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I. INTRODUCTION—IN SEARCH OF A POLITY

As we search for normative perspectives in the advocacy for the human rights of those who belong to marginalized racial and ethnic groups, Hannah Arendt comes to mind. She was pointing in the right direction when she reminded us that "[t]he fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world [a political space] which makes opinions significant and actions effective."1 It is crucial to become aware of the right to have rights as an essential quality of human dignity: "Only the loss of a polity itself expels [us] from humanity."2

Minorities and those who are made minorities by virtue of discrimination lack such a place in the world. Their equal worth and dignity as citizens of nation-states and, derivatively, as members of an international society remains an inadequate formalistic refuge. Paths to more secure lands entail the search for appropriate genealogies.

Critical theoretical works have exposed the limitations of a human rights framework informed by notions of citizenship that cling to liberal normative accounts. The critique of the state and of the public/private split along with its individualistic rendition of rights are at the core of the search for the exclusionary script that entrenches limited horizons for human rights that describe and protect human dignity. Elsewhere we character-

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2 Id. at 297.
ized women as the *aliens* of such a state and, in turn, of an international society populated by such states.\(^3\) Violence against women, perpetrated in "private" spaces, served as a mirror of the inadequacies of a liberal normative account which failed to conceive violence as an equality issue, as torture, and as a state responsibility to prevent, punish and eradicate it.

In addressing the *wanderer* status of those in search of a polity, the liberal narrative of the state is exposed as one failing to fulfill its promise of neutrality and as a failed neutral stage for the airing of competing accounts of social and political association; it is an institutional space that fails to properly acknowledge intersubjective experiences that derive from cultural, racial and ethnic communities.\(^4\) The point of entry in this essay on the critique of those liberal foundations is an examination of an assimilationist narrative that devalues and, in sync with dominant racial categorizations, racializes the cultural identities of "minorities" and deprives them of the opportunity of an empowered cross-cultural dialogue which builds democratic institutions. The enabling power of human rights is particularly important as membership in a reconstructed polity is envisaged.

Critical readings of such a world-view have been quick to point out the highly formalistic constructions embedded in those accounts. The social character of identity—its construction via the interplay of autonomy/agency and social constraints—paves the way for diverse constructions of individuality and free choice, and of deep diversity.

The failure to acknowledge the political character of norms proclaimed as universal delays the aspired "reconstruction, and the multiculturalization of human rights."\(^5\) The liberal aspiration of equal worth and dignity is not incompatible with a deeper understanding of the maneuvers involved in the construction of *otherness* and the suppression and silencing of difference.

The development of alternative normative conceptions of human rights must grapple with re-imagining modes of compatibility between modern liberal notions of the self and those informed by critical views on identity.\(^6\) Such is the task of those who are interested in exploring the expansion and scope that a discourse of human rights would offer to combat inequality and oppression. Fear of vagueness, ambiguity, and broadness plagues the work of prominent human rights scholars and devalues the huge potential

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\(^4\) See generally Celina Romany, *Interrupting the Dinner Table Conversation: Critical Perspectives, Identity Politics and Deliberative Democracy*, 93 AM. SOC'Y INT'L L. PROC. 190, 190-99 (2000) (critiquing liberalism within international human rights law and discussing the potential for inclusion of different groups through the use of deliberative democracy).


\(^6\) Calls for institutional reforms devoid of alternative conceptual paradigms leave behind the powerful motor of consciousness and the awareness required for grounding the emancipatory project that informs this work.
of dialogues among empowered participants.

A. Equality

At the international human rights level the renewed and expanded principle of democratic inclusion can be inserted within “the project of cosmopolitan democracy” that in turn affects the potential for “deepening democracy within nation-states.”

All categories of human rights in their different configurations and permutations need to be activated if expanded versions of equality are to be secured via political participation.

Equality lies at the vortex of a framework of human rights with historic origins that freshly recollect the horrors of discrimination and persecution. Its eventual development in different international conventions refined the aspiration through the prism of the expanded knowledge brought about by processes of decolonization and racial and gender struggles.

