To be sure, not all individualists agree as to what would constitute equal treatment and what sort of rights should attach to the unit of our moral concern. But they all agree that the individual is the only unit of moral worth and individuals must be treated equally.

54 See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180-83, 270-74 (1978). "We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice." *Id.* at 182.

achieve this is to recognize and protect individual rights and to make the treatment of individuals the point of comparison. Assimilation is the political and legal (institutional) response consistent with the above individualist view.

Currently, assimilation is the most common response to ethnic differences. Assimilation is premised on two assumptions, one practical and the other philosophical. The practical dimension holds that nationhood and development will be possible only when there are uniform cultural outlooks and a common language. One does not have to go very far to find an example of discourse informed by this assumption. Supporters of the English-only debate in this country cite nationhood and development as possible casualties of what Dennis Baron refers to as "plurilingualism."<sup>55</sup> Philosophically, assimilation is seen to be desirable, for once the assimilation process is completed, then, so the argument goes, it will be easier to treat every one as an individual rather than as a member of a group. Insofar as individual treatment is seen to be both politically possible and philosophically defensible, then assimilation is seen to be an indispensable first step towards that goal. As such, the assimilationist sees himself to be in the tradition of classical liberalism, committed to making the individual both the point of departure and the telos, the ultimate agent of action and the ultimate beneficiary of institutional actions.

It is worth mentioning here that, as ironic and as implausible as it may sound, the individualist has an ally in the Marxist when the question is one of the rights of ethnic minorities. Just like the individualist, the Marxist is suspicious of ethnic groups, for he, like the individualist, conceives of the universal individual to be constituted by factors that go beyond the particular ethnic group to which the individual belongs.<sup>56</sup> To be sure, the two have radically different conceptions of the nature of the individual and how that

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55 DENNIS E. BARON, *THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS?* 179 (1990).

56 John Hazard, the pre-eminent student of Soviet law and Soviet society, reports that before the October Revolution, when Lenin and his comrades were organizing the Revolution, some demanded that ethnic differences be recognized and that some form of autonomy be granted to them. Lenin argued that there was no reason for such organization. "[W]hen his Jewish party comrades expressed a desire to create a separate Jewish revolutionary organization, the 'Bund,' Lenin insisted that there was no reason for an autonomous unit. All communists were expected to put aside their ethnic origin and their nationalistic sentiments when enlisting under the working class banner." John N. Hazard, *Socialism and Federation*, 82 MICH. L. REV. 1182, 1185 (1984).

individual is constituted. But both agree that the factors that define the individual are not group-specific. For the individualist, there is such a thing as a universal, transcendental nature. For the Marxist, the universalizing factor is not a transcendental human nature, but the relationship of people to the means of production—i.e., class, if one is talking about capitalist societies, and the new set of institutions which produce the new man, if one is talking about a socialist society. Indeed, the most prominent promise of Marxism is that under a socialist society group affiliation will disappear and that the measure of things will be the new socialist man.

## 2. The Individualist Perspective Legalized

It is the individualist perspective which has, by and large, informed existing national<sup>57</sup> and international documents that attempt to speak to the needs of ethnic minorities.<sup>58</sup> Once one

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<sup>57</sup> See, e.g., Section 10 of the Racial Discrimination Act 1975 (Cth) (Australia). Sub-section 10(1) reads that members of ethnic minorities are to enjoy the same right "to the same extent as persons of [the dominant group]." The Equal Protection Clause of the United States Constitution has generally been read to embody the individualist anti-discrimination (non-discrimination) principle. Indeed, Equal Protection jurisprudence in the United States has had a major influence on the nature of international documents in the area. U.S. Const. amend. XIV, § 1.

A look at the constitutions of selected countries shows the dominance of the individualistic non-discrimination principle. The Basic Law of the Federal Republic of Germany provides: "No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions." F.R.G. Basic Law Pt. I, art. 3, § 3. The Egyptian Constitution provides: "All citizens are equal before the law. They have equal public rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed." CONSTITUTION OF EGYPT, pt. 3 III, art. 40. The Malaysian Constitution provides: "Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth. . . ." CONSTITUTION OF MALAYSIA, pt. II, art. 8, § 2. The above English translations are contained in CONSTITUTIONS OF THE WORLD (Albert P. Blaustein and Gisbert H. Flanz eds., 1991).

<sup>58</sup> It must be mentioned here that the suspicion about the value of ethnic rights is not limited to those whose institutions and/or theoretical constructs are informed by the liberal assumption of the individual and social life. Indeed, some of the most illiberal polities in the developing world are as unpersuaded about the value of recognizing group rights. The African response to ethnic minorities is a good example. The emphasis in many of the African countries is on national solidarity and territorial integrity. Indeed, since the establishment of the Organization of African Unity (OAU), the primary interest of individual countries as well as regional organizations, like the OAU itself, has been to insist on and reinforce the concept of national unity. Given such preoccupation with unity, the notion of ethnic rights is looked at very suspiciously. The African Charter on Human and People's Rights, the major regional human rights document, does not offer minorities very much. Indeed, from reading the document one would think and conclude

concludes that the individual is the only unit of moral worth, and that groups have no moral existence, it then follows that constitutional and legislative efforts must not differentiate on ethnic grounds. If there is to be such differentiation, then it must conform to the requirements of consequential individualism. If there is affirmative action, for example, it must be temporary.<sup>59</sup>

Indeed, in relation to international documents, at least those of the post-World War II era,<sup>60</sup> individual human rights provided

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that the "problem" of minorities is not an African "problem." The Charter simply refers to the rights of "peoples," without defining the term "peoples," and does not use the term minorities. To be sure, the Preamble and article 2 prohibit discrimination on the basis of race, ethnic group, colour, etc. But these prohibitions do not imply the existence of minorities as groups. African Charter on Human and Peoples' Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986), reprinted 21 I.L.M. 59 [hereinafter African Charter].

59 Article 2, paragraph 2, of The International Convention on the Elimination of All Forms of Racial Discrimination, for example, states:

Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Convention on Racial Discrimination].

60 It is interesting to note that in the pre-World War II period (following the end of World War I) there was, under the aegis of the League of Nations and the Permanent Court of Justice, a system of treaties and other arrangements to protect minorities as minority groups rather than as individuals, as current human rights law tends to do. See Case Concerning Minority Schools in Albania PCIJ Ser. A/B No. 64 (1935) 18. See also FRANCESCO CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES, at 16-26, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 U.N. Sales No.E.78XIV.1 (1979); NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 10-11 (1991); Joseph B. Kelly, *National Minorities in International Law*, 3 DEN. J. INT'L L. & POLICY 253 (1973).

Under the League system, minority rights included the positive right of cultural identity. And unlike the United Nations system, which conspicuously downgraded the question of the protection of minorities by assigning the responsibility to "a relatively powerless subcommission of the Economic and Social Council, the League system provided formal guarantee of minority rights by the international community's most powerful agency—the League Council itself." ROBERT G. WIRSING, *Dimensions of Minority Protection*, in PROTECTION OF ETHNIC MINORITIES: COMPARATIVE PERSPECTIVES 10 (Robert G. Wirsing ed., 1981). One, however, ought not overplay the virtue of the League's system of protection. As Wirsing notes, it had limited territorial and substantive application, and, more importantly, it did not prevent the European "slide into renewed warfare." *Id.*

It is no accident that the individualist perspective informed the international documents drawn up in the early days of the United Nations. One can think of two major reasons for such orientation. The first, and perhaps the more important, is that this emphasis on individual rights was in many ways a response to what was perceived to be

the mode of discourse in the United Nations and other venues. The earlier, and perhaps the two most well known, documents of the international community, the Charter and the Universal Declaration of Human Rights, took the position that rights are to be conferred on individuals as individuals, rather than as members of groups. In fact, neither of the documents considers the question of minorities. The Charter, for example, provides in article 1, section 3, as part of the purposes of the United Nations, the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>61</sup> There is no mention of ethnic rights. Similarly, the Universal Declaration of Human Rights does not deal with minority rights. In language similar to that of the Charter, article 2 of the Declaration provides that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>62</sup> The Charter and the Declaration are, therefore, examples of methodological individualism given legal and textual expression.<sup>63</sup>

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one of the causes of the horrors of the war that the world had just gone through: group thinking. The attempt by the Nazis to exterminate Jews was seen to be nothing but the most perverse manifestation of thinking in terms of groups and the supposed differences among them. The remedy to the consequences of group thinking was thought to be thinking in terms of the individual and to make the individual the unit of our moral concern. Individuals, by virtue of the fact that they are individuals, are seen to have certain rights. To say that individuals have universal human rights "is not just to think of them as right holders but also to think of them as equal in a morally significant respect." DAVID LYONS, *Introduction*, in RIGHTS 12 (1979).

There was a second reason for the dominance of the individualist perspective. This has to do with the structure of international relations in the immediate era of the post-war period. After the war, the United States emerged as the most dominant power on the international scene, exercising enormous power both within and without the United Nations. The international documents in some ways reflected the conceptual scheme that informed institutions and institutional structures within the United States. The individualist orientation of the documents was therefore a barometer of the sort of political influence exercised by the United States.

61 U.N. CHARTER, art. 1, para. 3. Article 55 of the Charter provides that the United Nations is organized to promote human rights for all without distinction on the basis of race, sex, language, or religion. And under article 56, all members of the United Nations pledge to take joint and separate action in cooperation with the United Nations to achieve the goals set out in article 55.

62 G.A. Res. 217A (III), U.N. Doc. A/810, at 72 (1948).

63 Many of the regional human rights documents have similar provisions. See, e.g., article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; the Preamble and article II of The



Some of the later documents appear to take groups seriously and to conceive of them as capable of being units of our concern. Article 27 of the International Covenant on Civil and Political Rights, for example, provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>64</sup>

Nevertheless, a close reading of the article suggests that ultimately that which is protected is the right of the individual to choose with whom to associate and under what conditions, rather than the rights of the groups which are mentioned in the article. "[P]ersons belonging to" ethnic minorities, not ethnic minorities themselves, are the beneficiaries of the right set out in article 27. Ethnic minorities as a group are singled out as a point of focus merely because it is the members of such a group who are usually denied the rights granted to the members of the majority. So, the explicit concern with ethnic minorities as a group here is in fact regarded as a first step towards making group affiliation irrelevant in the treatment of individuals.

Article 27 of the Covenant, therefore, does not create, as it appears with a first reading, a space for group rights with "the moral ontology of [individualism],"<sup>65</sup> but it reaffirms an important dimension of the individualist project: the individual right to freedom of association. The teaching of article 27 is simply that individual choices must not be constrained by the state for one group of individuals more than it is for another group of individuals.<sup>66</sup>

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American Declaration of the Rights and Duties of Man, Res. XXX of the 9th International Conference of American States (1953), *reprinted in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM pt. 1, ch. 4 (T. Buergenthal and R. Norris eds., 1984); articles 1 & 24 of The American Convention on Human Rights, Nov. 22, 1969, *reprinted in* OAS, Basic Documents Pertaining to Human Rights in the Inter-American System 25, OEA/Ser. L/V/II.71, Doc. 6, rev. 1 (1988); and articles 2, 3 and 19 of The African Charter on Human and Peoples Rights, *supra* note 58.

