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MINORITIES AND DIVERSITIES: THE "REMARKABLE EXPERIMENT"¹ OF THE LEAGUE OF NATIONS

*by Carol Weisbrod**

The State exists for the sake of Society, not Society for the
sake of the State.

Woodrow Wilson²

INTRODUCTION

This paper considers some issues relating to state frameworks intended to permit and encourage large diversities in societal group life. It focuses illustratively on material relating to the period after the First World War, when the League of Nations used a system of treaties to protect the ethnic, religious, and linguistic minorities of certain largely central European states, and suggests that in thinking about issues of minorities we must also think about our definitions of the state. Education, because it is of such importance to individuals, groups and the state, is used as a field through which a pluralist framework for diversity is explored.

The paper discusses a mix of international and domestic questions, on the theory that in a certain way they are similar. The basic situation

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This paper was given at the Symposium on Human Rights held in Budapest, Hungary in March, 1993, when there was, as a Hungarian participant in the conference noted, a "war in the neighborhood." Those facts, a central European forum and a war, provided the background for the paper and for the discussion of the paper at the conference and added an urgency to the conversation which is not always felt in relation to treatments which use as their starting place historical events.

I would like particularly to thank the following individuals for assistance of various kinds: Jody Freeman, Richard Kay, Elizabeth Kiss, Mark Janis, Leon Lipson, Martha Minow, and Aviam Soifer. Of course they are not responsible for anything said here.

1. JACOB ROBINSON ET AL., *WERE THE MINORITIES TREATIES A FAILURE?* 265 (1943).

2. WOODROW WILSON, *THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS* 636 (rev. ed. 1902)(1898).

is that, as Roscoe Pound wrote in 1947, "[m]en with very different conceptions of the social order, groups of men with one ideal or picture of what ought to be and other groups with wholly divergent pictures, must live together and work together in a complex social organization."³ This, he concluded, "is the situation within each state and the condition in a world society is the same magnified."⁴

A focus on material at the international level is particularly valuable for seeing the issue of normative diversity and the need for frameworks to accommodate many images of the good life. A conversation on this subject at the domestic state level is limited not only by the details of a specific legal system but by the image of the nation-state itself, which is often dominated by the idea of unity. The ideology of the state frequently stresses ideas of the common culture, if not the common background, as the aspiration, if not the fact, of the state enterprise. The state sees the issue of minorities as a we/they problem, in which we are many and they are few. This seems to be true regardless of how diverse in fact a particular state may be. By contrast, at this time, at least, the international conversation invokes ideas of philosophic and cultural unity only occasionally and largely rhetorically. We tend to concede that the family of man is a quarrelsome one, and that, as was once suggested, "looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel."⁵

At the domestic level, the problem of difference is often seen in terms of difference from an assumed norm. At the international level the problem of difference becomes the problem of cultural and normative diversity, multiplicity of authorities, and even chaos. It is therefore at the international level that we can usefully look for thinking which addresses the issue of frameworks, efforts in the direction of some sort of federalism,⁶ with some sort of minimal understandings and some sort

3. Roscoe Pound, *Toward a New Jus Gentium*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 1, 9 (F. S. C. Northrop ed., 1949).

4. *Id.* This perspective, while useful here, minimizes the point that the nation-state is (often) more unified and better able to mobilize force than the world-society.

For Northrop's criticism of Pound's view of the *jus gentium*, see F. S. C. Northrop, *Contemporary Jurisprudence and International Law*, 61 YALE L.J. 623, 653 (1952) (urging that Pound's "weak sociological *jus gentium* [should be] enriched by, strengthened and transformed into the eventual natural law *jus gentium* or *jus naturale*"). Northrop also invoked the term "living law pluralism," used below. *Id.* at 648.

5. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L. REV. 1229, 1249.

6. Minority rights and different forms of national association are under discussion in Hungary now. See Stephen Engelberg, *Now Hungary Adds Its Voice to the Ethnic Tumult*, N.Y. TIMES, Jan. 25, 1993, at A3. See also the federalist ideas of Count Mihály Károlyi, described by

of minimal guarantees of universally acknowledged human rights, assuming that we can identify them.

But if the bloodthirstiness and brutality of tribalism are constantly before us, the strategies for solutions remain controversial and/or undeveloped. Disenchantment with various kinds of modern universalism, often seen as the alternative to tribalism or particularism, is profound. A world-philosophy which seemed possible to some after the Second World War — a universalism based on secular humanism, enlightened reason and a possible redistribution of wealth — no longer seems so obviously the world-view to be preferred by all clear-thinking people or the ideology towards which the human race in general is in fact tending. Indeed, this ideology has been rejected by many — witness the strength of conservative and fundamentalist religion — sometimes in ways reminiscent of times we had hoped were past.

Perhaps, as background to the current discussion, we can recall the state of the question as it was left after the First World War, when the issue was treated against the background of an immediate need to do something under the auspices of an international authority. After the First World War, the League of Nations undertook two broad approaches to the issue of ethnic, religious, and linguistic minorities. The first was rooted in the idea of the homogenous state and involved population exchanges.⁷ The second, revealed in the system of minorities treaties established after the war, was based on the assumption that national minorities might always be characteristic of states and that a method had to be devised for accommodating and/or regulating them. These two approaches, and particularly the questions left open by the second, are the subject of this paper. The League of Nations approaches are described and then discussed not from the perspective of international law (a perspective perhaps inevitably focused on the issues of legitimacy and enforcement) but from the perspective of pluralist theory. How did the League actually see the internal groups? What sorts of groups were under discussion? What was expected from the enviroining state in support of those groups? This paper focuses on the League experiment as one form of pluralist framework encompassing

Rothschild as a "lone dissenter from the inherited ideology of the Magyar nobility." JOSEPH ROTHSCHILD, *EAST CENTRAL EUROPE BETWEEN THE TWO WORLD WARS* 139 (6th prtg. 1990)(1974). Rothschild describes Károlyi's plan as involving a "federalistic reorganization of the millennial kingdom." *Id.* at 140. On Károlyi, see *MEMOIRS OF MICHAEL KAROLYI: FAITH WITHOUT ILLUSION* (Catherine Karolyi trans., 1956).

7. Of course territorial adjustments may also be based on the idea of homogeneity.

highly diverse internal ordering systems. The period between the two wars has been seen as a kind of golden age with reference to this one point. Political scientist Rogers Brubaker uses the term "benign differentialism" to mean a "noninvidious legal differentiation along ethnocultural lines that assigns special rights or privileges to persons in their capacities as members of ethnocultural groups, typically as a means of guaranteeing the free practice of their religion, language or culture."⁸ He notes that the "fabulously complex world of the Hapsburg empire[] and East Central Europe in the early interwar period, the golden age (quickly tarnished, to be sure) of formal minority rights — affords multiple examples of such benign differentialism."⁹

Against this background, the paper is organized this way: the first section reviews the approaches of the League in dealing with the minorities question. It raises some theoretical questions relating to two central issues, the first is the problem of membership, the "who" question, the second is the issue of which minority groups count for purposes of a pluralist structure, the "which" question. The suggestion is made here that much of the discussion of group rights in the context of international human rights is not essentially about a group right, but rather about recognition of a group presence. The further suggestion is made that speaking seriously about a group right requires consideration of a group's power over its own members, and the supervisory role of the largest authority in relation to that group power. This is examined in this article through issues touching group self-definition in the context of education, which, as much as discipline or expulsion, concerns a group's authority over its members.

Thus, the paper focuses in the second section on issues relating to minority education in the international order under the Minorities Treaties, and then in one domestic order, the United States, under one particular constitution. Education is one of the critical contexts for the application of any political idea. It is through education, whether in the home¹⁰ or in private (non-state) schools, that minorities of all kinds

8. ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 177 (1992).

9. *Id.* at 178 (citation omitted).

10. Elshtain has noted that the family is often attacked as "the example par excellence of imbedded particularity." Jean Bethke Elshtain, *The Family and Civic Life*, in *REBUILDING THE NEST* 119, 121 (David Blankenhorn et al. eds., 1990).

For family rights and language rights, see *The Belgian Linguistics Case*, 31 Eur. Ct. H.R. (ser. A)(1968). For a digest of the case, see MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW*, 183-85 (1990). The court found that the Belgian system on geographic

create new generations of people identifying themselves as members of that minority. Thus it has been noted that "[t]he autonomy of the family defines an often unrecognized condition for the transmission of religious and ethnic pluralism from one generation to the next."¹¹ It is also through public education, or publicly enforced norms of education in private schools, that the central structure asserts its values. The problem becomes, then, not the issue of the classification of groups but rather our sense of the role of the state. We have recently seen the state occupying a large space and incorporating most significant values. With an emphasis on groups, and the fluid aspects of group affiliations, we may find it useful to refine our position on these issues. The present paper suggests some questions to consider in doing so.

I. THE LEAGUE OF NATIONS AND THE MINORITIES ISSUE

The co-existence of several nations under the same State is a test, as well as the best security of its freedom. It is also one of the chief instruments of civilisation; and, as such, it is in the natural and providential order, and indicates a state of greater advancement than the national unity which is the ideal of modern liberalism.

Lord Acton¹²

A. *The Nature of the State*

The idea that states should be composed of one people is old, with people referring often to ideas of ethnicity and nationality. Rogers Brubaker offers some detail. He describes a model of the national state — the state composed of a culturally homogeneous nation — and summarizes a number of ideas associated with that model. One of these ideas has to do with the concept of the nation, and the point that "state membership should be based on nation-membership."¹³ The goal is that

[t]he political community should be simultaneously a cultural

division for language instruction was incompatible with Article Two of the First Protocol of the European Convention on Human Rights, which provides for respect for the "rights of parents." *Id.* at 183.

11. JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY* 59 (1983).

12. JOHN EMERICH EDWARD DALBERG-ACTON, *Nationality*, in *ESSAYS ON FREEDOM AND POWER* 166, 185 (2d prtg. 1949).

13. William Rogers Brubaker, *Introduction to IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA* 1, 4 (William Rogers Brubaker ed., 1989)(emphasis omitted).

community, a community of language, mores, or belief. Only thus can a nation-state be a nation's state, the legitimate representative and authentic expression of a nation. Those aspiring to membership of the state must be or become members of the nation. If not (presumptively) acquired through birth and upbringing, such nation-membership must be earned through assimilation.¹⁴

The goal of creating a complete identification of state and nation has been attempted by those who under various slogans — currently of course “ethnic cleansing” — have attempted to expel minorities, sometimes in the expectation that another nation, perhaps “their” nation, would accept them, sometimes without any expectation or plan beyond the expulsion itself.

1. Population Exchanges

The idea of population exchanges in the interest of homogeneity is at least one step beyond simple expulsion. The experiments undertaken by the League of Nations in relation to the Greek, Bulgarian and Turkish populations in the early twentieth century were an attempt to work out a difficult problem under international authority, with a certain regard for the welfare of the populations being exchanged.¹⁵ A study in 1932 by Stephen Ladas describes the exchanges as a “supplement” to the Minorities Treaties and details the steps intended for protection of the property claims of the exchanged populations.¹⁶ While

14. *Id.* at 4. The naturalness of this idea is so great that we do well as a corrective to juxtapose it with an observation of Ralph Waldo Emerson:

In dealing with the State we ought to remember that its institutions are not aboriginal, though they existed before we were born; that they are not superior to the citizen; that every one of them was once the act of a single man; every law and usage was man's expedient to meet a particular case; that they all are imitable, all alterable; we may make as good, we may make better.

RALPH WALDO EMERSON, *Politics*, in *ESSAYS* 199 (2d series, Houghton Mifflin 1903)(1876).

To the ideology of nationalism as a centralizing force, one can add the impact of different but equally unifying ideas derived from Marxism-Leninism or religious traditions.

15. The model was invoked by Rebecca West in the character of Gerda, who refers to the Slavs in Germany, saying “[b]ut if all the Wends are Slavs . . . why do we not send them out of Germany into the Slav countries, and give the land that they are taking up to true Germans?” REBECCA WEST, *BLACK LAMB AND GREY FALCON: A JOURNEY THROUGH YUGOSLAVIA* 507 (Penguin Books 1982)(1941). Gerda is a generally unpleasant figure. West's book was written, she says, to explain what a typical (hardly) English woman in the late 1930s understood about the causes of the, as she understood it, inevitable war with Germany. *Id.* at 1089.