This essay focuses on positive or affirmative action—the gradual path to equality. Affirmative action constitutes the implementation of special temporary measures which address the structural and individual realities of discrimination while simultaneously recognizing the legal/political space for differences in multicultural societies. The resilience of a formalistic conceptualization of equality in the international human rights arena represents one of the major stumbling blocks in the effective implementation of equality and in the legal and social battle against racial and gender inequality. As part of a larger work in progress, this essay exposes the rationale advanced in support of such formalism and the existing contradictions in the implementation of an international norm that, at a minimum, aspires to a thin line of universality.

Formality goes hand in hand with sameness, it refuses to engage nuances. The international framework far from adequately grapples with the delicate and desirable balance between sameness and difference in multicultural societies. In construing the contours of the special temporary measures that facilitate the necessary empowerment towards the achievement of equality in difference, the international framework must be ready to break the locks of its confining cages. It is a sad irony to see that deference to state sovereignty, a feared concept in matters of human rights, will often times be the only route available for international support of creative state experimentation on affirmative action.

Furthermore, the rite of passage that equality must undergo at the international human rights level, in order to address structural and systemic global discrimination, can certainly contribute to renewed projects of citi-

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8 As can happen with a federal system of rights which allocates spheres of authorities between states and the federal government, national experiments of affirmative action can transcend international interpretations that, instead of ceilings, become floors in matters of equality.
zenship and democratic inclusion in expansive renditions of the polity. At stake is what Makau wa Mutua characterizes as "the opportunity for all major cultural blocs of the world to negotiate the normative content of human rights law and the purposes for which the discourse should be legitimately deployed." 9

B. International Human Rights and Affirmative Action

1. The Universal Declaration of Human Rights ("UDHR")

The elusive layers of equality get the spotlight right when special measures advancing social redistribution via affirmative action enter the stage. At the international law level the principle of equality, as enshrined in the UDHR, 10 provides the normative anchor for the redistribution of basic resources that benefit marginalized groups. 11 By establishing the principle of equality at its core, the framers of the international human rights infrastructure at the end of the Second World War sought to establish a system, namely, the United Nations ("UN"), that would "achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." 12 The international human rights framework is thus grounded in a notion of basic humanity which all individuals enjoy by virtue of being human, regardless of citizenship or status 13 and, most impor-

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9 Mutua, supra note 5, at 644.
10 Universal Declaration of Human Rights, G.A. Res. 217 A, 3d Sess., at 135 U.N. Doc. A/810 (1948) [hereinafter UDHR]. The first paragraph of the preamble states, inter alia, that "the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . ." Id. (preamble). Article 1 states that "[a]ll human beings are born free and equal in dignity and rights." Id. at 136. Article 2 states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind[.]" Id. Finally, Article 7 states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law." Id. at 137.
11 Matthew C. R. Craven, The International Covenant on Economic, Social, and Cultural Rights 184 (1995) (stating that affirmative action programs "involv[e] the adoption of special measures to benefit socially, economically, or culturally deprived groups"); see also Ruth Bader Ginsburg & Deborah Jones Merritt, Affirmative Action: An International Human Rights Dialogue, 21 Cardozo L. Rev. 253, 254-55 (1999) (defining affirmative action as "any program that takes positive steps to enhance opportunities for a disadvantaged group, with a view to bringing them into the mainstream of civic and economic life"); Girardeau A. Spann, Affirmative Action and Discrimination, 39 How. L.J. 1, 5 (1995) (defining affirmative action as "the race-conscious allocation of resources motivated by an intent to benefit racial minorities").
13 See Craven, supra note 11, at 154. Craven states that:

[the idea of human rights assumes that all human beings have some basic, commonly shared characteristics, and that as a result they should be viewed and judged as members of the human race rather than as members of a particular group. The
stantly, independently of the sanction of sovereign states.\textsuperscript{14}

It is precisely in the universalist account of humanity that, through the back door, enters a historically specific narrative of the Enlightenment, which is blind to systematically marginalized humans. From the outset, such a principle of humanity—narrowly construed—presents a non-contextual platform that creates a false dichotomy in identity. The internal-universal human is the proper subject matter of equality in human rights, while the external-context-specific social realities become disruptive attributes to be addressed through precarious balancing formulas. Critical works have provided a different understanding of identity, slowly finding echoes in judicial forums and legislative galleries.