64 G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter referred to as the "Covenant"].

65 WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 140 (1989).

66 Vernon van Dyke, a keen student of minority rights, also made the following observation: "The Covenant [ICCPR] includes an article on minorities, the statement being that 'persons belonging to . . . minorities' shall not be denied certain rights. The clear intent is to avoid giving minorities any basis for a claim of a collective right." Vernon

True, there are some international documents which seem to grant ethnic minorities more than article 27 of the Covenant does. Article 2(2) of the Convention on Racial Discrimination, for example, states that:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing the full and equal enjoyment of human rights and fundamental freedoms.<sup>67</sup>

Unlike article 27 of the Covenant, which requires the state to be neutral in relation to individual choices, here the state is allowed to intervene actively to assist minority groups. The special measures contemplated here are not conditioned on a showing of individual injustice or individual suffering. Nor are they dependent on the identification of individual responsibility. It seems to follow, then, that they are responding to group injustice, and consequently the rights are group rights.

There is, however, a limit to this apparent recognition of group rights. For instance, the special measures are to be temporary. This means that the notion of group rights is in fact being recognized in instrumental terms. Similar to what the equal protection jurisprudence in the United States does, the reality of groups is here being acknowledged so as ultimately to remove the conditions for their existence. Consequential individualism is what

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van Dyke, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, 44 J. OF POLITICS 21, 25 (1982). Cf. CAPOTORTI, *supra* note 60:

Nevertheless, there is reason to question whether the implementation of article 27 of the Covenant does not, in fact, call for active intervention by the State. At the cultural level, in particular, it is generally agreed that, because of the enormous human and financial resources which would be needed for a full cultural development, the right granted to members of minority groups to enjoy their own culture would lose much of its meaning if no assistance from the Government concerned was forthcoming. Neither the non-prohibition of the exercise of such a right by persons belonging to minority groups nor the constitutional guarantee of freedom of expression and association are sufficient for the effective implementation of the right of members of minority groups to preserve and develop their own culture.

*Id.* at 36.

<sup>67</sup> See also Convention on Racial Discrimination, *supra* note 59, at art. 1(4). Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women provides for a similar right. G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) 194, U.N. Doc. A/34/830 (1979).

the affirmative action provisions embody. Affirmative action provisions neither see groups as units of moral worth, nor do they see group membership to constitute individual identity. Rather, the objective of the temporary measures set out in the international documents is to provide the conditions that would allow members of minority groups to make choices with as much freedom as members of other groups.

Both methodological individualism and consequential individualism see the appropriate unit of action, the choosing agent, to be the unencumbered individual—the individual qua individual or the individual as a citizen. Consequential individualism denies the desirability of groups, while methodological individualism denies even their reality.

### 3. The Communitarian Challenge to the Individualist Perspective

[T]he story of my life is always embedded in the story of those communities from which I derive my identity.

——Alasdair MacIntyre<sup>68</sup>

The individualist perspective has, in recent times, come under serious challenge in relation to its descriptive capacity, the desirability of its normative position, and the enormously negative consequences of its position for minorities.

In terms of its descriptive capacity, the complaint is a general one. The argument is that the concept of the self (which is to be the bearer of rights), the individualist assumes, is at variance with what social life teaches us. The narrative of the presocial and autonomous self, the heroic individual, who stands against the threat of society, and whose confrontation with society is to be assisted with the notion of rights is a misleading one, says the critique. That position empties the self of the traditions and attachments which are the very stuff that constitute it.<sup>69</sup> The autonomously

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68 ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 221 (1981).

69 This is generally referred to as the communitarian critique of liberalism ("individualism" as I have chosen to refer to it). At times, the communitarian critique of liberalism seems to go in two seemingly contradictory directions. As Michael Walzer has pointed out, there are times when the critique appears to be directed at liberal social practice. But there are other times where the complaint seems to be about liberal theory, not liberal practice. In its first dimension, the communitarian critique assumes that liberal theory accurately reflects a defective liberal social practice, and that the critique is, therefore, about the defective social existence that is accurately represented, and celebrated, by liberal theory. The second aspect of the critique quarrels with the way liberal theory has characterized social life. The argument here is that liberal theory "radically misrepresents

choosing individual whose sense of self is not implicated by the choices he makes, and the traditions within which he makes them, is one who exists only in the imagination of the individualist. For Charles Taylor, for example, to think of the individual in the way in which the individualist thinks of him, is to think of "a void in which nothing would be worth doing, nothing would deserve to count for anything, [for] [t]he self which has arrived at freedom by setting aside all external obstacles and impingements is characterless, and hence without defined purpose, however much this is hidden by such seemingly positive terms as 'rationality' or 'creativity.'"<sup>70</sup>

The argument, therefore, is that the individual is always situated in a particular tradition, plays certain roles, and has commitments and relationships. Those conditions give meaning to the notion of individual choice, for they specify the content of, and provide the inspiration for, the individual's action. The notion of a freely determining individual who can suspend herself on a web of transcendental thread is nothing more than an abstraction.<sup>71</sup>

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real life." The radically situated and autonomous individual that the liberal theorist constructs does not exist in real life. See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 7 (1990).

In this Article, when I talk about the communitarian critique of individualism, I refer to the second variety. I take that to be the major critique. But I must also say that, even though the two critiques appear to be contradictory and that Professor Walzer is right in seeing the tension between the two positions, it might not be right, contrary to Professor Walzer's insistence, that the two are inherently contradictory and that "each of the arguments is right in a way that undercuts the value of the other." Walzer's argument is that you cannot simultaneously maintain that liberal societies are devoid of communitarian possibilities, as the first critique would have it, and that the "deep structures even of liberal societies is in fact communitarian." *Id.* at 10. In my view, the two critiques can be seen to be complementary rather than contradictory. It could be that liberal theory does in fact misrepresent social life in that it emphasizes some aspects of social life at the expense of others, but that misrepresentation will also have an important impact upon how consequent social practice takes form. In so far as theory can be seen to be constitutive of practice, defective description does not remain in the realm of theory. Over time it has a significant impact on what form social practice takes.

70 CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 157 (1979). See also MACINTYRE *supra* note 68, at 204-06 (1981); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179 (1982) ("To imagine a person incapable of constitutive attachments . . . is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth.").

71 "[F]reedom . . . to be pursued *for its own sake* [is] empty. [T]here has to be some project that is worth pursuing, some task that is worth fulfilling . . . . [A] valuable life, for most of us, will be a life filled with commitments and relationships." WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 48-49 (1989).

The culture and tradition that surround the individual are ones that enable her to continue to tell stories about herself, and make it possible for her to continue to make choices and define her life. Once the individual is seen to be at least partially constituted by the tradition to which she belongs, those narratives the group tells about itself, both to itself and others, then the fate of the individual is tied to the fate of the group and tradition. One cannot have a right as an abstract individual. Rather, one has a right as a member of a particular group and tradition, and within a given context.

The first challenge to the individualist is therefore a challenge to its universalist, abstract, conception of the self. The complaint is that it is a defective description of social life, a radical misrepresentation of real life.<sup>72</sup>

This concept of the self is also normatively undesirable, according to critics, because, as Michael Walzer put it, "[i]t generates a radical individualism and then a radical competition among self-seeking individuals."<sup>73</sup> It follows that a political culture committed to such an individualist conception of the self will find it difficult to move in the direction of effective egalitarian and socially just society.<sup>74</sup>

I am someone's son or daughter, someone else's cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has to be the good for one who inhabits these roles.

MACINTYRE, *supra* note 68, at 220.

<sup>72</sup> See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 7-9 (1990).

<sup>73</sup> MICHAEL WALZER, RADICAL PRINCIPLES: REFLECTIONS OF AN UNRECONSTRUCTED DEMOCRAT 92, 98 (1980).

<sup>74</sup> Mark Tushnet makes this point in relation to the concept of rights. Tushnet first observes that the concept of rights has an individualistic bias. He then goes on to observe that the argument has been made that this bias makes it more difficult to make "movements in the direction of general social justice and greater material equality more difficult in societies committed to the idea of individual rights." Mark Tushnet, *Law and Group Rights: Federalism as a Model*, in LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM? 277, 279 (1989).

As will be apparent in this Article, I am not convinced by the argument that the concept of rights is inherently individualistic. For my present purpose, however, I do not have to accept that part of Tushnet's observation. What I do agree with is his observation that, in a political culture committed to an individualistic conception of the self, it will be more difficult to move in the direction of a more effectively egalitarian and socially just society.

For a view contrary to Tushnet's, regarding the strategic relevance of the concept of rights for progressive social change, see Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J. L. Soc'y. 309, 310 (1990). ("I will advance and defend

In terms of the practical consequences of the above conception of the self to members of ethnic minorities, the implication seems to be obvious. The individualist claims that her objective is to treat individuals equally, and that she does so by treating them as abstract individuals rather than as members of a group. In reality, for members of minority ethnic groups, having equal treatment turns out to be merely the right to be turned into some version of the members of the dominant culture. One can treat individuals equally only if one is comparing them from a given point of view. That point of view is not the abstract individual, for there is not such a creature, but rather the individual who is located in and defined by the dominant culture and tradition.

In addition, the individualist argument that to treat individuals equally is to simply allow them to associate with whomever they want has, although seemingly neutral in relation to each individual and each cultural group, a greatly disproportionate negative impact on ethnic minorities. As Will Kymlicka has argued, what this apparent neutrality masks is the fact that minority cultures, unlike the dominant culture, are vulnerable to the decisions of non-minority groups. Dominant majority groups are able to out-vote and outbid the minority groups regarding the resources crucial to the survival of the latter's cultures. This is a threat that the dominant group does not face.<sup>75</sup>

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the thesis that to achieve the project of counter-hegemonic political strategy requires the transition from the 'discourse of interests' to the 'discourse of rights.'"). See also Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 701 ("In the context of the contemporary indigenous struggle for survival and international legal protection, rights discourse has functioned effectively in generating a shared, empowering vocabulary and syntax for indigenous peoples. The discourse of international human rights has enabled indigenous peoples to understand and express their oppression in terms that are meaningful to them and their oppressors. Thinking in terms of rights has organized indigenous peoples on a global scale to combat their shared experiences of being excluded and oppressed by the dominant world order.").

<sup>75</sup> Will Kymlicka, *Liberalism, Individualism, and Minority Rights*, in LAW AND THE COMMUNITY 181, 196 (1989). Kymlicka, arguing for an affirmative governmental protection of Aboriginal cultural membership in Canada, expresses the reason for such protection as follows:

The point isn't that aboriginal people care more about cultural community than others. We all care about the fate of our cultural community . . . . Aboriginal fears about the fate of their cultural structure, however, are not paranoia—there are real threats. The English and French in Canada rarely have to worry about the fate of their cultural structure. They get for free what aboriginal peoples have to pay for; security of their cultural structure. That is an important inequality, and if it is ignored, it becomes an important injustice. Special political

Take, for example, the Aboriginal people of Australia, a people which was, and has been, subjected to one of the most brutal treatments of an indigenous people by a colonizing power. What does it mean to say that Aboriginal people enjoy the same right as European Australians for their culture to compete in the marketplace of cultural values? It is a hollow right. Aboriginal people are only slightly more than one percent of the entire population.<sup>76</sup> In the past, their culture was systematically undermined by the government. Under such circumstances, to claim that the Aboriginal people can place their cultural practices in the marketplace of cultures is to be oblivious to two crucial facts. First, the government has had an important role in undermining the competitive capacity of the Aboriginal culture.<sup>77</sup> Secondly, the Aboriginal people will be outvoted and outbid by European Australians in relation to the resources needed for the survival and the flourishing of their culture. The majority will determine the fate of the culture that it has always seen as the Other.