16. See generally STEPHEN P. LADAS, *THE EXCHANGE OF MINORITIES: BULGARIA, GREECE AND TURKEY* (1932).

the Turkish-Greek exchange was compulsory, the Bulgarian-Greek exchange was voluntary. The purpose of that exchange was outlined in the advisory opinion of 1930 concerning the Greco-Bulgarian Communities:

The general purpose of the instrument is by as wide a measure of reciprocal emigration as possible, to eliminate or reduce in the Balkans the centres of irredentist agitation which were shown by the history of the preceding periods to have been so often the cause of lamentable incidents or serious conflicts, and to render more effective than in the past the process of pacification in the countries of Eastern Europe.¹⁷

Patrick Thornberry sees the compulsory Turkish-Greek exchange¹⁸ of population in the 1920s as an effort whose central thrust was not protection of minority rights. Thus, he writes of the 1923 Greek-Turkish Convention that it is a "notorious inter-war example of a treaty exhibiting a reverse [non-protective] tendency."¹⁹ Thornberry concludes that "[t]he transfer, which involved appalling human misery, was initiated by a treaty which represents the crudest expression of State power over individuals and groups."²⁰

17. Advisory Opinion No. 17, Greco-Bulgarian "Communities," 1930 P.C.I.J. (ser. B) No. 17, at 19 (July 31).

18. The Convention signed at Lausanne in 1923 provided that "[a]s from the 1st May, 1923, there shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in the Greek territory." PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 51 (1991) (noting that Article 1 provides that these parties were not to return to live in the respective countries of origin unless authorized by the relevant governments). See generally LADAS, *supra* note 16. See also ROBINSON ET AL., *supra* note 1, at 57 (calling the exchange a "drastic repudiation" of the purpose of the Treaties); and ISTVÁN BIBÓ, *The Distress of the East European Small States* [1946], in *DEMOCRACY, REVOLUTION, SELF-DETERMINATION: SELECTED WRITINGS* 71 (András Boros-Kazai trans., Károly Nagy ed., 1991).

19. THORNBERRY, *supra* note 18, at 51.

20. *Id.* The central group definition used was religious. Moslems were to go to Turkey, even if "Greek," while Greek Orthodox Turks were to go to Greece.

Professor Olympiad Ioffe provides an example of a state imposing a group membership without necessary relation to the standards used by the group itself. He describes the practice of the Soviet Union in imposing the label "Jew" on non-Jews seeking emigration who were going to Israel. OLYMPIAD S. IOFFE, *HUMAN RIGHTS* 29 (1983).

See also the discussion of whether Jew is an ethnic or religious term in note 82, *infra*. Note the differences, even in the Holocaust, of this aspect of the definitional problem. Hitler used a racial definition and the Bulgarians used a religious definition, and thus the latter provided escape for some Jews who converted. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933-1945*, at 388 (1975).

By the time the story of the Turkish-Greek exchange was told in 1931, the League of Nations

The exchanges remain controversial, particularly to the extent that they were compulsory.²¹ When Fridtjof Nansen, League of Nations Commissioner on Refugees, defended the exchanges, he did so on a very limited basis.²² Turkey had already expelled many Greeks, and "there could be no question that the Turks intended to expel the few who remained. Surely it was all to the good that this should be done in a legal manner with proper safeguards, thereby, *inter alia*, securing their economic interests."²³

But the populations exchanges are remembered as one solution to an apparently intractable problem. Thus others faced with issues apparently equally intractable have occasionally invoked their example.²⁴

2. The Minorities Treaties²⁵

An experiment under the League of Nations in many ways more congenial was established under the treaties imposed on a number of

could have dropped out of the narrative. Thus, *The New York Times* of November 11, 1931, reported the facts of the exchange in a way which eliminated the role of the League.

Istanbul, Nov. 10. — The Foreign Minister telegraphed today to all Turkish consuls authorizing them to issue visas to exchanged Greeks desiring to revisit Turkey

The exchanged Greeks are those former Grecian residents of Turkey who were expelled by the Angora Government a decade ago. In retaliation for this action Greece expelled all Turkish subjects from her territories.

Turkish Consuls to Issue Visas For Visits by Exchanged Greeks, N.Y. TIMES, Nov. 11, 1931.

21. It should be noted, however, that duress may be involved in even voluntary exchanges.

22. FRIDTJOF NANSEN, *ARMENIA AND THE NEAR EAST* 23ff. (Da Capo Press 1976)(1928).

It may be objected that it was hard for the Turkish population in Greek territory to be compelled to leave their peaceful homes, where they had not been interfered with; and there is no denying that they had to suffer for the sins of their kinsmen in Turkey. But the intention was that they should receive full compensation, and they should get plenty of fertile land that had been left untenanted in Eastern Thrace and Asia Minor, where they could settle among people of the same race and faith. There appeared to be no doubt that this plan would give good results in the future, by creating more homogeneous populations and removing one chief cause of the endless conflicts, often attended by massacres, in the Near East.

Id. at 25.

Fridtjof Nansen, (d. 1930) the Norwegian explorer, was head of the League of Nations Commission on Refugees. He was highly regarded for his work, which included an unsuccessful attempt to devise a solution to the Armenian issue. *Nansen Dies at 68*, N.Y. TIMES, May 14, 1930, at 1, 14.

On "Nansen passports," certificates for stateless persons, see MICHAEL R. MARRUS, *THE UNWANTED: EUROPEAN REFUGEES IN THE TWENTIETH CENTURY* 94-95 (1985). The documents were recognized finally by 51 countries.

23. NANSEN, *supra* note 22, at 25-26.

24. See PALESTINE ROYAL COMMISSION REP., PRESENTED BY THE SECRETARY OF STATE FOR THE COLONIES TO PARLIAMENT BY COMMAND OF HIS MAJESTY, 1937, CMD. 5479, at 389-93.

25. These are sometimes referred to as "Minorities Treaties" and sometimes as "Minority"

nations after the First World War whose purpose, at least in part, was understood to be the protection of certain minorities, particularly ethnic, linguistic, and religious. These treaties were between governments, in the conventional sense.²⁶

These treaties, broadly speaking, assured the rights of internal minorities in countries whose majority populations were understood to be different ethnically, nationally, or religiously. The Treaties were signed between 1919 and 1920 by the Allies with five states: Poland, Czechoslovakia, Romania, Yugoslavia and Greece.²⁷ Minorities clauses were incorporated in treaties with four defeated states: Turkey, Austria, Bulgaria and Hungary.

It was stressed in 1945 that the objective of the Treaties, though involving protection of minorities, had not been primarily humanitarian, but rather political. Reviewing various forms of international protection, the former director of the Minorities Questions Section of the League of Nations, Pablo Azcárate, wrote: "The essential aim of [one kind of] protection might be to shield the minorities from the danger of oppression by the majorities and from the pain and suffering, both moral and material, which such oppression necessarily causes."²⁸

A system like that could be called humanitarian. But the League system was not like that. "The object of the protection of minorities

treaties.

On historical background relating to the Treaties, including the drafting of the Treaties, see particularly C. A. MACARTNEY, *NATIONAL STATES AND NATIONAL MINORITIES* (Russell & Russell 1968)(1934).

26. Thus the idea that the groups themselves might be sovereign and appropriately party to treaties is not invoked here. An initial caveat is in order. To say that rights are guaranteed by treaties or constitutions is not to say that they will be honored in fact, or even that they will be ultimately vindicated by a judicial system theoretically committed to the rule of law when they are violated by governments which reject the rule of law. There are examples of constitutional statements too unreal even to be considered in the category of legal propositions expressive of values even when they are not the instrumental values of the society. And a rule of law which is honored in fact may, as in the case of group libel legislation in Nazi Germany, not operate to the benefit of groups which are in theory the beneficiaries of such legislation.

27. Romania, Yugoslavia (Serb, Croat, Slovene State) and Greece were on the Allied side during the war. Poland and Czechoslovakia were new states. The nations bound by the Treaties might be also minorities in other states. Thus, Theodore Woolsey wrote in support of the provisions on minorities: "We recall the repeated efforts of Prussia to stamp out language and spirit of nationality in her Polish subjects, and still more those of Russia." Theodore S. Woolsey, *The Rights of Minorities Under the Treaty with Poland*, 14 AM. J. INT'L L. 392, 392 (1920).

Some states (e.g., Albania) made Declarations to the League on the question of minority rights. See text accompany note 108.

28. PABLO DE AZCÁRATE Y FLÓREZ, *LEAGUE OF NATIONS AND NATIONAL MINORITIES: AN EXPERIMENT* 14 (Eileen E. Brooke trans., 1945).

which those treaties committed to the League of Nations was to avoid the many inter-state frictions and conflicts which had occurred in the past, as a result of the frequent ill-treatment or oppression of national minorities."²⁹

The model for all the Treaties was the Polish Treaty, signed at Versailles in 1919. The Polish Treaty called for what were later termed negative and positive rights. The negative rights were what Americans would probably refer to as rights relating to equal treatment, or based on the idea of non-discrimination.³⁰ The positive rights called for the state to act to promote group interests.

Articles two, seven, eight, and nine indicate the spirit and tone of all of the Treaties. Article two provided that "[a]ll inhabitants of Poland shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals."³¹

Article seven provided for equality before the law and equal civil and political rights for all Polish nationals without distinction "as to race, language or religion."³²

Article eight provided:

Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals. In particular, they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions,

29. *Id.* Writing in 1934, Macartney agreed that the Treaties were not primarily humanitarian, seeing the goals as peace, (first); through stability of the treaty countries, (second), which had been often jeopardized by mistreatment of minorities, (third). MACARTNEY, *supra* note 25, at 279. He also thought, as against the group or collective rights reading of the Treaties (held then and now by various writers), that the Treaties were essentially built on the modern idea of the nation-state, without intermediate sovereign or quasi-sovereign groups. *Id.* at 283. Thornberry also writes that the Treaties were not group centered. THORNBERRY, *supra* note 18, at 48.

More recently, Robert Cover read the Treaties as premised on the idea "that the nation-state, ordinarily dominated by a single racial, religious, or ethnic group, might fail to afford the benefits of its political processes to the racial, religious, or ethnic minorities within the state." Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1298 (1982) (reading the Treaties in relation to footnote four of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

The Treaties are also discussed in H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1958).

30. See generally Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

31. The Treaty with Poland, June 28, 1919, chap. I, art. II, 225 Consol. T.S. 412 (entered into force Jan. 10, 1920), reprinted in THORNBERRY, *supra* note 18, at 399, 400.

32. *Id.*, art. VII, reprinted in *id.* at 401.

schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.³³

Article nine provided:

Poland [must] provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Polish nationals through the medium of their own language.³⁴

The Polish government could, however, make the teaching of the Polish language obligatory. State funding of minority schools was also authorized where there "is a considerable proportion of . . . minorities."³⁵

The Polish Treaty contains two clauses directly referring to the rights of Jews (particularly sabbatarian rights), a reference explained by Georges Clemenceau, President of the Peace Conference, as necessitated by the history of the Jews in Poland.³⁶ In his letter transmitting

33. *Id.*, art. VIII, *reprinted in id.*

34. *Id.*, art. IX, *reprinted in id.*

35. *Id.* at 402. As historian Salo Baron noted, there is a range of claims associated with the idea of group autonomy rights. One idea relates to control of schools, cultural institutions and the goal of a plural society. But in addition, he writes, wherever possible, "the minorities also sought to secure the right to collect a proportionate part of the governmental expenditures for schools, hospitals, and other cultural and charitable institutions." SALO W. BARON, *ETHNIC MINORITY RIGHTS: SOME OLDER AND NEWER TRENDS* 4 (1985). And, he adds, in some cases "national minorities demanded, and occasionally obtained, quotas in political elections, for the most part in the form of electoral *curias* with each minority being allotted a percentage of officials to be elected equal to its percentage in the population." *Id.* On this issue at the Peace Conference, see DAVID HUNTER MILLER, *13 MY DIARY: AT THE CONFERENCE OF PARIS* 56 (1924)(diary entry, May 16, 1919).

36. Letter from Clemenceau to M. Paderewski (June 24, 1919), in H. W. V. TEMPERLEY, *5 A HISTORY OF THE PEACE CONFERENCE OF PARIS* 432 (H. W. V. Temperley ed., 1921)(transmitting the Treaty to M. Paderewski, one of the signers for Poland). For Paderewski's view on the Treaties generally, see his comments in MILLER, *supra* note 35, at 171-79 (*Report of Committee on New States, Memorandum by M. Paderewski*, dated June 15, 1919).

See generally on the Jews in Poland in the period of the First World War, ARTHUR L. GOODHART, *POLAND AND THE MINORITY RACES* (1920). Goodhart was counsel to a factfinding mission appointed by President Wilson to investigate reports of the murder of Jews in Poland.

Other treaties mentioned other minorities specifically. See, e.g., THORNBERRY, *supra* note 18, at 43 (referring to the Szeklers and Saxons of Transylvania, the Vlachs of Greece, and the Ruthenes of the Carpathians).

In addition, some treaties made provisions for the application of personal (Muslim) law. E.g., the Serb-Croat-Slovene Treaty, art. 10, *reprinted in* TEMPERLEY, *supra*, at 451.

See also the treaty with Czechoslovakia, providing in Article 10 that Czechoslovakia under-

the Polish Treaty, Clemenceau wrote as to the special provisions for Jews:

The information at the disposal of the Principal Allied and Associated Powers as to the existing relations between the Jews and the other Polish citizens has led them to the conclusion that, in view of the historical development of the Jewish question and the great animosity aroused by it, special protection is necessary for the Jews of Poland. These clauses have been limited to the minimum which seems necessary under the circumstances of the present day, viz. the maintenance of Jewish schools and the protection of the Jews in the religious observance of their Sabbath. It is believed that these stipulations will not create any obstacle to the political unity of Poland. They do not constitute any recognition of the Jews as a separate political community within the Polish State.³⁷

The Treaties generally are often viewed as a failure.³⁸ They did not prevent the Second World War and they did not ultimately protect vulnerable minorities. And of course they were politically suspect insofar as they were imposed by the victors on others, but not on themselves, despite the fact that the victors also had significant minorities

takes to constitute the Ruthene territory as "an autonomous unit within the Czecho-Slovak State, and to accord to it the fullest degree of self-government compatible with the unity of the Czecho-Slovak State." Treaty Between the Principal Allied and Associate Powers and Czecho-Slovakia, Sept. 10, 1919, art. 10, No. 20, Cmd. 479, *quoted in* TEMPERLEY, *supra*, at 465. In general, the Treaties did not speak of autonomous units.