The UDHR frames the equality aspiration in positive and negative terms. Whereas the UDHR contains several anti-discrimination provisions,\textsuperscript{15} some of its articles also prescribe positive state action in the areas of work and employment,\textsuperscript{16} basic living standards,\textsuperscript{17} and education.\textsuperscript{18}

The presence of the modern natural laws of Locke and Rousseau, dating back to the American Declaration of Independence of 1776 and the \textit{Declaration des droits de l'homme et du citoyen} of 1789, is evident.\textsuperscript{19} Human rights are predicated on the notion of individual freedom from arbitrary interference.\textsuperscript{20} Central to the UDHR, however, are not individual liberties per se, but the imperative that these individual liberties be \textit{equally} protected. As Kant recognized in his time, equal coexistence is inherent in recognition of these shared qualities gives rise to a principle of equality which requires that all persons be treated with equal respect.

\textit{Id.} \textsuperscript{14}See, e.g., J\O RGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 189 (Ciaran Cronin & Pablo De Greiff eds., 1998) [hereinafter THE INCLUSION OF THE OTHER] (stating that human rights "seem to have a double character: as constitutional norms they enjoy positive validity, but as rights possessed by each person qua human being they are also accorded a suprapositive validity.").\textsuperscript{15}See, e.g., UDHR, supra note 10, at 137 (stating in Article 12 that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation"); \textit{id}. at 138 (stating in Article 13 that "[e]veryone has the right to freedom of movement and residence within the borders of each State"); \textit{id}. (stating in Article 17 that "[e]veryone has the right to own property alone as well as in association with others"); \textit{id}. (stating in Article 18 that "[e]veryone has the right to freedom of thought, conscience and religion"); \textit{id}. (stating in Article 19 that "[e]veryone has the right to freedom of opinion and expression").\textsuperscript{16}See \textit{id}. at 139 (art. 23).\textsuperscript{17}See \textit{id}. at 140 (art. 25).\textsuperscript{18}See \textit{id}. (art. 26).\textsuperscript{19}THE INCLUSION OF THE OTHER, supra note 14, at 189.\textsuperscript{20}See, e.g., CRAVEN, supra note 11, at 155 (stating that non-discrimination "is primarily a legal technique to counteract unjustified inequality"); THE INCLUSION OF THE OTHER, supra note 14, at 191-92 (stating that "law serves to protect individual freedom of choice in accordance with the principle that everything is permitted which is not explicitly forbidden by general laws that set limits to freedom").
the idea of individual "freedom." 21

Racial inequality lies at the center of that historical record and thus constitutes a key platform to understand the need to guarantee protections against racial systematic degradation. Slavery, the ugliest face of inequality, 22 coupled with a fresh recollection of the racial inequality ideologies spurring World War II, served as the global picture backdrop. 23

2. Affirmative Action and the UDHR

Affirmative action is a human rights tool that embodies both negative liberties and the progressive, historical realization of material equality among disadvantaged groups. 24 It is not surprising, then, that organizations representing racial minorities were active in supporting the establishment of a strong international human rights framework at the end of World War II. 25 For oppressed minorities, international human rights discourse opened the prospect and hope of substantiating justice claims where none were validly recognized within the confines of domestic constitutional orders.

21 "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of everyone else in accordance with universal law, is the only original right belonging to every man by virtue of his humanity". THE INCLUSION OF THE OTHER, supra note 14, at 191-92, (emphasis added)(quoting Immanuel Kant).

22 See, e.g., DOMINIC McGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 3 (1991) (stating that the rise of individual rights under international law originates in the activities during the nineteenth century to abolish slavery and the slave trade).

23 Gunnar Myrdal described fascism and Nazism as based on a racial superiority dogma and noted that "America had to stand before the whole world in favor of racial tolerance and cooperation and of racial equality." 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1004 (1962).