What a seemingly neutral state purports not to affirm, is affirmed for it by a market which acts as its surrogate. In matters of

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rights, however, serve to correct this inequality by ensuring that the aboriginal communities are as secure as non-aboriginal ones. People should have to pay for the costs of their choices, but special political rights are necessary to remove inequalities in the *context of choice* which arise before people even make their choices . . . .

If [the goal is] that no one is penalized or disadvantaged by their natural or social endowment, but allow people's fate to vary with their choices about how to lead their lives . . . then it must be recognized that the members of a minority culture can face inequalities that are the product of their circumstances or endowment, not their choices or ambitions. And since this inequality would remain even if individual members of aboriginal communities no longer suffered from any deprivation of material resources, temporary affirmative action programs are not enough to ensure genuine equality. Collective rights may be needed.

*Id.* at 198.

<sup>76</sup> Garth Nettheim, *Indigenous Rights, Human Rights and Australia*, 61 AUSTL. L.J., 291, 293 (1987).

<sup>77</sup> Australian courts have, for example, refused to recognize Aboriginal law, even though the Australian Law Reform Commission recommended such a recognition. See Nettheim, *supra* note 76, at 293, citing *The Recognition of Aboriginal Customary Law* A.L.R.C. 31 (AGPS, Canberra, 1986). See also Australian Law Reform Commission, Reform, Jan. 1989, No. 53 at 32 ("With very limited exceptions Aboriginal customary laws have not been recognized."), Australian Law Reform Commission 31, for example, recommended the recognition of, among other things, traditional Aboriginal marriages, the Aboriginal child placement principle, which emphasizes the placement of Aboriginal children in need of care with the Aboriginal community, and Aboriginal customary law in relation to hunting, fishing, and gathering rights.

group affiliation, state neutrality, in the face of unequal circumstances between minorities and majorities, is nothing less than an affirmation of one particular way of life and a deconstitution of another.

There is another undesirable practical implication of the individualist project. By de-emphasizing the constitutive dimension of culture and tradition, and by undermining the culture and tradition of minority groups, it breeds social dislocation and social pathology among members of those groups.<sup>78</sup> For to destroy the cultural framework is to destroy the framework within which choices can be made.

It also cures the society of the possibility of counter-narratives, narratives that might continually disturb the totalizing tendencies of the dominant narrative, "the ideological maneuvers through which 'imagined communities' are given essentialist identities."<sup>79</sup> The argument here is that the individualist, while professing to be a friend of the individual and skeptical of, even hostile to, the notion of groups, is in fact totalizing. Assimilation is nothing but one form of totalizing, in that it is out to destroy the possibility of counter-narratives and, hence, the possibility of challenge and change.

#### 4. Communitarians And Ethnic Rights: The Totalizing Tendency

The communitarian critique, while persuasive about the defective conception of the individualist self both normatively and descriptively, is itself not immune from a serious challenge. Indeed,

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<sup>78</sup> The condition of Australian Aboriginals clearly illustrates this implication. According to a recent report, the life expectancy of an Aboriginal is twenty years less than that of a white Australian. Alcoholism, which is widespread among the Aboriginals, contributes to this decreased life expectancy. Perry, *Australian Aboriginal Life—Disease, Despair, Death*, The Reuters Library Report, June 14, 1991. See also Seltzer, *Acculturation and Mental Disorder in the Inuit*, 25 CANADIAN J. OF PSYCHOLOGY 17 (1980), cited in Kymlicka, *supra* note 75, at 191.

<sup>79</sup> HOMI K. BHABHA, *DissemiNation: Time, Narrative, and, the Margins of the Modern Nation*, in NATION AND NARRATION 300 (1990). Recently, a group of minority legal scholars in this country has forcefully argued that storytelling (narrative) by minorities serves a strategic function as an oppositional counter-hegemonic activity. See DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); and see generally Symposium: *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). See also Hunt, *supra* note 74, at 310.



the most effective challenge is a counter attack from the individualist. The claim is that the communitarian self is so thickly-constituted that the notion of an individual as an agent loses all meaning. This will be the condition for authoritarian social arrangements.

The authoritarian charge against communitarians is directed on two levels, aimed at the two versions of communitarianism. On one level, the complaint is against what can be referred to as the localist communitarian, one who takes local communities, rather than political communities, as sources of culture and the stuff that constitutes the individual. Here, the complaint is that, in so far as the communitarian emphasizes the constitutive nature of these local communities and glorifies and protects them, he is prescribing the condition for closed, local communities. Such communities are likely to stifle the full development of their members by putting formal and informal restrictions upon the members, both in terms of exit and reentry. In addition, the institutional implication of the localist conception of community is the emergence and proliferation of insulated and exclusionary communities.

The charge of authoritarianism against the nationalist version of communitarianism is directed at what is seen to be the totalizing tendency of the traditions and cultures that are invoked. This concern is a legitimate one, for when the leading communitarians complain about the loss of meaning and solidarity in modern life, they have "grand" traditions in mind. It is an attempt to recapture a "lost grand" tradition that motivates their search. For Alasdair MacIntyre and Charles Taylor, for example, it is the Catholic tradition.<sup>80</sup> For Robert Bellah and his colleagues,<sup>81</sup> it is the liberal Protestantism of an earlier America.

The insularity and parochialism implied by local communitarianism, and the totalizing tendency of national communitarianism, are of serious concern to those who have lived on the margin of political and social life. For them, the prevalence of terms like "solidarity," "communion," "tradition," and the like, might not be a source of reassurance, but rather, cause for apprehension.<sup>82</sup> Those on the margin, such as ethnic minorities,

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80 To be precise, the figure that looms large in the works of these two authors are St. Thomas Aquinas in MacIntyre's work and St. Augustine in the work of Taylor. See MACINTYRE, *supra* note 68; CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

81 ROBERT NOELLY BELLAH, ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND THE COMMITMENT IN AMERICAN LIFE* (1985).

82 In the legal domain, leading theorists are turning to the concept of community

do not clearly see themselves as part of the "we" the national communitarians embrace.<sup>83</sup> Nor are they any more secure with the possibility of numerous insular and exclusionary communities proliferating at the local level.

In sum, communitarianism does not offer very much hope for minorities. It is assimilationist in its nationalist dimension, and exclusionist in its localist version. For minorities, these are not attractive alternatives. Indeed, the historical sentiments and the renewed interest in traditions that seem to define current communitarianism are precisely the sort of conditions that have historically led to the devaluation of the lives of minorities. By devaluation, I mean that minorities are either excluded as being different (i.e. unequal), or they are admitted to play roles (and to accept identities) that they did not endorse or shape.<sup>84</sup> Retrieving

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in the belief that political and legal legitimacy are to be found in the concept of community and its attendant obligations. Ronald Dworkin, in his recent book, *LAW'S EMPIRE*, declared:

[T]he best defense of political legitimacy . . . is to be found not in the hard terrain of contracts or duties of justice or obligations of fair policy that might hold among strangers, where philosophers have hoped to find it, but in the more fertile ground of fraternity, community, and their attendant obligations.

RONALD DWORKIN, *LAW'S EMPIRE* 206 (1986). It is not only leading liberal legal theorists, but their radical critics as well who have embraced the notion of community as being a more secure foundation for the law and social arrangements in general. Some members of the Critical Legal Studies Movement have argued for some form of decentralized social arrangements in the belief that such arrangements are likely to cultivate and nurture solidarity and community. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

This recent emphasis on community has been greeted with uneasiness among minority scholars. The concern is not because these scholars are less committed to the ideal of community than their counterparts. On the contrary, many of these people would undoubtedly consider themselves as being very much linked to, and even strongly defined by, the various communities to which they belong. The concern is informed by the history of this and other countries where in the name of community and solidarity certain people were (and still are) marginalized and excluded from participation in the political and social life of the polity. That exclusion and marginalization, in turn, justified the challenge to their very humanity. See Delgado, *supra* note 79; Williams, *supra* note 79.

83 The communitarians simply assume that there is a "we" and do not inquire into the nature of this "we." See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710-11 (1990). The communitarians attempt to "cure" the society of multiple (and at times contradictory) traditions by assuming a coherent tradition.

84 To be a human agent partly requires that the agent endorses the components of its life as being the ones that constitute the good life. And that endorsement would be genuine only if the condition exists for the agent "to consider the critical merits [of the components] in a reflective way." Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV.

and strengthening such traditions and sentiments will not empower minorities. It will continue to do exactly the opposite—marginalize them.

Also unattractive about the communitarian conception of groups (communities) is that it conceives of groups in essentialist ways. Consequently, it sees differences among groups as given, rather than seeing them for what they are: relational constructions. As I will argue in the next section, the best way to think of groups is, unlike the individualist, to acknowledge their important and pervasive role in our lives, and, unlike the communitarian (and with the postmodernist), to acknowledge their instability and transformability.<sup>85</sup>

#### IV. CRITICAL PLURALISM AND ETHNIC RIGHTS: GROUPS AND THE POLITICS OF DIFFERENCE<sup>86</sup>

##### A. *Introduction: What is Critical Pluralism?*

We want equality without its compelling to accept identity, but also difference without its degenerating into superiority/inferiority.

—Tzvetan Todorov<sup>87</sup>

If one rejects the individualist model and its institutional manifestation, assimilation, and if one is not comfortable with the communitarian argument both in terms of its unitary tradition (and its institutional implication, which is assimilation by other means) or parochial multiplicity, what alternative forms of argument exist for establishing and defending the cultural rights of ethnic minorities?

I shall argue that the perspective I have chosen to refer to as "critical pluralism" might provide us a better way of talking about

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479, 486 (1989).

85 "We need to conceptualize groups in a 'post-modern' way, recognizing their reality in our lives without losing sight of the partial, unstable, contradictory character of group existence." Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

86 "We have paid a high enough price for the nostalgia of the whole and the one, for the reconciliation of the concept and the sensible, of the transparent and the communicable experience . . . . Let us wage war on totality; let us be witnesses to the unrepresentable; let us activate the differences and save the honor of the name." LYOTARD, *supra* note 9, at 81-82.

87 TZVETAN TODOROV, *THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER* 249 (Richard Howard trans. 1985).

the rights of ethnic minorities. Against individualism, critical pluralism would argue that groups can be units of our moral concern and that the provision of individual rights in the form of human rights is an insufficient way of insuring full participation of ethnic minorities in the life of the polity.