For a description of minorities covered by the Treaties, see MACARTNEY, *supra* note 25, at 518-42 (appendix III).

37. Letter from Clemenceau to M. Paderewski (June 24, 1919), *in* TEMPERLEY, *supra* note 36, at 436.

38. See generally ROBINSON ET AL., *supra* note 1. For recent discussions on the rights of groups and indigenous populations, see generally THE RIGHTS OF PEOPLES (James Crawford ed., 1988) (collecting essays on the subject of peoples or group rights in the international context); Symposium, *The Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1195 (1991) (collecting essays on national, ethnic and minority rights); NATAN LERNER, GROUP RIGHTS IN INTERNATIONAL LAW (1991). Articles on human rights often include at least a brief description of the Minorities Treaties as background to current issues. See, e.g., András B. Baka, *The European Convention on Human Rights and the Protection of Minorities Under International Law*, 8 CONN. J. INT'L L. 227 (1993).

The League in 1922 also adopted a provision referring to the obligation of loyalty to the state which was imposed on the minorities. See Asbjorn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311, 1319 (1991).

For a detailed examination of the Treaty provisions, see also ROBINSON ET AL., *supra* note 1, at 36ff.

issues to deal with.³⁹

But the failures of the Treaties are not the only things recalled. Jacob Robinson and his associates, for example, saw the strengths of the system, and more recently, Natan Lerner has said:

Among the merits of the system, the following should be stressed: minority schools were established in several countries; neglected groups were rehabilitated; forced assimilation was resisted; and representatives of democratic minority groups could play a role in the political affairs of countries such as Czechoslovakia and Latvia. Moreover, the methods of mediation and conciliation produced some results, and the Permanent Court of International Justice contributed to the protection of minorities with important decisions, of great value even today.⁴⁰

David Weissbrodt, one of a number of contemporary authorities in the field of human rights to include a discussion of the Minorities Treaties as a background to a current discussion, sees the system as "the first extensive multilateral system for the protection of minorities."⁴¹

A failure or not, the Treaties are considered to have been superseded by the current United Nations materials on international human rights.⁴² It is often noted, however, that the current material does not focus explicitly on issues of minorities, or indeed of collectivities, but largely addresses issues in terms of the rights of individuals. This is sometimes viewed as a weakness in the present human rights effort. But it is also possible to see the question differently. Arcot Krishnaswami, rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, writing in 1960, understood that the limitation to specified groups in the Minorities Treaties was a weakness. The guarantees "applied only in respect of members of racial, religious or linguistic minorities," he wrote.⁴³ While in the Uni-

39. Robinson offers an elaborate statement of the problems. See generally ROBINSON ET AL., *supra* note 1. In 1934, Poland in effect renounced its duties under the Minorities Treaty. *Id.* at 178-79. By 1939, Thornberry concluded, the system had stopped functioning. See THORNBERRY, *supra* note 18, at 46.

40. LERNER, *supra* note 38, at 11.

41. David Weissbrodt, *Human rights: an historical perspective*, in HUMAN RIGHTS 1, 3 (Peter Davies ed., Guernsey Press 1991)(1988).

42. See THORNBERRY, *supra* note 18, at 52ff.

43. ARCOT KRISHNASWAMI, STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, at 12, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60.XIV.2 (1960).

versal Declaration of Human Rights, "[e]veryone has the right to freedom of thought, conscience and religion."⁴⁴

While some commentators call for more explicit recognition of group rights and status⁴⁵ others have been cautious about the issues of groups in the law. American discomfort with certain aspects of the European group experience remains clear. For if the idea of the group rights has in it the goal of compensation for historic violence and injustice perpetrated against innocent people, it also has the idea of the privileges of the caste and the estate systems. Thus one has this description of the constituted bodies of the eighteenth century: "Most of them had in fact originated in the Middle Ages. Persons did have rights as members of groups, not abstractly as 'citizens,' and all persons had some legal rights, which, however, approached the vanishing point for serfs in Eastern Europe and slaves in America."⁴⁶ Perhaps with an eye on such issues, it has recently been said that the system of human rights should not serve as a cover for the reintroduction of privilege,⁴⁷ and is sometimes noted that the recognition of a group right does not yet reach the possible conflicts between group rights and individual rights.⁴⁸

B. *Some Unresolved Issues*

1. Groups and Individuals

One version of the debate over groups and the state sees groups as essentially without contemporary meaning. That is, religious and ethnic groups are atavistic survivals of dying tribalism whose disappearance is

reprinted in 11 N.Y.U. J. INT'L L. & POL. 227-96 (1978). Arcot Krishnaswami (M.A., Cambridge and Ph.D., London), an Indian barrister, published *The Indian Union and the States*, a book on Indian federalism, in 1964.

44. KRISHNASWAMI, *supra* note 43, at 12. See also the International Covenant on Civil and Political Rights:

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 practise their own religion, or to use their own language.

International Covenant on Civil and Political Rights. Dec. 19, 1966, art. 27, 999 U.N.T.S. 171.

45. See generally Vernon Van Dyke, *Justice as Fairness: For Groups?*, 69 AM. POL. SCI. REV. 607 (1975); THORNBERRY, *supra* note 18.

46. R. R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA. 1760-1800*, at 29 (1959).

47. Eide, *supra* note 38, at 1346.

48. E.g., LERNER, *supra* note 38, at 150.

to be expected and welcomed as people come more and more to believe and appreciate the same sorts of things. Julian Huxley is used in Part II of this paper to represent a position along these lines.

Another version of the debate sees all groups as equally good — giving perhaps a slight edge, on food at least, to one's own group — and as not raising serious issues of contested value. Tolerance and respect are demanded for all groups against what is seen as a continuing background of groundless hatreds, murderous prejudices, and irrational discrimination. Where we see social facts underlying the hatreds and the prejudices, we say that these may explain some behavior, but cannot justify it, and note that the "facts" are in any case quite often untrue.

Yet another version attempts to say that, in effect, even if we agree that groups have a right to existence, relativism and toleration stand on a base of something agreed upon, and that some groups may really be given to bad practices, directed to their own members or outsiders or both. Their right to existence is then qualified by the idea that we hope we can modify their practices — issues relating to the status of women provide a clear example — and the mode of their existence.⁴⁹ Somehow one must decide, globally and country by country, where the lines are.

An American theorist once observed on the issue of groups, individuals, and the state that she was "advocating throughout the group principle, but not the group as the political unit. We do not need to swing forever between the individual and the group. We must devise some method of using both at the same time."⁵⁰ Mary Parker Follett's sense of what was needed holds true still. Liberal theory has conventionally assumed that groups result from the choice of individuals, essentially each group being created by a real or fictional social contract. To speak of a conflict between an individual and a group is then really

49. This attempt by the outside to influence a group is of course an issue about appropriate uses of state power. It also presents a problem under, for example, Capotortis' discussion of minority, which often includes the idea of loyalty to the true faith of one's forefathers. Francesco Capotorti, *The Protection of Minorities Under Multilateral Agreements on Human Rights*, 2 ITALIAN Y.B. INT'L L. 3, 14, 18 (1976). Change, whether or not state-fostered, becomes a reason to challenge the legitimacy of the group.

50. MARY PARKER FOLLETT, *THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT* 292 (1918). She continued: "But my relation to the state is always as an individual. The group is a method merely." *Id.* "[N]o one group can enfold me, because of my multiple nature. . . . But also no number of groups can enfold me. This is the reason why the individual must always be the unit of politics, as group organization must be its method." *Id.* at 295.

to speak of a conflict between one individual (or set of individuals) and another set of individuals, claiming to represent the group. While it has been noted that this view of groups as resulting from the choices of individuals misrepresents to some degree the psychological situation — since individuals do not perceive themselves as creating certain groups, but rather often feel that the groups were there first⁵¹ — it seems also to be true that this last observation, primarily empirical, is matched by the opposite observation, which is that individuals often feel themselves to be the founders of groups, whether these are associations, or intentional communities, or families. The relationship works then in two directions: individuals create groups and groups shape individuals.⁵²

If “groups” is a short-hand for “created in fact or in meaning by individuals,” saying that groups have rights is simply another way of saying that individuals have rights. Indeed, much of the American discussion about groups is not about the question of whether groups have rights but rather about the question whether the group affiliations of individuals should be given more weight than has been traditional in the American legal system. Thus, when Aviam Soifer argues for the importance of group life or the historical group experience, he is not suggesting a shift to a group rights approach from an individual rights approach. Rather, he is adding depth to an individual right of association by adding a group dimension to our understanding of what is at stake in a controversy.

51. See on this point, Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 106ff. See also JACQUES PRESSER, *THE NIGHT OF THE GIRONDISTS* (Harvill/Harper Collins 1992) (1957), for a fictional account of complex self-identification and crisis of an assimilated Dutch Jew who assists the Nazis during the Holocaust.

The complexities of individual identity raise issues which cannot comfortably fit within the two categories public/private. To begin with, one needs a third category, perhaps “inner,” and then one raises the question of the relation of that inner to what are conventionally considered the public and private spheres. Sometimes one has an inner identity within a public sphere (whether it is governmental or market, as when one considers oneself primarily a citizen, or a professional), sometimes with a domestic/private sphere (as when one considers oneself primarily a mother). Depending on historical context, a religious affiliation could be inner, and either public or private.

Robert Musil's novel, *The Man Without Qualities*, identifies “at least” nine characters for the inhabitants of a country, as well as an inner tenth, still however shaped by one social situation. ROBERT MUSIL, *THE MAN WITHOUT QUALITIES* 34 (Eithne Wilkins & Ernst Kaiser trans., Perigee Books/G. P. Putnam's Sons 1980)(1953). The novel is set in the dying Austro-Hungarian Empire in Vienna, 1913.

52. Or, individuals (alone or in groups) create other individuals, continuously. See ANTON CHEKHOV, *THE DARLING AND OTHER STORIES* 3-22 (Constance Garnett trans., Ecco Press 1984)(1916), a story which can be read as describing a particularly uncentered woman, or as a story about the social de-centering of all women, or as a story about the human condition. Compare Tolstoy's reading, based on a view of woman's need to love, regardless of object. *Id.* at 25-26.

This observation may also be true of other academic explorations of these issues. When Yoram Dinstein says that the right to education must be thought of as a group right rather than an individual right because no individual can run a school, he seems to be saying simply that individuals can act collectively. He does not seem to be focused on a group right if by that we mean, for example, that the group right displaces any individual right of individuals (as it might under fascism, for example).⁵³ Indeed, Dinstein notes that "collective human rights retain their character as direct human rights" and are collective only in the sense apparently that "they shall be exercised jointly rather than severally."⁵⁴ Or perhaps they are collective because we believe that the individual has waived all rights by contract and given them to the group.⁵⁵

A fairly strong illustration of a group rights issue is the issue of a group's control over children lost or about to be lost through (illustratively) war, genocide, or even conventional adoptions. To the extent that the group has a claim independent of the claim or wishes of parents, one might say that this is a group right. But even here, the group can be understood as affiliated individuals, even though many of them

53. "Against individualism, the Fascist conception is for the State; and it is for the individual in so far as he coincides with the State . . ." Benito Mussolini, *The Doctrine of Fascism*, in *THE SOCIAL AND POLITICAL DOCTRINES OF CONTEMPORARY EUROPE* 166 (Michael Oakeshott ed., 2d ed. 1941).

And no groups, political, economic, or cultural, are outside the state. See generally Zeev Sternhell, *Fascist Ideology*, in *FASCISM: A READER'S GUIDE* 315 (Walter Laqueur ed., 1976).

Referring to material around the time of the New Deal, Aviam Soifer has noted that at the time of the New Deal, "[o]dious comparisons to Mussolini's fascist brand of syndicalism helped to underscore a pervasive American distaste for government recognition of groups. Judicial opinions and lawyers' arguments are full of references to the contrast between good old American individualism and the treatment of people in old world group terms." Aviam Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 MD. L. REV. 350, 366 (1989).

54. Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L COMP. L.Q. 102, 103 (1976).

55. Does inalienable right mean only a right that others cannot take away? Does it include the idea that individuals or groups cannot alienate it? There was an attempt in at least one case to renounce rights provided by the League, when minorities in Turkey said that they did not want to be protected by the Minorities Treaties. This was described by Julius Stone as a legal nullity (because the minorities were not parties to the Treaties). JULIUS STONE, *INTERNATIONAL GUARANTEES OF MINORITY RIGHTS: PROCEDURE OF THE COUNCIL OF THE LEAGUE OF NATIONS IN THEORY AND PRACTICE* 22-23 (1932). Louis Marshall described it as an outrage. LOUIS MARSHALL, *The Renunciation of Minority Rights by Turkish Jews*, in 2 LOUIS MARSHALL, *CHAMPION OF LIBERTY: SELECTED PAPERS AND ADDRESSES* 575-76 (Charles Reznikoff ed., 1957) (statement to the press on Aug. 10, 1926 on the action of Turkish Jews renouncing all national minority rights guaranteed by the Treaty of Lausanne (July 24, 1923)). See ROBINSON ET AL., *supra* note 1, at 81, 288.

are dead.⁵⁶

From a certain point of view, the most powerful group claim is that of the state itself, for example, in enforcing compulsory education over the objection of parents. But even this circles back to the question of whether the state is or is not an association of individuals through real or fictional consent.