The anti-racist agenda is central to the conception of equality in the post-war framework of international human rights law. Cf. MARI J. MATSUDA, WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER AND THE LAW 53 (1996) ("Critical race theory, grounded as it is in a descriptive understanding of racism as a resilient, anti-progressive force in American history, suggests that an antiracist agenda is key to a conception of justice.") (emphasis added).

24 See Ginsburg & Merritt, supra note 11, at 254 ("Focusing on affirmative action, we may better comprehend how the two classes of rights (civil and economic), though once and still set apart by politicians, jurists, and scholars, commonly relate to promotion of the health and welfare of mankind.").

25 After World War II, W.E.B. Du Bois "and other African-American leaders participated as 'activist observers' at the San Francisco Conference where the UN was founded. There they joined oppressed and colonial peoples from around the world in lobbying the 'great powers' to include basic guarantees of fundamental rights in the U.N. Charter." McDougall, supra note 12, at 572. In 1946, the tenth anniversary convention of the National Negro Congress adopted a petition to the UN Economic and Social Council calling for the UN to study patterns of racial discrimination in the United States and take any actions that it might deem proper to ensure United States compliance with international human rights standards. Id. at 573. In 1947, the NAACP filed a petition with the UN denouncing racial discrimination in the United States. Dorothy Q. Thomas, Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy, 9 HARV. HUM. RTS. J. 15, 17 (1996). In 1951, the American Civil Rights Congress filed a second petition, charging the United States with genocide under the Convention on the Prevention and Punishment of Crimes of Genocide. Id.
As Patricia Williams eloquently captured in the United States context more than a decade ago, African-Americans:

never fully believed in rights . . . yet . . . also . . . believed in them so much and so hard that . . . gave them life where there was none before . . . . This was the resurrection of life from 400-year-old ashes; the parthenogenesis of unfertilized hope.26

The international human rights framework carries the torch of this hope inasmuch as its legitimation of affirmative action programs can offer a stronger normative basis for their national justification.27

The unfortunate reality is that, as will be elaborated below, the international human rights system has failed to fulfill its promise and continues to cling to frozen versions of formal equality that ironically reverts the hope in the struggle for racial justice to the national arena. A huge normative abyss must be addressed in order to restore the racial equality core of human rights to its central place and thus acknowledge that such historical record, notwithstanding its liberal enlightenment narrative, supports contextualized views of the self and identity, both racialized and engendered. The failure to acknowledge a contextual identity brings about inadequate adjudicative and remedial frameworks that, within structurally limited systems, perpetuate the false neutrality covering up systemic inequality and discrimination. Its continuing obsession with the hunt for the individual perpetrator who acts intentionally only serves to reinforce improper notions of identity and the internal/external dichotomies of universality and particularity. The simultaneous attempts to grapple with the larger questions of multiculturalism and diversity become a barely audible and discordant fugue clashing with the equality social leitmotiv. The increasing criminali-


27 See, e.g., Matsuda, supra note 23, at 10 (“Proposals for nonneutral laws that will promote the human spirit include affirmative action . . . .”); Ginsburg & Merritt, supra note 11, at 261 (“[A]ffirmative action is not necessarily at odds with human rights principles, but may draw force from them, in particular, from the prescriptions on equality coupled with provisions on economic and social well-being.”); Jordan J. Paus, *The Permissibility of Affirmative Action in Higher Education under Human Rights Law*, 3 N.Y. City L. Rev. 91, 91 (1998) (“International human rights are the supreme law of the land, and thus are a legitimate and valuable source of the permissibility of affirmative action.”); Jordan J. Paus, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659, 677 (1997) [hereinafter *Race-Based Affirmative Action*] (“[T]he propriety of affirmative action under treaty law of the United States and related duties provide compelling state interests and can contribute to a continuing or evolving meaning of the Constitution compatible with generally shared values and human dignity.”); Thomas, supra note 25, at 21-22 (“[B]oth [ICERD and the ICCPR [the International Covenant on Civil and Political Rights]]—if fully implemented—could provide a basis for demanding the maintenance and extension of affirmative action.”).
zation of ethnic and racial atrocious acts of violence, characterized as aberrations of an ethno-racial neutral system, comes as no surprise.