Contrary to the dominant trend of communitarianism, critical pluralism argues against what Jean-Francois Lyotard calls the "great story,"<sup>88</sup> the grand narratives within which all of us are supposed to find ourselves and through which each one of us is to be inscribed. It argues that both descriptively and normatively it is better to think of societies as contests of narratives, "struggle[s] for the privilege of recounting the past."<sup>89</sup> Unlike paternalistic pluralism, which defines ethnic minorities as the "Other," critical pluralism starts with the proposition that the right of ethnic minorities is not merely one to be preserved from the cultural threat of the majority, but also to have the institutional capacity to interrogate the majority. Let me make my point clear. I am not arguing that whatever control groups like Native Americans have achieved in terms of running their affairs amounts to nothing. On the contrary, Native Americans and other indigenous groups have fought long and hard even to get cultural breathing space, and such control would be essential for the group's capacity to narrate its story. My point simply is this: in so far as the local narratives of indigenous peoples are surrounded by the narrative of the dominant tradition, explicitly or implicitly validating those local narratives without itself being a point of reflection, then the right of the group will have been a very limited one.

Critical pluralism is pluralist in the sense that its objective is to provide the necessary resources and institutional structures for the cultures of the minorities to flourish. It believes in multiplicity. In its vision, the good society does not eliminate (or transcend) group differences. On the other hand, unlike paternalistic pluralism, where multiplicity is accompanied by the attitude of the Other, critical pluralism sees society as a constant and desirable mutual interrogation of various narratives. As such, critical pluralism is concerned not only with providing resources for minorities so as to enable them to maintain and develop their culture, to produce and tell their stories, but it seeks also to develop institutional

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88 *Supra* note 9.

89 David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989).

structures that will enable the minority cultures to engage the dominant culture in a dialogue. Some might refer to critical pluralism as dialogic pluralism.

Why is institutional dialogue an important aspect of critical pluralism? First, if it is true, as I have argued it is, that groups are contingent rather than essential, and that their very meaning can be rearranged and recast, then dialogic engagement becomes the means by which this recasting takes place. Second, it is through the process of dialogue, where different cultural groups are recognized as dialogue partners rather than as either negations or imitations of the dominant groups, that dominant groups might cease to see their norms as neutral and universal. When the traditions of ethnic groups are positively affirmed, the dominant group will slowly discover its own specificity. This feeling of specificity is the most important condition for the respect and celebration of difference. When, for example, African Americans' culture is positively affirmed, European Americans will realize that their cultures and attributes are not neutrally American and universal, but specific, that is, European.

Third, institutional dialogue among cultural groups will serve the same function Roberto Unger saw being served when theoretical insights are considered along with their institutional realizations: there will be necessary mutual correction.<sup>90</sup> Dialogue among cultural groups is likely to lead to mutually corrective engagement.<sup>91</sup> In some sense, the point I am making here is very similar to the contingency argument I made earlier. The process of mutual correction might be understood to be the recasting and reconceptualizing of groups, a process that is the result of the contingency of groups.

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90 For Unger's view of the value of a discourse which allows the institutions and ideals of a society to interrogate and mutually correct each other, see ROBERTO UNGER, *FALSE NECESSITIES: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY, POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* 355-395 (1987). The value of such a project is that the institutions of a society are examined in the light of the ideals of the society, while the ideals themselves get revised as a result of the institutional experience of their (attempted) realizations.

91 Some might refer to this as the "mirror theory." The mirror theory says that one cannot fully understand oneself unless one sees oneself through others. Antonio Faundez puts it this way: "[I]n order to discover ourselves, we need to see ourselves in the other, to understand the other in order to understand ourselves, to enter into the other." PAULO FREIRE & ANTONIO FAUNDEZ, *LEARNING TO QUESTION: A PEDAGOGY OF LIBERATION* 14 (1989). See also MARGARET MEAD & RHODA METRAUX, *THE STUDY OF CULTURE AT A DISTANCE* 18-22 (1953).

Fourth, it is in the process of dialogue, where social groups attempt to accommodate in their "own normative world the objective reality of the other,"<sup>92</sup> that the dominant group will come to understand how it feels to be oppressed and excluded.

To summarize, critical pluralism is pluralist in the sense that it acknowledges and celebrates the role of social groups in our lives. It does not see the good society to be one where group differences are transcended. It is critical (as opposed to complacent) because it seeks to provide institutional structures that will force the dominant group to open itself up for interrogation by those that are regarded as the Other. Critical pluralism is a pluralism of groups which argues that it is through the process of positively reinforcing marginalized groups that we establish the condition necessary for dialogue: the dominant group seeing its own specificity.

### B. *Critical Pluralism and the Concept of Group*

To argue that critical pluralism takes the plurality of groups seriously and does not view the good society to be the elimination (or transcendence) of groups still does not answer the individualist's claim that the notion of group is a "metaphysical nonsense."

The individualist's claim that ethnic rights are to be understood as a short hand for individual rights is, as I have noted earlier, a result of the suspicion on the side of the individualist that it is conceptually possible to think of groups as being capable of having an existence other than as a framework within which individuals are aggregated. If one cannot conceive of a group other than in terms of its various constituent parts, then of course one

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92 Robert M. Cover, *The Supreme Court Term, 1982-Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 28-29 (1983) cited in Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1837 (1990). Professor Singer cites a story from Tony Hillerman's novel, *TALKING GOD*, which makes the point well. In the novel, some American Indians, upset by the display of the skeleton of their ancestors in museums, demanded that those museums stop displaying the skeletons and that they should return them for burial. The museums refused to comply with the demand of the Indians. After the refusal, "the public relations director of the Smithsonian finds a parcel on her desk. She opens it up and finds two human skeletons inside." The letter accompanying them reads: "You won't bury the bones of our ancestors because you say the public has the right to expect authenticity in the museum when it comes to look at skeletons." When the director looks at the names of the persons to whom the skeletons belonged she finds that they were her grandparents. *Id.* at 1837.

cannot even begin to think and talk about the notion of group rights. If the rights of groups are translatable into the rights of the constituent parts of the group, then the individualist is right that the notion of group rights is both conceptually incoherent and unnecessary. But is the individualist correct? I shall argue in this section that the individualist is wrong and that there are some rights which can only be understood as group rights and are not translatable into individual rights. I shall also suggest that the notion of ethnic rights makes sense only if it is understood as a moral right attached to a group.

Let me first make the point that the individualist might, in fact, recognize group rights more than he thinks he does. Take, for example, secession, an issue I dealt with earlier. If the individualist supports secession as one institutional manifestation of ethnic rights, as many committed individualists do, then his support is informed not by the rights of individuals, but by the right of the group. Presumably, even if there are some individuals who do not support the idea of seceding from the larger political unit, the individualist will feel justified in supporting the wish of the majority to establish itself as a new political unit.

Of course, a utilitarian argument can be made that even in relation to secession, what is being considered is individual interests and rights, and that when one supports secession one is merely responding to the greater number of individual interests and choices. This utilitarian argument is unavailable to the individualist, for utilitarian calculus that sacrifices the interests of certain individuals is the very thing against which the individualist traditionally defined his position. As Ronald Dworkin has argued, individual rights are "trump cards" against the pursuit of a collective, utilitarian goal.<sup>93</sup>

In any case, on the conceptual level, the individualist's claim that there can never be circumstances in which the appropriate unit of agency is the community (or the group) to which the individual belongs seems to be incorrect. There are circumstances in which simple aggregation of the activities and functions of individual members will not tell us the whole story about the community or the group to which the individuals belong.

If the individualist is right, the concept of social injustice, for example, could easily be understood in terms of individual injus-

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93 RONALD DWORIN, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 136 (Stuart Hampshire ed. 1978).

tice. That does not seem right. Take, for example, a situation Robert Paul Wolff considers in his discussion of social injustice. Suppose a black man who has all the necessary qualifications for a particular job is denied that job simply because he is black. Further, assume that a white man, who was interviewed immediately after the black man, and who is less qualified, is hired for the job. We may rightly say that an injustice has been done to this particular black individual, for we might conclude that the color of one's skin is not relevant to how one performs the task required by this particular job. Suppose there was another open position in the same company. Suppose also that a qualified white candidate was turned down for the position simply because the interviewer did not like the interviewee's father, who happens to be a member of the same social club of which the interviewer is also a member. In this circumstance, we might also say that an injustice has been inflicted on the rejected white candidate.

But are the two situations really the same? Are they both about individual injustice? I think Wolff's right in making the observation that to treat both instances as cases of individual injustice is to misunderstand the nature of the rejection of the black candidate.

The black man . . . is denied [the job] solely because he possesses a certain characteristic which [the interviewer] *thinks of as defining a social group*. In that sense, the motive for the unjust act is general rather than particular, and the injustice is visited on the victim *qua instance of a type rather than qua individual*. [The interviewer] is not rejecting *this* black man; he is rejecting *a* black man.<sup>94</sup>

The interviewer makes no distinction between one black man and another black man; his rejection of the particular black man is a rejection of all black men (and perhaps all black people). The injustice that he has inflicted is "on blacks as a group, rather than merely on a group of blacks."<sup>95</sup> The injustice and hurt inflicted is indivisibly on blacks as a people. In such circumstances, one could logically talk about group rights, for the existence of group injustice must imply the possibility of collective rights and group duties.

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94 ROBERT PAUL WOLFF, *The Concept of Social Injustice*, in *FROM CONTRACT TO COMMUNITY: POLITICAL THEORY AT THE CROSSROADS* 65, 74 (Fred R. Dallmayer ed. 1978).

95 *Id.*



Now, the individualist might accept the concept of social injustice, but might argue, in her consequentialist moments, that although social injustice cannot be understood as a collection of many individual injustices, and although one might have to think in terms of groups and the injustice to a group, this characterization applies only for strategic and temporary reasons. That is, the individualist might concede the conceptual coherence of the notion of groups and even its utility, but only because of the strategic relevance of thinking that way, rather than the intrinsic value of thinking in terms of groups.

I think the individualist project, even in this revised form, is unsatisfactory if it is meant to be a global claim. There are other circumstances one can cite to show that giving an account of individual activities and interests does not fully capture the activity and interests of the collective.

Consider, for instance, the example Ronald Dworkin gives to highlight the importance of community as a point of departure, the orchestra. Individual members of an orchestra are

exhilarated, in the way personal triumph exhilarates, not by the quality or brilliance of their individual contributions, but by the performance of the orchestra as a whole. It is the orchestra that succeeds or fails, and the success or failure of that community is the success or failure of each of its members.<sup>96</sup>

In Dworkin's example, one could legitimately talk about the group, the orchestra, being a unit of agency. To say that the community or the group is the unit of agency is to make the claim that the lives of the members of the group or of the community "are bound up in their communal life, and that there can be no private accounting of the critical success or failure of their individual lives one by one."<sup>97</sup> Accordingly, one cannot understand the success of the enterprise in terms of the statistical summary of the success or failure of individual members.

If groups can be units of agency, then they can be units of our moral concern in the same way individuals are or can be. Groups as units of agency can be treated justly or unjustly; conversely, they can treat others justly or unjustly. Since rights are conferred, and duties imposed, on individuals precisely for those reasons, as the individualist is quick to remind us, it seems logical

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96 Ronald Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479, 493 (1989).