The debate over group rights is based fundamentally on the idea that individuals who have been persecuted as a group should be acknowledged as a group in any public remedies.⁵⁷ This, more than logical necessity, would seem to justify reference to particular religious groups, for example, to Jews in the Polish Treaty where presumably a reference to sabbatarians would have done as well.

Acknowledgement of the past as well as solutions in the present require a discussion of the group idea, but not because a legal recognition of a group right is necessary for group life. Group rights can usually be easily understood in terms of individual rights. Individuals can associate in many forms, corporate and non-corporate for various purposes. For example, land can be held collectively through corporations or a system of individual trustees. And, as Boris Bittker points out in his discussion of group rights, the German reparations paid to Israel or to the conference on Jewish material claims against Germany were primarily payments made to the state which assisted refugee resettlement and to the group which, in effect, represented residuary legatees.⁵⁸

Perhaps we can ask what turns on the question. Clearly we can differentiate between different kinds of demands which are made by individual members of groups on the larger system. Sometimes it is a claim simply not to be discriminated against. In the strongest version of this idea, once the discrimination disappears, the group disappears also, since the group had no identification other than that caused by the injury imposed by the outside system. In the different context of the group autonomy idea, the members of the group seek some sort of cultural recognition, sometimes, as already noted, with claims for support

56. The customs of the Amish, for example, document the great respect paid the testimony of those who have died in the faith. (And such are, as Peter Taylor Forsyth once pointed out, the majority of the faithful . . .)

Franklin H. Littell, *Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?*, in *PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS* 72 (Donald A. Erickson ed., 1969).

57. Owen Fiss argues for a principle which recognizes historically disadvantaged groups. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107 (1976).

58. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 78 (1973).

or direct representation.

If we ask whether it matters if we address these issues in terms of something called an individual right or something called a group right, we might say that the difference would be revealed in the attitude of the outside state towards decisions made by the group over its own members. That is, the group issue is tested by the deference given by the state to, for example, the claims of the group to decide membership, discipline or educational issues. Ultimately, issues of groups and individuals will be what Crawford saw when he suggested that the question is finally about the issue of the minority of minorities.⁵⁹ Related to the issue of deference is the issue of representation, and the question: "Who Speaks for the Group?" This is clearly difficult in the case of disorganized groups, and is equally difficult, although different, in the case of highly organized groups.

The problem of minorities and recognition of minorities becomes one of control of minorities by the majority structure, at whatever level we see it operating. A nation-state may have to review the decisions of a (minority) smaller unit, governmental or non-governmental. The international community provides another substantive level of review of that decision and in that case the nation-state becomes an intermediate level.⁶⁰ If we view "living law pluralism"⁶¹ as good or inevitable, the question is what form of global or state political organization can sustain difference without disintegration.

It should be noted that difference is assumed in the present discussion to be good. And it is assumed, as the English philosopher Leonard Hobhouse put it, that "[e]ssentially political freedom does not consist in likemindedness, but in the toleration of differences; or, positively, in the acceptance of differences as contributing to richer life than uniformity."⁶² For Hobhouse, difference is dealt with as an aspect of individualism. The emphasis on individual rather than collective rights is justified by its focus on experience rather than form. Individuals of

59. James Crawford, *The Rights of People: 'Peoples' or 'Governments'?*, in *THE RIGHTS OF PEOPLES*, *supra* note 38, at 60. We behave as though communal or aboriginal societies are monolithic, though of course this is not true in fact and may or may not be a goal.

Problems of political federalism can be explored through the issue of state review of individual exclusion from community. See Carol Weisbrod, *Emblems of Federalism*, 25 U. MICH. J.L. REF. 1 (1992). See also illustration from Grotius, in *infra* note 173 and accompanying text.

60. This assumes a politically active and effective international community.

61. See Northrop, *supra* note 4, at 648.

62. LEONARD T. HOBHOUSE, *THE METAPHYSICAL THEORY OF THE STATE* 60 (Greenwood Press 1984)(1918). On Hobhouse, see generally JAN G. DEUTSCH, *SELLING THE PEOPLE'S CADILLAC: THE EDESEL AND CORPORATE RESPONSIBILITY* (1976).

course relate to communities, and individuals are not eternally self-separated, and egoism is not the truth of the world. But, as Hobhouse indicates, the focus on individuals is a recognition of the human situation:

It is . . . an effort to go back from institutions, laws and forms, to the real life that lay behind them, insisting that this was a life of individual men and women with souls to be saved, with personalities to be respected, or simply with capacity for feeling anguish or enjoying their brief span of life.⁶³

Individualism can also reappear in the idea that one's interest in group life and in the diversity of group life and even its sovereignty has its root in the problem of individual autonomy. There is, on the individual level, an analogue of the point which Acton made as to the growth of political liberty. Civil liberty for the individual, Acton argued, was a result of the conflict over centuries between church and state.⁶⁴ So too, one might say that the claims of groups to normative authority over individuals results in the freedom of those individuals to evaluate and finally to choose between those normative claims.⁶⁵

But even if we resolve the large issue of group and individual rights, other issues remain, many of which have been discussed recently in American scholarly and political discussion. For example, it is common now to find discussions of groups and group rights which distinguish between voluntary and involuntary groups.⁶⁶ American discussion

63. HOBHOUSE, *supra* note 62, at 26. He also notes that the danger exists that an emphasis on individual personality can be exaggerated "to the point of depreciating the common life" and that "criticism might degenerate into anarchy." *Id.* at 26-27.

64. ACTON, *The History of Freedom in Christianity*, in *ESSAYS ON FREEDOM AND POWER*, *supra* note 12, at 58, 62.

65. See a discussion of this point in the context of a treatment of Proudhon in ALAN RITTER, *THE POLITICAL THOUGHT OF PIERRE-JOSEPH PROUDHON* 210 (1969). Another emphasis sees the value of pluralism in the richness it brings to society. See AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987).

66. See, e.g., Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713 (1988). On these problems generally, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

Voluntary groups are said to be those which the individual chooses, and typical examples are clubs, churches and professional associations. Involuntary groups are those into which the individual is born, and typical examples here are ethnic groups and racial groups.

See Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 *WASH & LEE L. REV.* 381 (1991); John H. Garvey, *Introduction: The Rights of Groups*, 80 *KY. L.J.* 862 (1991-92). Garvey suggests that complexity and difficulties in the field can be illustrated by the case of the family which is voluntary from the point of view of the couple — marriage being a status based on contract — but involuntary from

has frequently raised the issue of the nature of the protection involved, whether this was to be thought of as an affirmative obligation to encourage the existence of the group, or simply a posture which did not directly injure the group. We have also reached the question of the systemic injuries created simply by minority status, particularly within the educational context where injury may derive from no specific oppression or insult but simply from the fact of minority status.⁶⁷ These questions were broadly involved in *Wisconsin v. Yoder*,⁶⁸ and resulted in Philip Kurland's comment that *Yoder* was basically an ecology case, presumably meaning that issues of group preservation were at the heart of the controversy.⁶⁹

But many explorations of group issues assume static (natural, involuntary) and relatively few (black-white; male-female) memberships. The present inquiry attempts to incorporate a recognition that the affiliations of individuals⁷⁰ are multiple and changing.

Here, the perspectives of sociologists are of interest.⁷¹ As Professor Daniel Bell wrote some time ago, the issue can be caught in the difference between "I, the subject" and "me, the object," i.e., the object in effect of labels used by others.⁷² Bell addresses the issue of possible group labels this way: "At particular times — *but usually in relation to an adversary, which gives it its political character* — one specific identification becomes primary and overriding and prompts one to join

the point of view of the children, born of the marriage. *Id.* at 862.

67. See Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 582, 584 (1993) (discussing the *Mozert* litigation).

68. 406 U.S. 205 (1971).

69. See Philip B. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 245 (1972-73).

70. See generally FOLLETT, *supra* note 50; GEORG SIMMEL, *CONFLICT AND THE WEB OF GROUP-AFFILIATIONS* (Kurt H. Wolff & Reinhard Bendix trans., Free Press Paperback ed. 1964) (1955); CHESTER I. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (Harvard Univ. Press, 1968) (1938).

71. See on the question of the definition of minority, one having nothing necessarily to do with numbers, HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY* (1981). Writers on human rights frequently address the issue of the definition of minority, sometimes contrasting the international definition with domestic or sociological definitions, sometimes assuming that the subject itself requires a definition focused on particular minority groups. See generally JULES DESCHÈNES, UNITED NATIONS ECONOMIC AND SOCIAL COUNSEL, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, PROPOSAL CONCERNING A DEFINITION OF THE TERM "MINORITY," U.N. Doc. E/CN.4/Sub.2/1985/31 (1985).

72. Daniel Bell, *Ethnicity and Social Change*, in *ETHNICITY: THEORY AND EXPERIENCE* 141, 159 (Nathan Glazer & Daniel P. Moynihan eds., 1975).

a particular group; or, one is forced into a group by the action of others.”⁷³ But he writes, “there is no general rule to state which identification it might be.”⁷⁴ Bell adds a discussion on the “range of diverse identities available.”⁷⁵ His category “socially deviant” raises serious issues for pluralism, since some identities may be anti-social or criminal.⁷⁶ The critical idea here is the floating and contextual nature of the paramount identification.

73. *Id.*

74. *Id.*

75. *Id.* at 159 n. 9. Bell lists the following as “*Intermediate Social Units*”:

1. Political parties
2. Functional groups
 - a. Major economic interests: business, farm labor
 - b. Segmented economic interest: for example, professional associations
 - c. Economic communal groups: for example, the poor, the aged, the disabled
3. Armies
4. Voluntary associations (for example, consumer, civic)
5. Age-graded groups (for example, youth, students)
6. Ethos communal groups (for example, the “community” of science)
7. Symbolic and expressive identifications
 - a. Regional (for example, Texans)
 - b. Socially “deviant” (for example, drug cultures, homosexual)

Id.

See Reisman for a list of groups not limited to traditional ethnic or religious groups which might in some contexts produce public disorder. W. M. Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 J. INT'L L. & POL'Y 29, 45 (1971). For a list of groups not limited to traditional groups which need protection, see Leon Lipson, *Piety and Revision: How Will the Mandarins Survive Under the Rule of Law?*, 23 CORNELL INT'L L.J. 191, 197 (1990).

76. One problem is that of creating political forms large enough to hold not only different ethnicities but groups — and new groups — which compete ideologically, groups whose differences can not be described as “merely” physical or cultural, but must be treated as significant and even possibly disturbing. This issue is litigated often in the United States in terms of the protections of the First Amendment’s guarantee of religious liberty. But it raises problems which go beyond “religious” differences to competing visions of the world, whether these are religious or secular.

It is also possible to distinguish between good and bad kinds of pluralism. Thus historian David Hollinger argues for a post-ethnic America, in which “affiliation on the basis of shared descent would be voluntary rather than prescribed.” David A. Hollinger, *Postethnic America* 2 CONTENTION 79, 79 (1992). He distinguishes between pluralism and cosmopolitanism, noting “cosmopolitanism is willing to put the future of every culture at risk through the critical, sympathetic scrutiny of other cultures . . . [while] pluralism is more concerned to protect and perpetuate particular, existing cultures.” *Id.* at 83. “Cosmopolitanism is more oriented to the individual, whom it is likely to understand as a member of a number of different communities simultaneously, while pluralism is more oriented to the group, and is likely to identify each individual with reference to a single, primary community.” *Id.*

2. The Problem of Self-Evidence

The Minorities Treaties are the products of an intellectual world in which two different issues are treated as self evident. The first is the question of membership, i.e., who is actually a member of a linguistic or religious or ethnic group. The second is the question of categories, and raises the distinct issue of which memberships are important, or which community memberships are relevant for what purposes.

About the first there is some writing,⁷⁷ and about the second it seems relatively little, possibly because self-evidence in this area seems to be created by history and experience. Those memberships for which people kill or die — now, in this place — it might be said, are the relevant ones. Frankfurter wrote as a member of the most “vilified and persecuted minority in history.”⁷⁸ His minority status had been relevant all too often.

Yet even here, one might wonder if this has not to do as much with cultural perceptions as universal truth. Those memberships for which people kill or die may be more complex than we are accustomed to think. We can attach the label “class” or “economic” to issues for which people have killed and died in the name of labels relating to race or ethnicity. Those persecuted for religious heresy may “really” (that is, through another lens) have been persecuted for intelligence or deviance. Physical differences, and whether or not they are considered significant or disabling, differences of age or sex, and whether they are judged positively or negatively in particular contexts, are similarly complex.⁷⁹ Individual group and national histories all bear the marks of construction and imagination.

a. *The Membership Issue*

Central to the question of minorities is the problem of identities and identification. It is not merely the question who or what is a minority, a highly contested issue in itself. It is also the general question: “Who is a What?” This relates essentially to the question: “Who

77. Notably BITTKER, *supra* note 58; MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984).

78. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943)(Frankfurter, J., dissenting).

79. Consider, for example, left-handedness or unusual weight. See Clyde H. Farnsworth, *Anti-Woman Bias Basis for Asylum*, N.Y. TIMES, Feb. 2, 1993, at A8 (discussing sex-based persecution as a basis for asylum in Canada). It is common for gays and lesbians to be referred to as minorities denied rights. On whether a physical characteristic is an asset or a liability, see H. G. WELLS, *THE COUNTRY OF THE BLIND AND OTHER STORIES* 536-68 (1911).

Wants to Know and for What Purpose?" Some of the complications of this question are familiar. They may be illustrated here by a figure in Rebecca West's book, *Black Lamb and Grey Falcon*. In the book, Constantine is a poet, and a Serb, "that is to say a Slav member of the Orthodox Church, from Serbia."⁸⁰ We are also told that his mother was a Polish Jew. His father was a Russian Jew. Constantine is "by adoption only, yet quite completely, a Serb."⁸¹ Constantine would seem to have various possible identifications. And his is, perhaps, an entirely common case.

There are cases in which one particular form of identification trumps all others, either in the mind of the individual or the practice of an outside group. Constantine would have been a Jew under some definitions and usages.⁸² People are in fact defined often by one thing, which thing is often something into which they have been born.⁸³ But in the American setting at least we have focused more and more on self-definition and on limiting the impact of those identifications which are not voluntary and on permitting freer choices of identities over a lifetime.⁸⁴ Some of the contexts in which we deal with these issues are difficult and even technical.⁸⁵ The basic point, however, is that as a culture we are concerned about ascribed statuses.

b. *The Relevant Group*

It is clear that the central issue of those pluralist structures with which we are familiar, the *millet* system of the Ottoman Empire⁸⁶ perhaps, or the Pillars of Dutch pluralism,⁸⁷ is that from the point of view

80. WEST, *supra* note 15, at 41.

81. *Id.*

82. On what it means (in terms of religion or nationality) to be a Jew in different nation-state systems, see SALO W. BARON, *HISTORY AND JEWISH HISTORIANS: ESSAYS AND ADDRESSES* 19 (1964).

83. See Soifer, *supra* note 66.

84. See generally LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985).

85. For a difficult context, see Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REF. 879 (1992). For a technical context, see Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (Fall 1988).

86. The *millet* is a term "for the organized recognized religion-political communities enjoying certain rights of autonomy under their own chiefs." BERNARD LEWIS, *THE POLITICAL LANGUAGE OF ISLAM* 39 (1988). See also LÉON OSTROROG, *THE ANGORA REFORM* (1927). "[I]n its spirit of extreme liberalism towards non-Moslem creeds, Mohammedan Law prescribes not only tolerance of, but strict non-interference with anything which, in the Mohammedan conception, is considered as being within the province of the special religious beliefs of Jews and Christians . . ." *Id.* at 79.

87. Pillarization refers to a system of differentiation in which the major social, political, and cultural institutions are segmented along religious-ideological lines. See AREND LIJPHART, *DE-*

of problems of individual identity, the structure itself imposes an answer to the question: "Which Identity Matters Most." (It may also impose an answer to the question: "How do We Determine that Identity?") But it may be that the *millet* system and the Pillars of the Dutch — petrified versions of what we commonly invoke as a "rainbow"⁸⁸ — are not the answer for a permanent or semi-permanent structure. These work for a period of time, when a number of groups are known, established, and of conceded importance within a particular society. Thus, Arend Lijphart suggested some time ago that the high point of Dutch pluralism — in the sense of pillarization — might already have been reached, and that now the society was not so segmented.⁸⁹ (Perhaps this is so because ethnic or religious affiliation is no longer as important as it once was, though class differences might remain significant.⁹⁰) Or it might be that in the Dutch case even a society once segmented, then integrated, is now simply to be segmented again, but along different lines, as by the entry of new immigrants.⁹¹ In which case there might be a role for pillars again.

And Horace Kallen's "cultural pluralism," while the term sticks, may not be the answer either. To begin with, cultural pluralism is a description finally of an attitude towards difference and at least as currently used, suggests no particular structures. Further, to the extent that Kallen himself thought in terms of "perfection of men according to their kind," it raises problems. What is "my kind" is exactly the point at issue.⁹² Kallen thought that certain identifications were perma-

MOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 5 (1977), who calls it consociationalism.

88. See Sullivan, *supra* note 66; Tony Hiss, *The End of the Rainbow*, THE NEW YORKER, Apr. 12, 1993, at 43, 44 (discussing the Rainbow Curriculum in New York City). On a "rainbow coalition," see Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 264 (Jan. 1989). Note that the rainbow is limited to primary colors on a spectrum which we can see. It is used as an image of diversity, but in fact may not be the image we need.

89. Arend Lijphart thinks that its high point has been over because the society is no longer so fragmented. LIJPHART, *supra* note 87, at 1-2, 52. But doesn't the introduction of the new immigrants into Dutch society raise similar questions again?

90. For a review of the American class structure, see generally PAUL FUSSELL, *CLASS* (1984). See also MEMOIRS OF MICHAEL KAROLYI, *supra* note 6, at 15 (noting Karolyi's cousin's identification of himself, always, as an aristocrat).

See generally JAY A. SIGLER, *MINORITY RIGHTS: A COMPARATIVE ANALYSIS* (1983).

91. For writing on problems relating to new immigrants, see chapters eight and nine of DUTCH DILEMMAS: ANTHROPOLOGISTS LOOK AT THE NETHERLANDS (Jeremy Boissevain & Jojada Verrips eds., 1989). See also JANWILLEM VAN DE WETERING, *OUTSIDER IN AMSTERDAM* (Pocket Books 1978) (1975).

92. HORACE MEYER KALLEN, *THE STRUCTURE OF LASTING PEACE: AN INQUIRY INTO THE*

nent and natural: "[A]n Irishman is always an Irishman, a Jew is always a Jew. Irishman or Jew is born; citizen, lawyer or church-member is made. Irishman and Jew are facts in nature; citizen and church member are artefacts in civilization."⁹³ It is a stance that omits a fair number of questions. They are, in fact, questions that are involved in the limitations of the Minorities Treaties.

The strength of the Minorities Treaties is the positive approach to the issue of minorities and group life. The limitation of the approach taken in those Treaties is that in effect they perpetuate the understanding of group life which characterized the *millet* system or Dutch pillarization. That is, the Treaties defined which particular group affiliations were important, which then tends to reinforce that importance.

The limit to religious or linguistic or national groups privileges the schools of those groups above, for example, schools whose relevant group was based on particular talents or ideas. It allows no room for a new group whose nature is presently unknown to the outside and possibly to its own members.

A central objective, then, becomes that of relating the idea of pluralist living law,⁹⁴ and associations which are not traditional national or religious groups, to the problem of the federalist framework.

II. EDUCATIONAL PLURALISM: AN APPLICATION

Since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed.

UNESCO Constitution⁹⁵

MOTIVES OF WAR AND PEACE (Haskell House 1974) (1918). See also DAVID A. HOLLINGER, IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS (1985); MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION AND NATIONAL ORIGIN 141-45 (1964); Philip Gleason, *American Identity and Americanization*, in HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 31 (Stephen Thernstrom, et al. eds., 2d prtg. 1981). Kallen suggested some structures, including an internationalization of education. See KALLEN, *supra*, at 174.

93. KALLEN, *supra* note 92, at 31.

94. Multiple codes surrounding the individual are described, *inter alia*, in BARNARD, *supra* note 70, at 267. Note a problem with Barnard's intuitive ordering of the codes. He puts protection of children first and the professional code second, with religion and citizenship codes last. But protection of the child itself, for example, may be derived from the religious code.

95. U.N.E.S.C.O. CONST. pmbl., quoted in JULIAN HUXLEY, UNESCO: ITS PURPOSE AND ITS PHILOSOPHY 5 (1947), who attributes the language to the labor leader Clement Atlee. 15 THE ENCYCLOPAEDIA JUDAICA 1566 (1971-72) says that the language is often attributed to the French socialist Léon Blum.

A. Universalism

One might recall, to begin with, the universalist efforts of Julian Huxley.⁹⁶ The grandson of T. H. Huxley, the grandnephew of Matthew Arnold, and the brother of Aldous Huxley, Julian Huxley, the first director of UNESCO, was distinguished as a scientist and a humanist. Interested always in large issues of human development, Huxley was a well-known writer on many subjects, including issues of evolution and humanistic religion. His appointment was indeed controversial because of his position on revealed religion.⁹⁷ But he also had a great vision for mankind based on ideas of evolutionary humanism.

Huxley wanted a universal world philosophy, and wrote: "In order to carry out its work, an organization such as UNESCO needs not only a set of general aims and objects for itself, but also a working philosophy, a working hypothesis concerning human existence and *its* aims and objects."⁹⁸ This would "dictate, or at least indicate, a definite line of approach to its problems."⁹⁹ At the time of writing, at least, Huxley thought that such an overview was essential. Without it, he thought, "UNESCO will be in danger of undertaking piecemeal and even self-contradictory actions; and will in any case lack the guidance and inspiration which spring from a belief in a body of general principles."¹⁰⁰

Huxley was essentially focused not on religion but on science. While he might have viewed his philosophy as a kind of religion, much of his discussion of religion sees religion in one of its historical roles, as an opponent of science. UNESCO, he said, "cannot and must not tolerate the blocking of research or the hampering of its application by superstition or theological prejudice."¹⁰¹ It must "disregard or, if necessary, oppose unscientific or anti-scientific movements."¹⁰² These movements included "anti-vivisectionist, fundamentalism, belief in mir-

96. This discussion is adapted from Carol Weisbrod, *The Brave New World of Julian Huxley*, Paper Delivered at the Amherst Conference on the "Paradox of Rights" (Nov. 6, 1992)(unpublished manuscript, on file with the *Connecticut Journal of International Law*, University of Connecticut School of Law). Huxley served for two years as director of UNESCO. Perhaps by that time he was overwhelmed by the practical problems of doing what he had in mind. And perhaps he saw, as others came to, that UNESCO had itself a political dimension and was a political organization. Just before his death in 1975 he criticized UNESCO for ostracizing Israel. *Julian Huxley, scientist and writer, dies, 87*, N.Y. TIMES, Feb. 16, 1975, at 1.

97. *Julian Huxley, scientist and writer, dies, 87*, *supra* note 96.

98. HUXLEY, *supra* note 95, at 6.

99. *Id.*

100. *Id.*

101. *Id.* at 37.

102. *Id.*

acles, [and] crude spiritualism."¹⁰³ He called for "widespread popular education . . . in the facts of science, the significance of the scientific method, and the possibilities of scientific application [which are required] for increasing human welfare."¹⁰⁴

But within a year or two Huxley had abandoned, if not the goal, at least the idea that UNESCO could achieve it. By the time of the republication of a part of Huxley's pamphlet in a volume published in 1949,¹⁰⁵ Huxley had given up the idea of UNESCO's formulating a world philosophy as an initial project. The single world philosophy was not feasible. Presumably Huxley had come to see what is so obvious to us, that is, the necessary particularisms involved in his version of universalism.

The Minorities Treaties had already, at least implicitly, considered and rejected the universalism of Huxley's approach in the provisions on minority education.¹⁰⁶

B. Minority Schools in Albania

One issue brought to the Permanent Court of International Justice¹⁰⁷ for an advisory opinion related to the status of minority schools in Albania, and the interpretation of Article Five of the Albanian Dec-

103. *Id.*

104. *Id.*

105. See JULIAN HUXLEY, UNESCO: ITS PURPOSE AND ITS PHILOSOPHY, reprinted in IDEOLOGICAL DIFFERENCES AND WORLD ORDER, 305 (F. S. C. Northrop ed., 1949).

Huxley said:

[S]ince I wrote the pamphlet my views have somewhat changed. In the first place, I do not now feel that UNESCO, in the present stage of its career, should even aim at formulating an explicit philosophy. This would at best lead to interminable and on the whole pointless debate, and might promote serious ideological conflict. What the first conference of UNESCO and our subsequent years' work have taught us is that UNESCO can best achieve its aims by undertaking a program of concrete and limited projects, and that on such a program a remarkable degree of agreement can be reached among delegates with astonishingly different philosophical, racial, and cultural backgrounds.

In the second place, although I still believe strongly in the need for the world to reach an eventual agreement on some basic creed or philosophy, I would now lay less stress on the urgency of this task and more on the immediate necessity of securing mutual comprehension between different and apparently alien or even hostile cultures, as the inevitable first step toward the later, unified "world philosophy."

Id. at 305.

106. United Nations documents on education continue to assert, in the context of parental rights, values besides the values of the state philosophy. See, e.g., *infra* notes 160 and 161 and accompanying text.