97 *Id.* at 494.

to insist that once the capacity of groups to be units of agency is admitted, then it must be accepted that it is not metaphysical nonsense to talk about the rights of groups. Nevertheless, because I have argued that groups have rights, I must not be understood to assume that groups have unalterable identities to which a right is attached. This position is at odds with the argument I have presented thus far: group identities are constructed relationally and, as a result, they are contingent and unstable. I neither assume nor make such a claim. Arguing that it is logical to conceptualize moral rights to groups in the same way we conceptualize moral rights to individuals, because in each case, what is decisively relevant is the notion of agency, does not purport to make any claim about the stability of the agent in either circumstance. Indeed, those that want to read such a claim into my argument do so because of their own faulty assumptions. Because they assume that individual identity is stable, any analogy between groups and individuals must therefore assume a corresponding stability as to group identity. But individual identities are not stable, nor are they any less the result of relational or negotiated constructions than are group identities.<sup>98</sup> Individual identities are formed in the process of interacting with other individuals as group identities are formed in the process of interacting with other groups. An identity so formed can never be stable.

Even if one is persuaded that groups have an existence apart from the existence and life of their components, and even if one is convinced that those groups could be said to have rights that might not be easily translated into the rights of the constituent parts, one will still have to argue persuasively as to why it might be said that a particular group exists and that it should be treated as a group, rather than as a sum of its various parts. In other words, what constitutes an ethnic group?<sup>99</sup>

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98 "[W]e are not born with a 'self,' but rather are composed of a welter of partial, sometimes contradictory, or even antithetical 'selves.' A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990).

99 One might want to address the slippery-slope argument here. The argument is that to recognize one group is to open the society up for the claim of other groups for such recognition. There is no principled way to distinguish between an ethnic group and an association, such as the National Rifle Association (NRA). There are many responses to the above claim. First, it seems intuitively correct to say that there is a significant moral and political difference between the NRA on one hand, and Blacks and Native Americans on the other. Second, ethnic groups are multi-dimensional in that they affect and constitute various dimensions of the life of the individual, while groups like the NRA

In my introductory remarks I gave some examples of ethnic groups. Those examples suggest a definition of "ethnic group." Examples, however, are vulnerable to counter examples. Without a rough agreement on a set of general criteria defining what constitutes an ethnic group, the dialogue about ethnic rights might in fact be unhelpful cross-talking.

An ethnic group might be defined as a unit whose members believe themselves to be bound by a common history and culture. The cultural heritage might take various forms, from a common language to a common religion or other rituals and social practices. Another defining feature of an ethnic group is that the self perception of its members concerning the identity of the group is shared by outsiders. That is, members of the group, as well as outsiders, believe that a distinctively shared history, culture, and tradition define the group in question.<sup>100</sup>

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are "uni-dimensional," that is, they are organized on the basis of a single purpose. See Frances Svensson, *Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes*, 27 POL. STUD. 421, 434-35 (1979). Third, ethnic groups are partly defined by history, rather than simple choice of individuals (as is the case with the NRA). Fourth, ethnic groups, unlike associations such as the NRA, are partly constituted and sustained as a result of outsiders' perception of the existence of the group. It is not only their narrative, but also the narrative of others, that constitute and sustain groups like ethnic minorities.

100 "For the identification of ethnic groups, what matters is the belief, held by their members and by others, in a shared distinctive culture or tradition and community of descent." M. G. Smith, *Pluralism, Race and Ethnicity in Selected African Countries*, in THEORIES OF RACE AND ETHNIC RELATIONS 193 (1986). See also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 148 (1976) ("Blacks [in the United States] are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives.") Fiss goes on to fully define "group" in the following way:

[A] social group is more than a collection of individuals, all of whom, to use a polar example, happen to arrive at the same street corner at the same moment . . . . [It] has two other characteristics. (1) It is an *entity* . . . [having] a distinct existence apart from its members, and . . . an identity. You can talk about the group without reference to the particular individuals who happen to be its members at any moment. (2) There is also a condition of *interdependence*. The identity and well-being of the members of the group and the identity—well-being of the group are—linked. Members of the group identify themselves—explain who they are—by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group.

*Id.*

There is also a useful discussion of the concept of social groups in YOUNG note 1, at 42-48.

Now, to define ethnic groups this way is to acknowledge simultaneously the reality of social groups, their importance in our lives, as well as the fact that they are products of social relations. Social groups constitute themselves (or are constituted by others) in relation to other groups. Group identities are constructed by interaction among groups.

Of course, not all ethnic minorities need our attention, nor do they require special institutional "protection". Ethnic groups that are numerically in the majority in a given polity, and that have control of or have access to power will protect themselves by virtue of the fact that they exercise power. So, our concern must focus on the ethnic groups that can be considered minorities. I will take the term "minority" to refer to a group "which is numerically inferior to the rest of the population of a [s]tate"<sup>101</sup> and is in a subordinated position in the polity.<sup>102</sup> "Ethnic minority" will, therefore, refer to a group that is numerically smaller than other groups, especially the dominant group, such that it cannot have access to effective power through the procedural means of statistical democracy or the market, and whose members perceive them-

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101 Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, defined a minority group in a 1977 study as follows:

[A minority] is a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

CAPOTORTI, *supra* note 60, at 1.

It is often the case that some groups do not see themselves as a group prior to their encounter with the dominant and dominating group. For example, American Indians probably never saw themselves as such until their encounter with colonizing Europeans. But that does not in any way reduce the significance of their group status now. Part of what constitutes a group is a shared memory of common suffering.

102 By introducing the notion of subordination I mean to make it impermissible to apply the notion of ethnic rights to a numerically inferior group which is or has been in a dominating position in a given polity. I mean to deny a small but powerful group to continue to entrench itself in power by invoking the notion of group rights. Specifically, I have South African whites in mind. One of the ironies of recent times is that in South Africa it is de Klerk and the whites who have embraced the notion of group rights, while Nelson Mandela and the African National Congress are adamant that the concept of group rights will not have any place in the new South Africa. The *New Republic* quotes Mandela as having said that de Klerk must "abandon the concept of group rights . . . without any reservation." The magazine also refers to a speech by de Klerk where he is quoted as having said that what South Africa needs is a "multiracial" society that avoids "simplistic majority rule on the basis of one man, one vote." Michael Kinsley, *Minority Rules*; *TRB-South Africa*, THE NEW REPUBLIC, May 28, 1990, at p.4.

selves, and are perceived by others, to be tied to each other by a common history and cultural heritage.

### C. *Cultural Right as Group Right*

Even if you are convinced that critical pluralism is desirable, that the notion of group is not metaphysical nonsense, and that you know what an ethnic group is, you might still be skeptical about the value of cultural rights.

A cultural right is a group right, for by its very nature, culture is a communion of its members rather than the sum of the attitudes and life-projects of the various individuals within the group. Just as one would not understand the orchestra, its success and its failure, in terms of the success and failure of individual members, so one would not understand culture in terms of the attitudes of the individual members. The argument for cultural rights cannot, therefore, be understood in terms of individual rights. It is within groups that constitutive narratives (cultures) are produced and through groups that sense is made of the social world. As Fred Jameson put it: "the telling of the individual story and the individual experience cannot but ultimately involve the whole laborious telling of the collectivity itself."<sup>103</sup> Note that the claim here is not that the individual story is identical to the story of the collectivity, and that the story of each individual member is identical with the story of other members of the group. Rather, the claim is that the story of the collectivity sets the range of options within which the story or choice of the individual member will be meaningful and will have significance.

So, when we say that ethnic minorities have a right to their culture, we mean that the group has a moral right to have the condition and the framework necessary for making choices. Culture provides the framework, the anchor, within which a range of choices and values can be considered and evaluated.

Once one sees the protection and sustenance of minority cultures as a right, then the argument sometimes offered as justification for the protection of minority cultures might be misplaced. One sometimes hears political leaders and intellectuals (usually liberals from dominant groups) attempting to ground this right of groups in what they see to be the value of such protection for the

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103 FREDERIC JAMESON, *THIRD WORLD LITERATURE IN THE ERA OF MULTINATIONAL CAPITALISM, SOCIAL TEXT* (Fall, 1986) cited in HOMI K. BHABHA, *Dissemination: Time, Narrative, and the Margins of the Modern Nation*, in *NATION AND NARRATION* 292 (1990).

entire polity, for oppressed as well as oppressor. I have no quarrel with the idea of setting out as many benefits and reasons for protecting minority cultures as possible. In fact, I myself will do that later in this Article. Nevertheless, those reasons can only be additions to, rather than conditions for, recognizing the right. If it is a right of a group, then the utilitarian view of whether or not it benefits all of us cannot be allowed to determine its acceptability. A right exists not because of, but regardless of, its utilitarian impact.<sup>104</sup>

If culture is an important framework within which groups make choices and through which those choices are given significance, why shouldn't that simply mean that all cultural groups should be given the same amount of resources to develop and maintain their cultures? Presumably, all cultures are similarly important to their members. Put simply, why should there be a special and affirmative intervention by the state to help minorities maintain and develop their cultures? The answer is clear, and in many ways I have already suggested it. Minority cultures need affirmative support because of the unequal circumstances that define their relationship with dominant cultures. As Kymlicka has argued, minority cultures are "vulnerable to the decision of the . . . majority around them."<sup>105</sup> The majority is not subject to such vulnerability. That being the case, the right cannot be exhausted by simply equalizing the circumstances of individual members of minority cultures with those of members of the dominant cultures.

And since [the] inequality [between dominant and minority cultures] would remain even if individual members of [minority] communities no longer suffered from any deprivation of material resources, temporary affirmative action programmes are not sufficient to ensure genuine equality [among cultures]. Collective rights may be needed.<sup>106</sup>

International law, as I argued earlier, does not explicitly provide for a group right to culture. Whenever there is a right to culture, it is expressed, as in article 27 of the Covenant, in individualist terms—the right to belong to culture. However, the interna-

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104 "Special rights are justified because aboriginal people have a legitimate claim to the protection of their cultural membership, whether or not the Lives of non-aboriginal Canadians are thereby improved or enriched." KYMLICKA, *supra* note 75, at 191.

105 Will Kymlicka, *Liberalism Community and Culture* 187 (1989).

106 *Id.* at 190.

tional community is not totally silent on the subject. Thus, article 19 of the Universal Declaration of the Rights of Peoples (the Algiers Declaration) provides for a minority's right to cultural identity.<sup>107</sup> In addition, one could argue that the references to the rights of peoples to their cultural developments one finds in article 22(1) of the African Charter on Human and Peoples' Rights, or in article 1(2) of the UNESCO Declaration of the Principles of International Cultural Cooperation, or in article 13 of the Algiers Declaration, support the protection and support of cultural minorities.<sup>108</sup>

Of course, it is not quite clear that the word "peoples" in the above documents refers to anything other than the entire inhabitants of the nation state. If it is meant to refer to the entire political community, then the right is nothing more than a right of one political community against another political community. Read this way, the formulation can be seen merely as a rejection of the traditional understanding of colonialism on the cultural level.<sup>109</sup>

It could, however, be argued that since the term "peoples," in its ordinary usage, is also used to refer to groups other than a political community, like indigenous communities, there does not seem to be a good reason why a cultural right to a people could not also be taken to mean a cultural right to an ethnic minority.<sup>110</sup>

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107 Universal Declaration on the Rights of Peoples, Algiers, July 4, 1976, reprinted in RICHARD A. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 225 (1981).