107. On the Permanent Court of International Justice, see Mark Janis, *The International Court*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 13 (Mark Janis ed., 1992).

laration of 1921, which states:

Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.¹⁰⁸

The background to the case is recalled by the historian Joseph Rothschild. He writes that Ahmed Zogu, upon becoming "Zog I King of the Albanians"¹⁰⁹ in 1928, attempted as part of a general political and cultural reform to deal with the schools: "The school system of the Roman Catholic church was closed in 1933, when Zog nationalized all education, but then reopened in 1936, upon the Franciscan Order's reluctant acceptance of state control and inspection."¹¹⁰ Rothschild notes:

[The nationalization] was an assertion of Albanian national pride specifically vis à vis Italian and Greek "paternalism," as the supervisory and pedagogical staffs of most religious and private schools were citizens of these two states and the ideological thrust of their teaching programs was felt to be the inculcation of their own national values into Albanian children.¹¹¹

The case on minority schools in Albania challenged a provision of the Albanian constitution of 1933 which gave the state entire authority over education: "The instruction and education of Albanian subjects are reserved to the State and will be given in State schools."¹¹² The Greek minority submitted petitions to the Council of the League of Nations under the procedures authorized,¹¹³ and in January 1935, the

108. Advisory Opinion No. 49, *Minority Schools in Albania*, 1938 P.C.I.J. (ser. A/B) No. 49 [hereinafter *Advisory Opinion No. 49*], at 485.

109. A formula, Rothschild remarks, which alarmed Yugoslavia, which had a substantial Albanian minority. ROTHSCHILD, *supra* note 6, at 362.

110. *Id.* at 364.

111. *Id.* Pomerance notes that the "repeal of the controversial provisions in the Albanian Constitution in accordance with the Court's guidelines effectively removed the grievance out of which the petition to the Council had arisen." MICHA POMERANCE, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N.* ERAS 340 (1973).

112. Advisory Opinion No. 49, *supra* note 108, at 485.

113. See STONE, *supra* note 55, for the necessary procedures.

Council requested the Court to give an advisory opinion on the interpretation of Article Five of the Declaration of 1921. Albania and Greece were both represented before the Court, as states best able to provide information to the Court.

The Albanian government argued that any "interpretation which would compel Albania to respect the private minority schools would create a privilege,"¹¹⁴ and further, that the "minority régime is an extraordinary régime, constituting a derogation from the ordinary law."¹¹⁵ This being so, in case of doubt texts should be "construed in the manner most favourable to the sovereignty of the Albanian State."¹¹⁶

The particular issue addressed by the Court was whether the treaties guaranteed simply non-discrimination or whether they guaranteed treatment for those protected by treaty provisions better than the treatment received by nationals in general. The Advisory Opinion elaborated the point that the central purpose of the Minorities Treaties was to protect group rights, and that this meant that a neutral principle of non-discrimination would not be adequate:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that pop-

114. Advisory Opinion No. 49, *supra* note 108, at 494-95.

115. *Id.* at 495.

116. *Id.* The Greek government urged a construction in light of the historical existence of community rights in the region.

A central problem for international human rights is the conflict between any idea of limitation on state power and the idea of sovereignty. See also for related issues, Joseph W. Singer, *Sovereignty and Property*, 86 Nw. U. L. REV. 1 (1992).

For a self-help manual on sovereignty, see ERWIN S. STRAUSS, *HOW TO START YOUR OWN COUNTRY* (2d-ed. 1984).

Issues of minorities are closely connected to questions of claims to particular territories. Minorities are frequently made so by shifts in territorial boundaries, and national minorities are sometimes discussed in terms of their [assumed] desire to either constitute or reconstitute a state or to join an existing state. The matter, however, is complex, on for example, the issue of knowing what the group is and what it wants.

The problems intensify when one considers minorities which are not national but rather religious, or finally "other," that is, groupings other than the traditional religious ethnic or racial groups. On the one hand, we might say that it is not clear that a [sovereign] territory is, for example, a characteristic demand of gays and lesbians, or persons with physical disabilities. On the other, we might conclude that issues of territory are involved, precisely because such groups, as much as ideological or political groups, may want to found communities or towns, or concentrate themselves in neighborhoods as an expression of their autonomy.

ulation and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.¹¹⁷

A dissenting opinion urged that the state interest had to have equal weight. In interpreting the treaty, the dissent said:

[T]he question whether the possession of particular institutions may or may not be *important* to the minority cannot constitute the decisive consideration. There is another consideration entitled to equal weight. That is the extent to which the monopoly of education may be of importance to the State. The two considerations cannot be weighed one against the other: Neither of them — in the absence of a clear stipulation to that effect — can provide an objective standard for determining which of them is to prevail.

International justice must proceed upon the footing of applying treaty stipulations impartially to the rights of the State and to the rights of the minority, and the method of doing so is to adhere to the terms of the treaty — as representing the common will of the parties — as closely as possible.¹¹⁸

As Schwebel notes, from the point of view of modern human rights, this opinion involves what is today called affirmative action.¹¹⁹ It

117. Advisory Opinion No. 49, *supra* note 108, at 496.

118. *Id.* at 504-05.

119. Stephen M. Schwebel, *Human Rights in the World Court*, 24 VAND. J. TRANSNAT'L L.

also echoes, more obviously in the European than in the American context perhaps, the older system of estates and privileges in a world in which groups and status dominated the political structure.¹²⁰ And it is possible to see the Treaties as raising issues for the republican or democratic state, particularly in its modern unified form. But it is also possible to see that modern states had sometimes adopted the view taken by the Treaties. Thus Clemenceau urged that "[t]he educational provisions contain nothing beyond what is in fact provided in the educational institutions of many highly organized modern States."¹²¹ He believed that "[t]here is nothing inconsistent with the sovereignty of the State in recognising and supporting schools in which children shall be brought up in the religious influences to which they are accustomed in their home."¹²² And as to language, he thought that "[a]mple safeguards against any use of non-Polish languages to encourage a spirit of national separation have been provided in the express acknowledgment that the provisions of this Treaty do not prevent the Polish State from making the Polish language obligatory in all its schools and educational institutions."¹²³

In fact, the precise delineation of control over the schools by the state was not accomplished in the Treaties. Jacob Robinson and his associates cited a number of questions left open and particularly the issue of state control over the minority schools:

The portions of the Treaties granting the minorities the right to establish, manage and control their own educational establishments also provoked many other questions. "Was the government free to prohibit or to close private minorities schools and associations?" "Was the state entitled to supervise such institutions?" "What was the relationship between those who established such schools and the state authorities, and what were the rights of the schools?" "In their schools and other institutions the minorities could use their language, but what

945, 951 (1991).

120. See R. R. PALMER, *THE WORLD OF THE FRENCH REVOLUTION* (1971), for a description of privileges in Europe.

121. Letter from Clemenceau to M. Paderewski (June 24, 1919) in TEMPERLEY, *supra* note 36, at 436.

122. *Id.*

123. *Id.*

was the extent of the right?" "Were the teachers obliged to know the State language?"¹²⁴

The approach of the Treaties to public support of minority education could raise a number of questions.¹²⁵ Americans, while of course they were not obligated to do anything under the Treaties, might have noted that in the United States there are objections, and constitutional problems, with public funding for sectarian schools, and in some quarters opposition to funding for any sort of private school.¹²⁶ And Clemenceau's reference to the children learning only that which they are taught in their homes anticipates an emphasis the United Nations documents, as well as the focus of those who view the educational issues for a society as very close to family autonomy issues.¹²⁷

The strongest statement of the danger posed by the radical decentralization possible under any of these international guarantees (either the limited approach of the Treaties or the broader family autonomy concepts in the later statements) is perhaps found in Homer's description of the social order of the Cyclops, who had "no muster and no meeting, no consultation or old tribal ways, but each one dwells in his own mountain cave dealing out rough justice to wife and child, indifferent to what others do."¹²⁸ But this particular danger seems remote in our present context, in which the greater threat seems to come from the powerful centers, governmental and non-governmental, of mass societies. The idea that the state has a responsibility to make room for and

124. ROBINSON, ET AL., *supra* note 1, at 68.

125. See *infra* note 158 and accompanying text.

126. Although of course private schools have been very important in the United States. The history of intentional communities, as well as the history of psychological movements, reveals an interest in private education which is essentially derived from a communal underlay which relates the issue of sub-groups and minorities to the issue of private education. See, for example, the discussion of educational radicalism in the chapter on the Ferrer Colony and the Modern School in LAURENCE VEYSEY, *THE COMMUNAL EXPERIENCE: ANARCHIST AND MYSTICAL COMMUNITIES IN TWENTIETH CENTURY AMERICA* 77-177 (Univ. of Chicago Press 1978)(1973).

127. The family is often viewed as a unity. Of course it is not. For one attempt at disaggregation, see Carol Weisbrod, *Family Governance: A Reading of Kafka's Letter to His Father*, 24 TOLEDO L. REV. (forthcoming 1993). On entity and aggregation in the family, see Lee E. Teitelbaum, *Intergenerational Responsibility and Family Obligation: On Sharing*, 1992 UTAH L. REV. 765 (discussing the continuing importance of the family). See also Stephen J. Roth, *Toward a Minority Convention: Its Need and Content*, 20 ISR. Y.B. HUM. RTS. 93 (1990). "For many minorities the family forms the nuclear group unit for their existence; the protection of the family is therefore of existential importance to minorities, just as the rights of the child are vital assurance of their continuity." *Id.* at 109.

128. HOMER, *THE ODYSSEY*, bk. 9, ll. 120-24 [p. 148] (Robert Fitzgerald trans., Vintage Classics ed. 1990)(1961).

even assist minority schools is central to the approach of the League of Nations, and has a parallel, (with a significant difference on the issue of subsidy) in American law.

C. *The American Experience*

An aspect of American exceptionalism has also to do with its approach to the issue of minorities.

In theory, the American system was uniquely designed to provide a social and political framework in which differences of race and culture could be maintained and enhanced according to their own genius and vitality at the same time that all individual members of the society are fused into a political and social system that assures equality of status and a decent measure of common belongingness and self-esteem to all.¹²⁹

But all this, Harold Isaacs comments, is "a tall, tall order."¹³⁰

The present American conversation raises problems similar to those discussed earlier. A basic illustration in the discussion of freedom of association is about discrimination on the basis of race, against a background of slavery and racism. The discussion of Native American claims typically begins with the narrative of the treatment of Native Americans by the "courts of the conqueror."¹³¹ The idea is that talking about the issue without the group history conceals rather than illuminates the problem. (And perhaps it is not necessary to resolve the question whether genocide¹³² is based on a group right — the right to group survival — or on an individual right — the right not to be murdered because of a group affiliation.) But often the American discussion concerns education.

The International Court of Justice case on the minority schools in Albania was curiously parallel to *Pierce v. Society of Sisters*,¹³³ American litigation of about a decade earlier, which, on the basis of princi-

129. HAROLD R. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE* 214 (Harvard Univ. Press 1989)(1975).

130. *Id.*

131. See Justice Marshall's opinion in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823). See generally Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1.

132. Lemkin's discussion of genocide included various kinds of genocide, including at least one which raises difficult questions. That is the "moral debasement" of a population through, for example, exposure to pornography. RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 90 (1944).

133. 268 U.S. 510 (1925).

ples peculiar to American constitutional law, reached a result similar to that reached by the Permanent Court of International Justice.

Before reaching that, however, a general comment of the relation of the approach of the Minorities Treaties to the American scheme may be in order, and the comments of one contemporary academic observer may serve as illustrative. Arthur Scott, Assistant Professor at the University of Chicago in 1920, attempted to explain why certain approaches were properly imposed on Eastern Europe but would not be proper in the United States. The minorities in America, he said, came voluntarily, presumably knowing what our institutions are and by implication accepting them. "If they find them unsatisfactory, they may go elsewhere."¹³⁴ By contrast, in central Europe, "the minorities are in few instances recent and voluntary immigrants."¹³⁵ Rather, they are people "settled in their districts for centuries," many "detached from the main body of their fellows by political events which they could not control."¹³⁶ Many of them, Scott wrote, "are given a citizenship which they do not desire."¹³⁷ For these reasons, "to reconcile them to the situation, it is necessary, as a measure of practical statesmanship, to grant them privileges which are entirely unnecessary in the United States."¹³⁸

134. ARTHUR PEARSON SCOTT, *AN INTRODUCTION TO THE PEACE TREATIES* 206 (1920). Of course the omission here of the history of Native Americans or the institution of slavery not only distorts the American experience but also makes comprehensible the grievance one might attribute, for example, to the Roumanians, who could easily have said that one state which had abolished slavery only in the nineteenth century (Roumania enslaved the gypsies until 1848 and refused civil rights to Jews much later) was being dictated to by another state (The United States), which had only abolished slavery in the middle of the nineteenth century, and had a somewhat problematic record on civil rights for Jews and Catholics through the nineteenth century which continued into the twentieth century. See MORTON BORDEN, *JEWS, TURKS AND INFIDELS* (1984).

135. SCOTT, *supra* note 134, at 206.

136. *Id.*

137. *Id.* The Coles suggest unqualifiedly that the First World War resulted in states having minority populations with "no loyalty" to the larger state. G. D. H. COLE & MARGARET COLE, *A GUIDE TO MODERN POLITICS* 32 (1934).

138. SCOTT, *supra* note 134, at 206. Scott included a discussion of the Jewish minority in Poland, noting that Sunday closing laws were not forbidden by the Treaties, and also were to be found in a number of American states. *Id.* at 207.

Jewish organizations were represented at the peace conferences by a number of delegations from various countries, among them the United States. See generally OSCAR I. JANOWSKY, *THE JEWS AND MINORITY RIGHTS (1898-1919)* (AMS Press 1966)(1933). Louis Marshall was a leader of these groups. Defending the Minorities Treaties, he rejected the idea that the Treaties were based on the idea of segregation:

When the Peace Conference convened in 1919 at Paris, it was recognized by President Wilson and other forward-looking statesmen that it would be essential in connection with the Treaty of Peace to protect racial, linguistic and religious minorities in the newly constituted countries and in those with which treaties of peace were to be consummated.

In fact the treaty provisions relating to education were not identical to American law on the subject of private education and in fact, in one respect they were opposed to that law. Thus, as Arthur Scott pointed out in his Introduction to the Peace Treaties, the United States did not permit public funding of religious education. "While we permit any privately supported school, notably the Roman Catholic parochial system, to teach any religion, in any language, we are opposed on principle to giving them any support from public funds."¹³⁹ ("Any" is perhaps too strong, but certainly the history of the parochial school funding issue over several decades indicates strong sensitivity on the question.)

On the language issue, the American position was (and continues to be) ambiguous. Scott in 1920 saw that while "[i]n some country districts a considerable part of the instruction in the elementary public schools was given in some other language than English," and when this fact came out during the war, "it was regarded with distinct disfavor."¹⁴⁰ The American point of view, Scott wrote with assurance "is that we do not want permanent communities in this country that are not able and willing to speak our language."¹⁴¹

The American discussion, perhaps not surprisingly, is focused on religious groups as much as ethnic or linguistic groups, particularly when the focus is normative diversity.¹⁴² Ethnicity itself may not have the role in the American setting that it has had in Europe (although race has, perhaps, had more importance in the United States) and tastes in food and music have not raised the sort of issues for the state that have been raised by the marriage and divorce regulations of different religions. Further emphasis on religious groups is made necessary by the particular American constitutional structure, which has channeled the discussion into a constitutional debate over the meaning of the religious liberty guarantees of the First Amendment. Issues may be

The prevailing idea was that there should be assured equal rights to all men in all lands. Those rights were to be the same as are conferred by the Constitution of the United States upon all persons dwelling within our land.

Letter from Louis Marshall to the Editor of the *American Israelite* (Aug. 23, 1926) in 2 LOUIS MARSHALL, CHAMPION OF LIBERTY *supra* note 55, at 577-78 (emphasis added).

Marshall contributed the amicus brief for the American Jewish Committee supporting the position of the private schools in *Pierce v. Society of Sisters*.

139. SCOTT, *supra* note 134, at 205.

140. *Id.* at 205-06.

141. *Id.* at 206.

142. See Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights* (1992 SUP. CT. REV. 295).

cast as religious issues exactly because individual conscience or tribal custom or ethnic tradition do not provide the basis for a free exercise defense.

*Pierce v. Society of Sisters*¹⁴³ is a leading case on free exercise issues and it involves a Roman Catholic school and a military academy. *Pierce* can be understood as a critical case in the history of American pluralism, as essential for the possibility of multiple systems as *Reynolds v. United States*,¹⁴⁴ the Mormon polygamy case, is for the idea of common values. *Pierce* stands for the proposition that the state does not own children, and that the state cannot have a monopoly in the education of children. *Pierce* makes room for alternative educational systems within the state, and by extension for multiple communities within the state.

The *Pierce* Court wrote:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁴⁵

The state's argument in *Pierce* was similar to the argument of the dissent in the case on minority schools in Albania to the extent that it stressed first that a substantial state interest was involved, and second that the particular state interest was in effect patriotic universalism.

If the governments of the several states have no power to provide for the education of the children within its limits, and if the character of the education of such children is to be entirely dictated by the parents of such children, or by those persons by whose influence the parents are controlled, it is hard to assign any limits to the injurious effect, from the standpoint of American patriotism which may result.¹⁴⁶

A pamphlet quoted in an amicus brief offered some detail:

143. 268 U.S. 510 (1925).

144. 98 U.S. 145 (1878).

145. 268 U.S. at 535. The Hill Military Academy was a private school for boys.

146. Appellant's Brief at 62, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)(No. 583)(No. 584).

Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, cliques, or *cults there to absorb the narrow views of life as they are taught*.¹⁴⁷

The *Pierce* case is understood by American constitutional lawyers to have in its most technical readings not much to do with American understandings of First Amendment rights.¹⁴⁸ The issue was ruled upon before the general understanding that the First Amendment, with its guarantees of religious liberty, bound the separate states as well as the federal government. Nonetheless, despite its technical irrelevance, the case has a clear role in constitutional development. *Pierce v. Society of Sisters*, in protecting the existence of religious education and non-state education in general, is widely understood as a powerful statement of group rights against the intrusion of state authorities.

The images of totalitarianism which are invoked by the Supreme Court in *Pierce* make plain that the limits on state authority are understood broadly. From the point of view of a pluralist structure, the critical participant in the *Pierce* case is perhaps the Hill Military Academy, precisely because it was not a religious institution and was not protected, and would not now be, by the First Amendment's free exercise clause. Further, the military academy, with all of the associations which can be brought to military structures and training, is precisely the example of the educational institution which was not open, not experimental and not focused on individual autonomy. At least as we can imagine it, it is the secular analogue of the religious fundamentalist school involved in some current American litigation. *Pierce* allows schools of quite different character to exist within a state-authorized school system.

The Minorities Treaties, for entirely understandable reasons, fo-

147. The pamphlet is quoted in the Brief of Louis Marshall, Amicus Curiae, On Behalf of Appellees, at 16, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (No. 583) (No. 584) (emphasis added).

148. Justice Black wrote of the technical holding in *Pierce*:

Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property." 268 U.S., at 536. Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth, I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. *Griswold v. Connecticut*, 381 U.S. 479, 516 (1965) (Black, J., dissenting) (citation omitted).

cused on groups limited to the familiar categories, categories created by the historical conditions under which they were developed. But the possible groups which might be entitled to the positive support of the state are highly various. Bell's list¹⁴⁹ ranges from groups based on occupations, to age, to sexual orientation. Each of these might want (and be entitled to) schools, and even under some systems, public support for schools.¹⁵⁰ Each might at least for a time, constitute a social context for associated individuals and some might be judged (by someone) to be better than others. "[E]specially in the case of very small linguistic groups and in the case of obscurantist religious groups," Van Dyke writes, "to assure a right of group survival is to restrict the opportunities of individual members for full self-realization. Assimilation, involving the disappearance of the group, is sometimes desirable."¹⁵¹

One question, then, is what range of private (meaning non-state) institutional life should be encouraged, or even tolerated. Another discussion focuses on the educational policy of the central state.¹⁵² In the context of education, one might say that this requires a system of vouchers given to parents of children who want to attend any school for any reason, subject to state regulation of minimum content (a point for exploration). Or one might want to say that state funding is required for state schools only (what does the state school teach about which

149. See *supra* note 75.

150. The issue of subsidy is complicated by the economic inequalities in particular societies, as well as by the problem created if the state decides which enterprises to fund (presumably those which suit state purposes) and it raises issues of free development versus fostered development. For a recent discussion, see Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368-86 (1991). For an earlier discussion, see Zechariah Chafee, Jr., *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930).

151. Van Dyke, *supra* note 45, at 613.

But how is one to know what groups are to be assimilated? Who is to decide this? Isn't this exactly the power which we do not want the state to have? Certainly American courts, operating under the constraints of the First Amendment, would have to be cautious about the consequences of any possible "obscurantism" in a religious group.

152. See GUTMANN, *supra* note 65, at 64ff (discussing especially arguments against an understanding of a minimal state-enforced standard with maximum decentralization of decision-making authority through ideas of family sovereignty). On family sovereignty, see JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978).

Laponce, in *The Protection of Minorities*, distinguishes generally between minorities by force and minorities by will, and suggests that certain latitudes ought to be allowed minorities by will in the area of education. He sees the central problem of the Doukhobors as that of whether the government can tolerate a certain number of uneducated children. This, however, misses the issue of the claims of the children as citizens (members of the state) or the claim of the state to protect the rights of children even when they do not assert those rights. J. A. LAPONCE, *THE PROTECTION OF MINORITIES* 181 (1960). See Justice Douglas' opinion in *Wisconsin v. Yoder*, 406 U.S. 205, 240 (1972).

groups?) but individuals who can afford them can send their children to private schools.¹⁵³

Once we get an image of the chaotic array of educational options, run by a theoretically unlimited number of groups, the question of the center re-emerges powerfully. What is holding all of this together?

Some in the United States have been concerned with symbolic answers to this question.¹⁵⁴ Others are concerned with the problem of minimal educational content,¹⁵⁵ and controversies continue to arise as to the substance of public education in the United States.

The difficulties in this area have been well understood for some time and the tensions between the goals of the various entities involved have been clear to those advocating the importance of group life and institutions. The point here is that education has been seen as the proper focus of the discussion. Thus it was said in 1920: "The educational process alone is the instrumentality properly responsible in a democracy for maintaining the national identity of minority communities."¹⁵⁶

153. The focus here has been on education because it is so central for group life. Related issues concern group libel, treated in the American literature in the 1950s and again a subject. See Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992).

154. See a re-working of the language of the pledge in George P. Fletcher, *Update the Pledge*, N.Y. TIMES, Dec. 6, 1992, § 4, at 19.

155. One aspect of the parental choice solution advanced by Coons & Sugarman, *supra* note 152, is perhaps most clearly addressed in detail by E. D. Hirsch. E. D. HIRSCH, JR., *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* (rev. ed. 1988); E. D. HIRSCH, JR. ET AL., *THE DICTIONARY OF CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* (1988); E. D. HIRSCH, JR., *A FIRST DICTIONARY OF CULTURAL LITERACY: WHAT OUR CHILDREN NEED TO KNOW* (1991).

While the minimal content of an educational program might be debated, one can usefully recall the language of Justice McReynolds writing for the Court in *Pierce*:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

There is an argument that even the most minimalist state-sponsored education — or even the communication and interaction focused proposals of E. D. Hirsch — contain normative judgments and require agreement among those who generally do not agree. Undoubtedly they do, but some of this is perhaps usefully seen as normative in the same sense that the teaching of language to infants normatively judges language to be better than no language, and the mother-tongue to be better than others not (yet) taught. The basic point here is that minimalist goals are different from maximalist goals, and that agreements on minimum frameworks might be possible where agreements on the good life might not be.

156. ISAAC BERKSON, *THEORIES OF AMERICANIZATION: A CRITICAL STUDY* 147 (Arno Press

Because that minimal ordering which makes peace possible had to include some sort of education, the discussion in the United States has focused very explicitly on the issues of education in a world of conflicting values and cultures. Some of the discussion has been by representatives of groups which have insisted that the public narrative include some telling of their story.¹⁵⁷ The Minorities Treaties approached the enterprise by protecting minority schools and also insisting, for example, on the right of the central state to teach the national language as part of the basic state program. Many today do the same. The educational arena continues to be a critical forum for the pluralist conversation. It is in this area that we find thinking about voucher plans, decentralization of educational authority, and a multiplicity of approaches to the subject matter itself. Pluralist ideas provide one way to cut through the grammar of epithets in which, as Gellner suggests, "I am a patriot, you are a nationalist and he is a tribalist."¹⁵⁸ Thus the historian John Higham has noted that "pluralism in all its forms is a philosophy of minority rights."¹⁵⁹

The current United Nations documents do not limit the rights of parents to issues of education organized on a religious basis.¹⁶⁰ They

& The N.Y. Times 1969)(1920). This is because

[n]either local segregation nor governmental separatism would allow the undisturbed interchange of social forces which democracy demands. On the other hand communal organization with the school as the centre would make it possible to continue the ethnic loyalty and to preserve the cultural and spiritual personality of the group without of necessity interfering with the free play of currents demanded by the unity of American life.

Id.

Berkson was thinking largely of supplementary schools.

157. Gypsies are still, for example, working to get their story told. They are also still the subject of inter-state agreements. Ferdinand Protzman, *Germany Reaches Deal to Deport Thousands of Gypsies to Romania*, N.Y. TIMES, Sept. 19, 1992, at 1. See generally on the history of the gypsies, IAN HANCOCK, *THE PARIAH SYNDROME* (rev. ed. 1988).

158. ERNST GELLNER, *NATIONS AND NATIONALISM* 86 (1987).

159. JOHN HIGHAM, *SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA* 200 (rev. ed. 1984).

160. For example, Article 18 of the International Covenant on Civil and Political Rights reads:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18, ¶ 1, 999 U.N.T.S. 171, 178. See also, *infra* note 161.

Thornberry comments on the issue of religious education that "[a]ccess to religious education in accordance with parental wishes implies a duty on the State to remove any obstacles to this, as

are broader than some of the coverage in the Minorities Treaties. At the same time, however, they do not much reflect the issues involving the definitions of parents (in view of the issues raised by new birth technologies) or family (a subject discussed in law review writing) or possible limits the state might want to impose on family autonomy, whether expressed through a formula relating to the best interests of the child or another formula (common in religious liberty provisions) relating to public welfare and good morals. And of course the current guarantee clauses do not much address the possibility of tensions between various aspirations expressed.¹⁶¹

well as, on a reasonable reading of the paragraph, to provide facilities for such education if the right of access is to be an effective right." THORNBERRY, *supra* note 18, at 194, commenting on Article 5, paragraph 2 of the International Declaration on the Elimination of All Forms of Intolerance, *infra* note 161. Capotorti believes that "the more a religious community lacks resources, the more the State is bound to take steps to ensure its survival." Capotorti, *supra* note 49, at 23.