108 Article 1 of the UNESCO Declaration provides that "[e]very people has the right and the duty to develop its culture." UNESCO Declaration of the Principles of International Cultural Cooperation, Nov. 4, 1966, reprinted in EDWARD H. LAWSON, ENCYCLOPEDIA OF HUMAN RIGHTS 1501-02 (1991).

Article 22(1) of the African Charter provides that "[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity." African Charter, *supra* note 58.

109 In another work, I have argued that the intense debate which took place during the early part of the 1980s between the Third World and developed countries under the banner of "the new world information order" can be understood as the third stage of self-determination, which is cultural decolonization. The first two stages were political decolonization and economic decolonization. The former described the formal independence process, while the latter is best exemplified by the United Nation's attempt to restructure the control and appropriation of international economic power. The name given to the attempt at such structuring is the "New International Economic Order" (NIEO). See Adeno Addis, *The New World Information and Communication Order: The Attempt to Restructure the International Communication Process* (1987) (Unpublished J.S.D. thesis). So, the cultural rights of peoples in the above instruments might plausibly be seen as being another normative statement to emphasize the importance of cultural self-determination if political communities are to be genuinely independent.

110 In any case, Professor James Crawford seems to be right when he observes that

In any case, it seems perverse to say that while cultural self-determination is important and is subject to a theory of justice when the domination is perceived to come from *outside* the political community, it is of no concern to a theory of justice when the domination comes from *inside* the political community. The fact that international law and international political theory have not taken the cultural rights of minorities seriously does not justify further neglect.

#### V. INSTITUTIONAL IMPLICATIONS OF TAKING CRITICAL PLURALISM SERIOUSLY

The required institutional response will necessarily vary according to the nature and history of a given ethnic minority and the larger social context within which the particular minority is making the claim. Nevertheless, there are two institutional implications of critical pluralism as it applies to cultural rights of ethnic minorities. First, critical pluralism requires that ethnic minorities be provided with the resources that will enable them to affirm and nurture their cultures, and hence to affirm themselves. Second, critical pluralism requires that there be institutional means which would enable the minority to engage the majority in a dialogue. The first is a necessary condition for the second, and the second requirement is what distinguishes critical pluralism from paternalistic pluralism.

##### A. *Ethnic Minorities and Resource Allocation*

A group must have certain resources before it can affirm itself as a group. Specifically, the conditions which lead to the group being outbid and outvoted in relation to the resources necessary for sustaining the culture must be removed. Quite often this requires that the government take special measures to provide those resources.

The resources needed for the affirmation and nurturing of cultures will vary from group to group. This is because cultures and communities arrange themselves differently and hence the resources crucial for the survival of one culture might not be centrally constitutive in relation to another. For example, land

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even in its usage in international documents, the term "people" "is context dependent." JAMES CRAWFORD, *The Rights of Peoples: Some Conclusions*, in *THE RIGHTS OF PEOPLES* 159, 169 (1988).



rights are essential to the survival and integrity of the culture of indigenous peoples, while land rights might be less crucial for the survival of the cultures of other people.

### 1. Land Rights

Why is access to and control of land important for the stability and survival of the cultures of indigenous peoples? First, as a U.N. Report put it:

It is essential to know and understand the deeply spiritual and special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such peoples, the land is not merely a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity to be acquired, but a material element to be enjoyed freely.<sup>111</sup>

Indigenous peoples see themselves as trustees of the land. Disposition is therefore not simply dispossession of the physical land, but the destabilization of their very identity, which to a large extent develops through their relationship to the land.<sup>112</sup> Second, physical space is necessary for them to be able to conduct cultural activities such as fishing and hunting. Cultural self-determination is, in this sense, strongly tied to the control of, and access to, a physical space. Third, the protection of sacred sites requires that there is access to and control of such land. Unless there is such control, history teaches that there is going to be great pressure on economic units and regimes of the larger political unit to sacrifice those sites for short term economic benefits.<sup>113</sup>

Put simply, for many indigenous peoples, land gives coherence to their culture<sup>114</sup> and provides shelter from the colonizing

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111 *U.N. Comm'n on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Population*, at para. 196-97, U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 4(16) (1986).

112 *Id.*

113 I have in mind something like mineral mining.

114 "The idea was expressed [in the third session of the Working Group on Indigenous Populations] by all the observers from indigenous populations who attended the meeting, that the preservation of the life and cultures of indigenous populations was indissolubly linked to their lands and natural resources." *U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study of the Problem of Discrimination Against Indigenous Population, Report of the Working Group on Indigenous Populations on Its Third Session*, at 27, U.N. Doc. E/CN.4/Sub.2/1984/20 (1984).

and disintegrative effects of the dominant culture. The right to land reduces the capacity of the dominant group to outbid and outvote the minority in terms of the resources necessary to develop the latter's culture. Of course, an initial right to land will not be sufficient to reduce the possibility of indigenous peoples being outbid and outvoted. As Kymlicka has argued, if non-indigenous people are allowed to move into the community, to buy land from the indigenous people, and to vote on matters that affect the community, then sooner or later the non-indigenous, because of their sheer number and greater resources, will have outvoted and outbid the indigenous people on many of the issues crucial to the latter's cultural survival.<sup>115</sup>

Given the above, what does land right mean? It means, at the minimum, recognizing the group's communal right to land, consequently restricting individual alienation of native land. Otherwise, individual alienation of land will seriously undermine the whole notion of an indigenous right to land. It also means that aboriginal landholders would be wholly responsible for the way in which their resources are used. Barring this, outsiders will have the numbers and the resources to determine the culture's fate.

Now, the questions of exit and re-entry also arise here. The issue of exit is relatively easy. If an individual does not want to remain a member of a tribe, for example, he or she should be free to move out. However, in most cases a "cultural exit" will be much more difficult than the physical exit. If nothing else, outsiders will likely remind (through attitude, actions or otherwise) the exiter of his or her heritage.

The issue of re-entry is a much more difficult one. Suppose a tribe member took steps which, according to the tribe's tradition, indicated an exit (for example, marrying a non-indigenous person). Suppose also that the particular individual terminated the act that led to the exit (for example, divorced the spouse) and consequently wanted to rejoin tribal life. Consider that there is a tribal prohibition of re-entry of people who took steps such as the ones taken by the individual in this case. The question is, should the final decision rest in the hands of the tribe, or does the larger political unit have a say in the decision? What if the refusal to readmit is inconsistent with another principle of the larger political unit?<sup>116</sup>

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115 KYMLICKA, *supra* note 75, at 197-98.

116 See *The Lovelace Case. Report of the Human Rights Committee*, 36 U.N. GAOR Supp.

One of the most important rights a minority group will have is the right to establish membership rules. If the majority decides (through its legislature or other bodies) the criteria for membership in the minority culture, then, for all practical purposes, the script for destroying the cultural identity of these minority cultures has been written. What the majority will see as peripheral to the cultural survival of a minority might in fact be seen to be an important cultural symbol by the minority. In any case, it seems rather odd that the very groups (dominant majorities) that did a great deal of the damage to the cultures of these minorities will be given the ultimate power to decide what is important and what is marginal in these cultures. Has not the problem been that dominant groups have tended to see minorities and their cultures as being, on the whole, peripheral?

The argument here is not that all aspects of minority cultures are attractive or desirable. Indeed, there might be some aspects of those cultures which will clearly strike an outsider as being very undesirable. My contention here is simply that in most cases when the majority has had the power to decide the criteria for membership, it has seriously destabilized the cultures of those groups. And indeed, many of the undesirable features of those cultures developed as a reaction to the dominant group's coercive interventions, rather than because of a lack of such interventions. Moreover, in many cases the supposedly unattractive feature of the minority culture might look that way because outsiders tend to see it in isolation, rather than in relation to other aspects of the culture which might function to correct it. Finally, cultures do change as a result of either internal challenge or interrogation by other cul-

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(No. 40) at 166, U.N. Doc. A/36/40 (1981). This was a case where a registered Maliseet Indian lost her right and status as an Indian after marrying a non-Indian. She lost her status because a Canadian statute, the Indian Act, CAN. REV. STAT. ch. I-b, § 12(1)(b) (1970), provided that an Indian woman who marries a non-Indian man loses her status. An Indian man who marries a non-Indian woman, however, would not lose his status. When Sandra Lovelace wanted to return to her tribe's reserve after her marriage ended, she, of course, was not allowed to do so pursuant to the Act. Lovelace took her case to the United Nations Human Rights Committee. The Committee ruled that the Act violated article 27 of the International Covenant on Civil and Political Rights, and that Lovelace was entitled, as a member of an ethnic minority, to associate with that group on the reserved land. Having determined that the Act violated article 27 of the Covenant, the Committee did not have to decide (or did not believe it had to decide) the other ground on which Lovelace challenged the statute: the prohibition of gender discrimination contained in article 2 of the Covenant.

Section 12(1)(b) was repealed by an Act to Amend the Indian Act of 1985. The new legislation repealed the gender specific restriction.

tures. Indeed, the latter will be required by critical pluralism. Such changes might be for the good, but the changes must be a result of the volitional and reflective acts of those communities.

In the area of land rights, there have been some steps in the right direction,<sup>117</sup> but these steps have been insufficient. In many countries which contain indigenous populations, individual rights is the language of discourse, and assimilation is the most favored course of action.<sup>118</sup> Perhaps the recent efforts of the United Nations Working Group on Indigenous Populations (Working Group)<sup>119</sup> will produce principles whose theme will be collective (as opposed to individual) rights and whose central institutional concern will be land rights (or territorial rights).<sup>120</sup> Given the numerous stories it has heard from indigenous peoples from all over the world since 1982, and the consistency of those stories regarding the importance of land to the cultural survival of indigenous peoples, it is unlikely that the Working Group will go in any other direction. Indeed, its Draft Universal Declaration<sup>121</sup> seems to indicate that.<sup>122</sup> The narratives of indigenous peoples are gradually transforming the nature of international discourse about

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117 In relation to Australian Aborigines, for example: "[I]n 1966 no Aboriginal Australian owned land by virtue of being Aboriginal. By January 1986, some 643,079 square kilometers, representing 8.37% of the Australian land mass, were held by Aborigines in freehold." Netheim, *supra* note 76, at 293. For an interesting and very informative exploration of the historical and current contexts of the land rights movement in Australia, see HENRY REYNOLDS, *THE LAW OF THE LAND* (1987).

118 "Indigenous rights in many countries are not even recognized in domestic law and policy. Often times, states impose forced assimilation programs upon indigenous peoples. . . ." Williams, *supra* note 74, at 703. For an exploration of the status of indigenous peoples in a few selected countries, see Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 *YALE J. INT'L L.* 127 (1991).

119 The Working Group was set up in 1982 by the United Nations Economic and Social Council (by Resolution 2(xxxiv)) as a forum devoted to the development of international legal standards. See Williams, *supra* note 74, at 666-685; see also Torres, *supra* note 118, at 170. The Working Group meets annually and its meetings are "attended regularly by nearly four hundred persons, including representatives from over fifty indigenous organizations and observers from more than two dozen national governments." Williams, *supra* note 74, at 677.

120 "National governments must realize that indigenous peoples would not accept a declaration on indigenous rights that failed to include a strong statement on land rights." Andrée Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 *VAND. J. TRANSNATIONAL L.* 703, 723 (1990).