On another point, Krishnaswami thought that religion and belief had to be defined very broadly. KRISHNASWAMI, *supra* note 43, at 1, n.1. Compare United States discussions on definitions and religion, especially *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The forms of necessary encouragement would have to be developed. As already noted, the Treaties viewed the internal minorities as part of the state, entitled even to state funding for their separate schools including religious schools. This is of course inconsistent with some domestic law, but we are not concerned here with problems raised by inconsistency with domestic law. Rather, the suggestion is made that such policies have reasons, history and experience behind them, and that the international discussion might well consider those reasons before flatly adopting the position that funding is a desirable or even necessary component of a human right, or the alternative position that funding always raises religious liberty issues.

161. Consider the text of Article Five of the International Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others

International Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Nov. 25, 1981, art. 5, 21 I.L.M. 205, 207 (adopted by the U.N. General Assembly Jan. 18, 1982, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Agenda item 75). Compare Universal Declaration of Human Rights, art. 26, ¶ 3, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948) (adopted Dec. 10, 1948) ("Parents have a prior right to choose the kind of education that shall be given to their children."). See generally ELIZABETH ODIO BENITO, ELIMINATION OF ALL FORMS OF INTOLERANCE AND DISCRIMINATION BASED ON RELIGION OR BELIEF. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF

In theory, non-state education could be organized on the basis of almost any identification.¹⁶² The focus would then be on some kind of minimal regulation, minimal core content and maximal room for complex group life. The world might look like something John Stuart Mill would have appreciated, in which the state involvement with education would be limited, as he suggested, to the administration of a national examination, limited perhaps, as he suggested, to an inquiry into facts rather than opinions.¹⁶³ The problem as he saw it was the risk of state power, and so on disputed questions Mill wanted taught only the information that some thought *x* while others thought *y*.¹⁶⁴ On this view, a framework that allows maximal choice for individuals (in their groups) works best. The home education movement offers a clear illustration of how small the tribe can finally be.¹⁶⁵

It is in the educational context that we see an interesting illustration of a shift from one group to another as the status category. In 1988, Quebec replaced confessional school boards with language based boards, arguing that this system "would better reflect the province's religious diversity and natural division on linguistic lines."¹⁶⁶ A lawyer arguing for the Protestant boards noted that the new linguistic boards would not have the constitutional protections of the old denominational boards (under the British North America Act) and that "without constitutional protection, they could turn around and replace linguistic boards with boards for left-handed people or for people who wear shorts."¹⁶⁷ We are at a point in history in Canada in which language

MINORITIES, U.N. Sales No. E.89.XIV.3 (1989).

See on such tensions Jack Greenberg, *Race, Sex, and Religious Discrimination in International Law*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 307, 331 (Theodor Meron ed., 1984).

162. "Almost" is a qualification relating to those problems understood to be opposed to central and strongly held social norms, whatever they are. But we can imagine — or can't we? — schools built on race, gender, class, ideology, all required to meet certain standards, including the teaching of tolerance and respect.

163. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 118ff. (John Gray ed., Oxford Univ. Press 1992) (1859).

164. But when is an issue "contested" as against seen as "we know" but "they think"?

165. The question of state and group can equally be pursued through the issue of exemption to programs within the public schools. It is in the answers provided to these very specific problems that we get some sense of the ranges of tolerance in particular societies. Consider also the impact of universal dress codes on sub-groups, for example, in the head dress controversy in France. See Martha Minow, *Identities*, 3 YALE J.L. & HUM. 97, 122-26 (1991).

166. Peggy Curran, *Protestant Boards say court case is fight for survival*, THE GAZETTE (Montreal), Dec. 8, 1992, at A1.

167. *Id.*

difference and religious difference count for public purposes, while handed-ness and short versus long pants do not. In the United States, diversity (viewed as desirable) is measured by ethnicity, gender, and race, more perhaps than by region of residence or birth or by religion, all of which were once prominent differentials. Sexual orientation is often viewed as relevant in a context forbidding discrimination, but not (yet) relevant in a diversity affirmative/action context.

This paper is not intended to outline or endorse any particular form of educational structure, though many proposals relating to such forms, and many discussions of such proposals, are available.¹⁶⁸ For some the emphasis will be on the alternatives to public education, for others the content of a basic public education, often minimal and with the development of institutions for diverse opportunities for education undertaken later on. These discussions assume that there will be differences which remain between people, even after the issues which we intend by such terms as racism, sexism, and discrimination have disappeared.¹⁶⁹

CONCLUSION: THE LESSONS OF THE TREATIES

It is sometimes suggested that the lessons of the Minorities Treaties have something to do with group rights, and that because the Treaties acknowledged specific groups where the present United Nations documents generally do not, the Treaties are stronger protections for minorities.¹⁷⁰

This is not the emphasis urged here. First, it is suggested that the present stance in the U.N. texts may be at least as valuable as the earlier one because of the broader coverage — to everyone rather than to specific groups — and because of the recognition of autonomy rights of families, a prime vehicle for preservation of minority group values of all kinds.

Second, the strengths of the Treaties are seen not in the references

168. E.g., ROCKNE MCCARTHY ET AL., *SOCIETY, STATE, AND SCHOOLS: A CASE FOR STRUCTURAL AND CONFESSIONAL PLURALISM* (1981); COONS & SUGARMAN, *supra* note 152; MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 181ff. (1983).

169. An ambiguity in some discussion on this point is of course that we do not know what is intended to be taught when, for example, we are told, as by Gutmann, that the public schools should teach tolerance and other democratic values, avoiding racism and sexism. GUTMANN, *supra* note 65, at 287.

170. For the approach of the Council of Europe, see *Report on Additional Protocol on the Rights of Minorities to the European Convention on Human Rights*, Eur. Parl. Ass., Doc. No. 6742 (1993).

to groups but in the recognition that groups, quasi-autonomous, and sometimes and to some degree self-regulating, have a relation to the modern state. This relation might be expressed in the sense of the Czech treaty regarding the Ruthenians: groups have autonomy to the degree consistent with state unity. That unity need not of course be total. Its content is to be explored, and one way to explore it is through the issues of common education.

The effort here has not been to resolve the issues of a common standard, or a common educational program, but to avoid the largest debate over those questions by asserting the need for some sort of framework within which different world views can survive. One way of talking about this would be to speak of a highly delineated role for government, sharply differentiated from "society" which then would function theoretically independently with a variety of institutions outside the state, which are allowed to exist as they can and will.¹⁷¹ One difficulty with this formulation is that it sees no role for the state in relation to those non-state institutions. At least in the present environment, in the world of the strong national state, some impact on non-state groups is inevitable and we are obliged to consider the form that impact takes.

It may be in fact that the claims of whatever largest group exists have always had considerable weight, even before the appearance of what we call the modern sovereign state, in part because the largest could be invoked to assist the smallest. The member of the group also stands in some relation to the larger group, and even the most minimal state can reach outside of its bounded field of concern to the functioning of society when the social issue involved is seen as having some relevance to something within the state province.

A basic model of the relationships is clear in the pattern in which the state judges the behavior of the group with reference to its own members. The relation between the state and the internal group is apparent, for example, in a discussion by Hugo Grotius¹⁷² the father of international law, of the rights of the Jewish Community of Amsterdam. He concluded that while there were certain autonomy rights of

171. One way to conceive this approach is through the public/private distinction. See Richard S. Kay, *The State Action Doctrine, The Public-Private Distinction, And the Independence of Constitutional Law*, CONST. COMMENTARY (forthcoming, Aug. 1993).

172. On Grotius, see generally Mark Janis, *Religion and the Literature of International Law: Some Standard Texts*, in *THE INFLUENCE OF RELIGION IN THE DEVELOPMENT OF INTERNATIONAL LAW* 61 (Mark Janis ed., 1991).

the community, still the central authority (here the city of Amsterdam) had the right to review the actions of the internal community, in this case using the Old Testament as the standard.

A historian of the Dutch Jewish Community has written:

As early as 1615 we find an approving mention of the right of the Jewish community to excommunicate in paragraph twenty of the *Remonstrantie* of Hugo Grotius, where he writes: "The teacher of the Jews or those who are appointed to that end among them will have the right to excommunicate and ostracize Jews whose way of life or opinions are evil". However in that very paragraph he opens the door for the possibility of the intervention of the Christian authorities. He writes: "Nonetheless, anyone who wishes to complain that he was excommunicated even though he was innocent should submit his complaint to the local authorities, who will investigate the matter and decide according to the laws of the Old Testament". Grotius' proposals were not adopted by the authorities; however with regard to the *herem*, there is no doubt that in fact matters were handled rather closely to the spirit of the Remonstrant theologian and jurist. The city authorities ratified the community ordinances and acknowledged its right to exercise the instrument of excommunication against deviants and rebels. That right was explicitly acknowledged a number of times upon various occasions. Notwithstanding, the city magistrates did not refrain from action whenever Jews of the Portuguese community turned to them and complained that they had been unjustly excommunicated.¹⁷³

The precise example, expulsion from a religious group, could of course come up today, as the general issue might be raised if the question involved a practice of any group with reference to its own members.¹⁷⁴

173. Yosef Kaplan, *The Social Functions of the Herem in the Portuguese Jewish Community of Amsterdam in the Seventeenth Century*, in DUTCH JEWISH HISTORY 111, 145 (Jozeph Michman & Tirtsah Levie eds., 1984). See discussion in Salo W. Baron, *Newer Approaches to Jewish Emancipation*, 29 *DIOGENES* 56, 59 (Spring 1960).

174. Thornberry suggests on this point that no individual should, under the various pronouncements of the United Nations be coerced by a group. THORNBERRY, *supra* note 18, at 205. This raises quite serious issues concerning the capacity to consent of those socialized within particular societies.

See reference to issues of female socialization in Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 *NOTRE DAME L. REV.* 1553 (1991).

The example from Grotius is telling not so much because of its substance as its source. It reinforces the continuities between the domestic and the international questions.

Stated negatively, the relation between the state and the group, or the world order and the state and the group is one of control and supervision. But positively, the idea would be that one of the enterprises of the modern state is to foster the growth of societal forms. The state should encourage diversities and differences just as in the world of the Minorities Treaties the state was supposed to support the educational institutions of the minority groups and in the world of the United Nations documents the state is generally supposed to encourage many forms of associational life.

The Treaties of course drew on their own history, a history of group experience both of accommodation and of persecution. The Treaties were informed also by the critical necessity of solving a problem. The particular minorities the Treaties considered were in fact there, people who even if they stayed in their own homes, on their own land, could be from one day to another, part of different nation-states.¹⁷⁵ In this sense, the Minorities Treaties were simply dealing with facts, facts which had been historically associated with war. But perhaps also the Treaties can be used as a model of some other possibilities.

The present inquiry was historically located at the period just after the First World War, and used material from the efforts of the League of Nations to deal with questions of minority rights. But the more general issues raised in Part I are in no way limited to either historical issues or to the forum of the international organization. Rather, Part I was offered as a discussion of the most general issues of frameworks for difference, suggesting that the two basic but distinguishable problems are membership and which groups count, when the issue is confronted by specific authorities.¹⁷⁶ These specific authorities may not at all agree, any more than the specific nation-states agree on the international norm. Indeed, this issue of fundamental disagreement is now as it has always been one of the most basic facts of the situation.¹⁷⁷ Part

Issues of consent and socialization only get us back to the education question.

175. See example of a man whose affiliation changed while his home did not, in Engelberg, *supra* note 6, at A3.

176. Here, there seems sometimes to be inadequate recognition of the point that there are multiple authorities outside the state-system.

177. On cultural relativism and normative pluralism, see FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 333-53 (1990). It is possible to use examples like female circumcision to demonstrate cultural relativism and normative plural-

II focused on education, as people often have, because of its central importance in considering politics and international peace. In the end, and with an awareness of at least some of the issues involved, perhaps one can simply quote, as an international objective, The Universal Declaration of Human Rights:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.¹⁷⁸

ism, this example perhaps comforting because the practice seems remote, safely alien, and under attack, especially in the West. See Marliese Simons, *France Jails Woman for Daughters' Circumcisions*, N.Y. TIMES, Jan. 11, 1992 (on jailing in France of mothers who performed operation on daughters). Consider also, however, the discussion of the right to change one's religion, an issue affecting much larger groups. See *Bastanipour v. Immigration and Naturalization Serv.*, 980 F.2d 1129 (7th Cir. 1992) (involving a Muslim convert to Christianity who feared persecution if returned to Iran). See also Jaap A. Walkate, *The U.N. Declaration on the elimination of all forms of intolerance and discrimination based on religion or belief (1981) — an historical overview*, 1 CONSCIENCE & LIBERTY 21 (1989). Compare issues in drafting of Vienna Convention on the International Sale of Goods, in which linguistic compromises sometimes conceal unresolved questions relating to legal problems. See Arthur Rosette, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984). See also Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 346 (1983).

On the development of international law from something involving an understanding between Christian nations, then civilized nations, then peace-loving nations, see DR. B. V. A. RÖLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* (1960).

178. Universal Declaration of Human Rights, *supra* note 161, art. 26, ¶ 2. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979), cites the Universal Declaration of Human Rights (1948), "which appears to proclaim education to be a fundamental right of everyone, at least on this planet." *Id.* at 864. The qualification simply raises the same issues to another level.