121 *Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989) [hereinafter *Draft Universal Declaration*].

122 The *Draft Universal Declaration* provides that indigenous peoples have a collective right to the ownership, possession, and uses of their land. See *id.* at paras. 12-13.

the needs and rights of indigenous peoples, showing the transformative capacity of narratives and the importance of allowing the oppressed to tell their own stories.<sup>123</sup>

## 2. Language

The survival and flourishing of a group's culture also depends, in large part, on the vitality of its language. Language is not a mere medium of a reality that is located outside it, but is constitutive of that reality. It is not that there is culture and then there is language through which the culture can be communicated. No, communication is not a secondhand activity. Our language, like our history, is the means through which we attach meaning and give structure to our cultural activities. It is the process by which the significance of a particular activity and its relationship with other activities is made clear to us.<sup>124</sup> In this sense, to destroy the language of a group is to destroy its culture.

There is also another, pragmatic reason for protecting and supporting the language of minorities. Perhaps it could be explained best with an example. The beginning of the tension between the Tamil minority and the Sinhalese majority in Sri Lanka, a tension that developed into an outright war and brought destruction to the island, can be said to date back to 1956, when the parliament of then Ceylon, by a simple majority, passed the Official Language Act making Sinhala, the language of the majority, the only official language. The Tamil minority saw this as an assault on the very existence of its culture.<sup>125</sup>

As the Sri Lankan example suggests, it is not only the centrality of language to cultures and cultural developments that requires us to take the languages of minorities seriously (although that is a sufficient reason). The tragedy of Sri Lanka demonstrates that

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123 See Williams, *supra* note 74, at 704 ("[The Working Group's draft] provides a powerful and empowering instance of the ways in which peoples of color, such as indigenous peoples, through their own stories, can seek to transform legal thought and doctrine about their human rights according to the terms of a different vision of justice in the world.").

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The processes by which options and choices become significant for us are linguistic and historical processes. Whether or not a course of action has significance for us depends on whether, or how, our language renders vivid to us the point of that activity. And the way in which language renders vivid to us the point of these activities is a matter of our culture heritage.

KYMLICKA, *supra* note 75, at 190.

125 Marasinghe, *supra* note 5, at 560-61.

undermining minority languages leads not to stability and union, as the advocates of linguistic conformity believe, but to conflict and destruction.

Now, there are institutional and practical problems with recognizing the linguistic identities of all groups in a polity. It is, for example, impractical, virtually impossible in most situations, to recognize all languages in the polity as official languages. The proposition of equal status for all languages is plausible if only two or three languages are spoken in a nation.<sup>126</sup> But when a nation has dozens of languages, as does Ethiopia,<sup>127</sup> it is, to say the least, rather impractical to think of according equal status to all the languages that are spoken in that nation. Many countries, especially developing countries, are defined not only multi-ethnically, but also multi-linguistically. And given those circumstances, it is likely to be financially prohibitive and administratively chaotic to give the languages of all groups an official status. So, how can the notion of linguistic identity be given institutional meaning? This is a very difficult question.

Some countries have dealt with the issue by giving official status to selected minority languages. The criteria by which official status is accorded some languages and not others is not always clear. Some seem to select those languages which are spoken by significant minorities.<sup>128</sup> The flaw in such a selection process is that deciding what is a "significant" minority is a political, rather than a mere mechanical, act. Indeed, in many circumstances the notion of significance is likely to be equated not so much with

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126 There are a number of countries which have made the languages of all ethnic groups national or official languages. In Switzerland, for example, French, Italian, German, and Romanish, the four languages that are spoken in the country, have been declared national languages. Now, even though at the federal level the equality of the four languages is recognized and affirmed, at the cantonal level their relationship is much more complicated. See CAPOTORTI, *supra* note 60, at 76. In Belgium, the three linguistic groups—Dutch, French, and German—have their languages recognized as official languages. *Id.* Canada is a bilingual nation, with both English and French recognized as national languages.

127 The number of languages in Ethiopia seems to vary from one observer to another. It is a commentary on the state of research on the country that there is not a definite number. The number seems to vary between forty and eighty, with the latest estimate being eighty. See Chazan, *Destitute Ethiopia Gets a Chance to Rebuild*, Agence France Press, July, 9, 1991.

128 Finland, for example, gives official status to the language of the Swedish minority, which constitutes about 6% of the population, while not according the same status to the language of the Lapps, who are said to number about 4000. See Capotorti, *supra* note 60, at 76. Canada recognizes French, but no languages of the indigenous peoples.

number, but, rather, with the amount of power a particular community possesses. In any case, it seems undesirable if the consequence of elevating some languages to an official status is the total neglect of other minority languages. For it is those very minority groups that would be outbid and outvoted in relation to the resources necessary for their language and culture to survive and flourish that are going to need the specific intervention of the state. The complaint here is not that some languages get equal status with the language of the dominant group, but rather that such action is accompanied by the total neglect of languages of less powerful minorities.

Perhaps one way a language could be preserved might be by allowing a minority community to have educational instruction in its community conducted in its own language, at least for elementary schooling.<sup>129</sup> Indeed, under the UNESCO Convention Against Discrimination in Education, adopted in 1960, states party to the Convention agree that it is important that minorities are allowed to use and teach their own language.<sup>130</sup> The need for a national language to conduct certain national activities need not require that all activities within the nation be conducted in that language. Elementary educational instruction is one activity which need not be conducted in one language. Indeed, in most developing countries where education is not widely diffused, it might be that using the local community's language as the medium of in-

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129 A number of countries have adopted a similar position. In Fiji, for example, primary educational instruction is in the languages of the various ethnic groups. In the case of indigenous Fijians, the instruction is in Bauan, while the Indian children get their education either in Hindustani or Urdu. See CAPOTORTI, *supra* note 60, at 86.

130 UNESCO Convention Against Discrimination in Education, *opened for signature* Dec. 14, 1961, 429 U.N.T.S. 93 (*entered into force* May 22, 1962).

struction is the most effective way<sup>131</sup> of making education more widely available.<sup>132</sup>

### B. *Ethnic Minorities and Institutional Dialogue*

As I argued earlier, critical pluralism also requires that the narratives of minorities are institutionally capable of engaging those of the dominant group. Otherwise, the protection and support of the minority culture will be seen in a most devastatingly paternalistic way by the dominant culture, and the growth and influence of the minority culture will be diminished.<sup>133</sup>

What does institutional dialogue mean in practical terms? There are a number of situations (perhaps an infinite number) one could think of as examples of institutional dialogue between the dominant and minority cultures. There are, however, two circumstances which explicitly address the issue of dialogue: one is the educational experience, and the other is the role of the media. These two aspects of social life become very important in relation to the possibility of cultural dialogue for two reasons.

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131 I must point out here, however, that in some developing countries it might be very difficult, at least initially, to do this for various reasons. A particular minority might not have a written language; even if it does have one, the language might not possess the vocabulary necessary to develop the appropriate curriculum. And until sufficient numbers of books are translated, there will obviously be a shortage of textbooks, as there will also be a shortage of teachers until teachers are trained in the language. See UNESCO, *The Use of Vernacular Languages in Education, Monographs on Fundamental Education*, No. VIII (1953) at 50-54, cited in CAPOTORTI, *supra* note 60, at 84. I believe, however, that most of these problems could be solved over time. The fact that a minority's language is not a written language does not mean that it is incapable of being one. And, as to the argument that some languages might not have the richness of vocabulary to be media of instruction, it is true that some concepts in a curriculum, especially scientific concepts, probably cannot be precisely described in many of the languages. But that is likely to be the case with almost any language that must describe for the first time concepts that are not (or have not been) part of the culture of the particular community. Over time, however, the language will develop the appropriate vocabulary to describe those concepts.

132 Some countries have taken a slightly different approach from both the selective recognition illustrated by the Finnish approach and from the quasi-decentralization I have suggested. They recognize only one official language at the national level, while allowing official status to minority languages at the regional level. Thus, for example, Austria has one official language, German, at the national level, while it simultaneously allows languages of minorities to have the same status as the national language in the region in which the particular minorities live. CAPOTORTI, *supra* note 60, at 76.

133 "It is the generally accepted view that to be effective a cultural policy must afford a variety of opportunities for the wide dissemination of the culture concerned . . . . [A] most important contribution is made today by radio and television." CAPOTORTI, *supra* note 60, at 99.



First, the media and the educational system have increasingly become the cultural memory of groups and polities. What elders and oral narratives perpetuated in an earlier era is now accomplished through the two institutions. Second, for various reasons, some intentional, others structural, for many groups, the two avenues have become the only means of contact they have with each other. As such, the two have become the most significant means by which each group constructs the identity of the other (and, ultimately, even its own identity). The absence of minorities in the curriculum and the media, both in terms of narratives and narrators, means that the identities of minorities are being constructed in their absence.

### 1. The Media and Minorities

Dialogue is the encounter between men, mediated by the world, in order to name the world. Hence, dialogue cannot occur between those who want to name the world and those who do not wish this naming—those who deny other men the right to speak their word and those whose right to speak has been denied . . . . Because dialogue is an encounter among men who name the world, it must not be a situation where some men name on behalf of others.

—Paulo Freire<sup>134</sup>

If I'm not who you say I am, then you're not who you think you are.

—James Baldwin<sup>135</sup>

One of the most effective ways through which dominant groups inflict violence on minorities is through cognitive representation/misrepresentation/nonrepresentation of those groups. The media play the most prominent role in this process. Given the complexity of societies, social organizations, and technological transformations, the media become the primary means through which groups learn of each other, and thus the means by which group identities are constantly constructed. The media, therefore, possesses great potential to ensure that there is genuine interaction and dialogue among groups.

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134 FREIRE, *supra* note 11, at 77.

135 Jannette L. Dates & William Barlow, *Introduction: A War of Images*, in *SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA* 5 (1990), citing James Baldwin, interviewed on CBS News, October 1967.

Nevertheless, in most cases, and in many countries, the media have not served that purpose well. Indeed, in most instances the identities of minorities are constructed in their absence. The media either systematically omit subjects that are of interest to minorities, or when minorities enter the discourse as subjects, they are usually cast in the most unfavorable light.<sup>136</sup>

The omission from the communication process of issues that are important for minorities or the negative picture of minorities that fill the mass media, quite often is accompanied by an almost complete absence of minorities as communicators.<sup>137</sup>

Any concern about the rights of ethnic minorities and the possibility of critical dialogue between minorities and majorities will have to take the communication industry seriously and to provide for the condition of a fuller and a more accurate representa-

136 In a forthcoming article, entitled "*Hell Man, They Did Invent Us: The Mass Media, Law and African-Americans*," I show in some detail how the mostly white mass media in the United States represents/misrepresents African-Americans. The media deals with Blacks in two ways. On the one hand, the media acts as if they do not exist. This is the case in terms of social items and generally issues that are of interest to African-Americans. What Ronald Walters, chairman of the political science department at Howard University, recently said about *The Washington Post* is true generally about the media in major urban areas which have a majority, or a significant minority, Black population.

The *Post* leaves a lot to be desired. . . . It is almost as if there is no vibrant black culture in the city [Washington D.C.]. It doesn't cover life at the community level. Washington, D.C., has the largest black middle class in the world, and you would never know it from reading *The Post*.

Quoted in David E. Rosenbaum, *An Editor Is Retiring, Leaving His Mark*, *N.Y. Times*, June 22, 1991, at 3, col. 1.

On the other hand, when African-Americans are of interest to the media it is to reinforce the stereotypical view of them. When it is not an image of African-Americans as criminals, it is one of them as people who are not capable of thinking rationally, with no ambition, without the capacity to lead, and with no sense of responsibility. My Article explores the image of African Americans in three specific areas: African-American politicians, young African-American males, and African-American athletes.

137 In the United States, for example, minorities own and control only about three percent of the broadcasting stations although they constitute twenty percent of the population. See *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997, 3033 (1990) (O'Connor, J., dissenting). Justice Brennan, writing for the majority, views minority representation in the electronic media in the last two decades in this way:

Although for the past two decades minorities have constituted at least one-fifth of the United States population, during this time relatively few members of minority groups have held broadcast licenses. . . . [I]n 1978, minorities owned less than 1 percent of the Nation's radio and television stations, . . . and in 1986, they owned just 2.1 percent [of the broadcast media].

*Id.* at 3003. In relation to the print media, the situation is even worse. A 1988 survey concluded that "the majority of U.S. dailies still have no minority professional on their staff." *American Society of News Papers Editors*, April 13, 1988, at 1.

tion of the lives of minorities in the mass media. This means, at least partially, developing programs that will enable members of minority groups to enter the industry as owners and or communicators.

## 2. The Curriculum and Minorities

[W]hen someone with the authority of a teacher, say, describes the world and you are not in it, there is a moment of psychic disequilibrium, as if you looked into a mirror and saw nothing.

—Adrienne Rich<sup>138</sup>

Another possible arena for critical dialogue between dominant and minority groups is the curriculum, where the narratives of minorities could engage the dominant narrative. Given the fact that schooling is the most explicit form of cultural politics, it becomes important that the conditions for inclusive and interrogative political action exist. In most countries, however, the general curriculum, from elementary to higher education, is defined by a set of texts whose central organizing theme is the dominant tradition, and from which the stories of those on the margin are conspicuously absent.<sup>139</sup> The curriculum makes minorities textually invisible. Quite often this textual invisibility reinforces and legitimizes the physical and social exclusion of minorities from various areas of social and political life. When a group's story is excluded from the very domain in which knowledge is produced and legitimated, this has not merely pedagogical consequences, but has profound

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138 ADRIENNE RICH, *BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979-1985* 199 (1986).

139 Currently, in the United States, there is an intense debate about the curriculum. Those who are challenging the canon, usually a coalition of postmodernists and minority scholars and activists, argue that the curriculum in the United States is, by and large, Euro-centric and must broaden itself to include traditions and cultures other than European culture(s) if it is to be relevant to a multi-cultural world. Those that resist these challenges do not deny that the curriculum is centrally constituted by a western tradition, but argue that the tradition is the best tradition and, therefore, see a challenge to it to be a challenge to civilization itself. Indeed, the complaint is that the curriculum already has strayed too far from the great western tradition. Allan Bloom, the most well known member of the "no-concession to the barbarians" crowd, argues that a good education, at least in institutions of higher education, has only one route: . . . "the good old Great Books approach, in which a liberal education means reading certain generally recognized classic texts . . . . [W]herever the Great Books make up a central part of the curriculum, the students are excited and satisfied. . . ." ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS* 344 (1987). There are numerous *Blooms* in this and other countries.

political consequences as well. The institutions and social practices which will be inscribed through this knowledge will not recognize those very minorities whom the textual authority has excluded.

A curriculum that is faithful to critical pluralism is one which includes the voices and stories of those who are marginalized minorities. The inclusion is likely to accomplish four important objectives. First, interrogation of the dominant culture by other cultures might lead the dominant culture to see its own particularity and partiality, "the constructed nature of [its] own historical and social categories,"<sup>140</sup> rather than continuing to see itself in universal, neutral terms. It is only when one realizes one's specificity and partiality that one is likely to engage the other in a dialogue. When one sees one's way of doing things as neutral and universal, one does not see the need for, or the value of, a dialogue.

Second, a diverse curriculum is likely to reveal how differences are constructed, that is, their historical and relational nature. The possibility of reconstituting those differences depends on the realization of their relational and contingent nature.

Third, in the classroom, faculty and students from minority groups<sup>141</sup> are more than likely to engage members of the dominant group when they feel and believe that they (and their experiences) are positively affirmed. The textual dialogue will make the human dialogue more probable.

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140 STANLEY ARONOWITZ & HENRY A. GIROUX, *POSTMODERN EDUCATION: POLITICS, CULTURE AND SOCIAL CRITICISM* 104 (1991).

141 An inclusive curriculum is inclusive not only in terms of the materials (texts) it includes, but also in terms of the people it admits. For minorities to be able to engage the majority in cultural terms requires not only that their stories be part of the curriculum, but that they be admitted as narrators of those stories, as teachers, and as students. The absence of minorities in the classroom will, more probably than not, lead to the reification of minority narratives.

It also appears to me that the relationship between intellectuals (in the broadest sense of the term) and narratives is a mutually constitutive one. Minority teachers and students give context and life to the narratives of minority cultures, as those narratives produce and reproduce the subjects that tell those stories. It is in this sense that people, since Antonio Gramsci wrote his celebrated notes on intellectuals, have been arguing that intellectuals occupy an important place in political life. They act as the memory of the community, by simultaneously giving coherence to the ideologies (or stories as I have elected to refer to them) through which a community produces and reproduces itself, and by saving it from reification. See ANTONIO GRAMSCI, *The Intellectuals*, in *SELECTIONS FROM THE PRISON NOTEBOOKS* (Q. Hoare & G. Smith trans. and ed. 1971). See also ARONOWITZ & GIROUX, *supra* note 140, at 151-55; Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L. J. 705.

Fourth, when narratives from minorities are allowed institutionally to interrogate the dominant discourse, that will allow the various minority groups to draw their solidarities "in the form of similarities between modes of repression and modes of struggle which all minorities separately experience, and experience precisely as minorities."<sup>142</sup> This will create the conditions "within particular institutions that allow students to locate themselves and others in histories that mobilize, rather than destroy, their hopes for the future."<sup>143</sup>

## VI. CONCLUSION: THE VIRTUE OF INCOMPLETENESS<sup>144</sup>

Incompleteness is a virtue . . . for it leaves room for local self-determination and cultural diversity.

—Michael Walzer<sup>145</sup>

The institutional complexity of giving substance to what I have called critical pluralism undoubtedly will be daunting. Nevertheless, we have no choice but to embrace critical pluralism and to attempt to give it institutional meaning. Otherwise, we will either continue down the road of cultural negation, politely termed assimilation, or we will continue to keep a semblance of respect for groups, not by engaging them, but by defining them as Others who are not capable of institutional engagement. Neither course of action is the condition either for stability and social peace or for social equality among groups (and consequently among members of groups). Indeed, both will produce and reproduce social and political inequality, and, consequently, instability and conflict.

We must abandon the false alternatives that currently seem to define the relationship between dominant and oppressed ethnic minorities: either members of ethnic minorities are seen to be, on a deeper level, the same as members of the dominant group, or minorities are seen to be so objectively and essentially different from the majority that only separate existence (unequal treatment) is seen to be the solution. Both have been tried and have had an

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142 Lloyd, *Introduction: Minority Discourse—What is to be Done?* 7 CULTURAL CRITIQUE 5, 11 (1987) cited in ARONOWITZ & GIROUX, *supra* note 140, at 133.

143 *Id.*

144 The title is inspired by the title of Michael Walzer's review of Agnes Heller's *BEYOND JUSTICE*. See Michael Walzer, *The Virtue of Incompletion*, 19 THEORY AND SOCIETY 225 (1990).

145 *Id.* at 225.

enormously damaging exclusionary effect on minorities. The first has given us assimilation, and the second segregation or total negation.

Critical pluralism argues that those are not the only choices available to us. Indeed, the only sensible route open to us is one where group differences are acknowledged to be an important aspect of social and political life, but where these very differences are adjusted and reconstituted in a process of constant and genuine dialogue.

We must resist the modernist tendency (both in its individualist and communitarian dimensions) to complete and hence freeze political and social stories and the institutions within which they are narrated. In their different ways, both individualism and communitarianism yearn for a totalizing account; they have the itch, as Michael Walzer put it, "for singularity and unity, as if these two might provide a relief from moral anxiety, an end to striving, and therefore a kind of completion."<sup>146</sup> Individualism does its totalizing and its completion through its image of the universal individual, who has certain needs and rights. That individual inscribes every other individual.<sup>147</sup> For the communitarian, the complete narrative is one that tells the story of a final harmonious union between the individual and the political community. The abstract individual and the abstract community are invoked to write a unitary and final story, to close the chapter, "to end the endlessness of liberation," to avoid the political and moral anxiety that seems to be implied by the role of groups in our lives and their potential to destabilize both our conceptual schemes and political arrangements. But the anxiety about groups cannot be dealt with by simple avoidance or denial. Only by living through it will the anxiety ultimately diminish.<sup>148</sup>

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146 *Id.* at 226. Walzer makes a similar point in another article. He observes: "[m]uch of liberal political theory, from Lock to Rawls, is an effort to fix and stabilize the doctrine [liberalism] in order to end the endlessness of . . . liberation." Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *POLITICAL THEORY* 6, 14 (1990).

As to communitarians, the tendency is to see the completed narrative to be one which tells the story of a harmonious union between the individual and the community within which the individual is located.

147 See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

148 Terry Eagleton makes the following observation:

'Nationalism,' remarks an African character in Raymond Williams's novel *Second Generation*, . . . 'is in this sense like class. To have it, and to feel it, is the only way to end it. If you fail to claim it, or give it up too soon, you will merely be cheated, by other classes and other nations.'

We must simultaneously acknowledge the existence of group perspectives, differences among those perspectives, and the transformability of those perspectives where "the meaning of difference itself becomes a terrain of political struggle."<sup>149</sup> This can happen when the cultures and stories of those minorities are positively affirmed and can institutionally interrogate the dominant story. The task is to open up cultural communities without destroying them, to resist the dominant culture's itch to complete the story, indeed, to resist the notion of completeness itself. The notion of cultural rights has, and must have, that objective.

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Terry Eagleton, *Nationalism: Irony and Comment*, in SEAMUS DEAN, TERRY EAGLETON, FREDERIC JAMESON & E. SAID, NATIONALISM, COLONIALISM, AND LITERATURE 23 (1990). My point here is not to imply that group differences, like Eagleton's class and nationalism, would ultimately be banished if we only acknowledge their existence, go through them, and come out through the other end. Indeed, in relation to group differences, I have argued throughout that transcendence is not what we should aim for, because that is not possible. Rather, my point is that the status quo's claim of overcoming group differences is also undesirable for the same reason that the announcement of the end of nationalism or class is undesirable: either will simply mean that one group's way of seeing the world is universalized. The way to reduce the anxiety is not to refuse to acknowledge that which is the source of the anxiety, but to live with it and to transform it from a nightmare into a noble dream.

149 IRIS YOUNG, *supra* note 1, at 169.