Part II exposes the contours and limitations of the current adjudication and implementation framework under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD" or "Convention") and the European regional human rights framework which is one of the most developed jurisprudentially. Part III exposes the conflict and potential for expansive dialogues in the context of the Durban Conference. Part IV addresses the UN Special Rapporteur's Report on Affirmative Action, and shows its narrow equality premises, and thus its silencing of the World Conference on Racism. Part V offers a normative and structural diagnosis of the international human rights system. Part VI lays out a sketch of a theoretical agenda presenting alternative normative accounts based on notions of identity and culture that can better ground expansive versions of equality.

As a conclusion, we argue that, at a theoretical level, a dialogic framework can better present alternatives to the frozen concepts of self, identity, and culture informing equality in human rights. In addition, it is argued that the non-discrimination principle, assimilationist in nature and a roadblock to the difference principle, needs to dispel its obsolete enchantment with sameness. Only then, both at a practical and theoretical level, can equality legitimately justify the realignment of power required for effective temporary measures—both in the backward- and forward-looking modes.

II. THE FAILURE OF THE INTERNATIONAL HUMAN RIGHTS SYSTEM

A. The Committee on the Elimination of Racial Discrimination ("ICERD")

ICERD has not lived up to its full potential. Originally a watershed event in international law, given its pioneering status as the first convention with an individual petition system, ICERD has fallen through the cracks of UN compartmentalization and lack of resources. The most recent World Conference on Racism in Durban, South Africa drove this point home when thousands of NGOs confronted governments' outdated and incomplete renditions of racism and inequality.

A historical record full of Cold War ideological debris set the scenario

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29 See Theo van Boven, The International Convention on the Elimination of All Forms of Racial Discrimination, in HUMAN RIGHTS FROM EXCLUSION TO INCLUSION; PRINCIPLES AND PRACTICE: AN ANTHOLOGY FROM THE WORLD OF THEO VAN BOVEN 177, 181 (Fons Coomans et al. eds., 2000) (stating that the individual petition system "grants the individual, after all, the central figure in human rights, both access to the body in charge of international supervision, and his own place in the international implementation system. The individual right of petition is considered the most effective form of international implementation . . . .") (emphasis added).
for global legislation against a racism primarily defined by recently de-colonized countries. The European and Latin American regions, with their own respective idiosyncrasies on the subject, lagged behind the activism on the African continent, the apartheid experience of South Africa, and the impulse of the civil rights movement in the United States.

The structural limitations of the enforcement mechanism proved to be a roadblock for the full development of a pioneering individual complaint mechanism. The structurally disjointed nature of the treaty bodies' framework also retarded the evolution of a normative and doctrinal framework in sync with changing social and political climates. Gender and racial matters are, for example, explored in separate compartments and it is only recently—in light of the work of feminist scholars and activists on race and gender—that some attention has been given to overlapping issues in an integrated fashion. Duplicative provisions such as those prohibiting racial and sex discrimination in the International Covenant on Civil and Political Rights, with its own individual complaint mechanism, have also contributed to CERD's arrested development.

A broad concept of color and the more expansive concepts of culture, race and ethnicity—that include but transcend biological traits—is also missing from the picture. Although provisions exist to encompass these concepts, separate treatment via conventions and declarations are elaborated to address these issues. "Minorities," "migrants," "cultural groups," and "ethnic groups" are descriptive categories that reflect realities not unrelated to racial discrimination and the degradation of groups. The cultural manifestations of a systematically inferiorized group by a dominant one, such the group who speaks the majority language, cannot be dissected under perfectly neat laboratory conditions, and be exclusively assigned to one treaty mechanism.


Formal equality provisions coexist with positive/affirmative action counterparts. Article 2(1)(a) provides that "[e]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions . . . ." Article 2(1)(b) provides that "[e]ach State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations." Article 5 provides that

31 ICERD, supra note 28, at 233-34.
32 Id. at 234.
In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.  

Special measures are provided with strong language authorizing them for the advancement of discriminated groups. Articles 1(4) and 2(2) refer to those measures and underscore the positive objective of guaranteeing the full and equal enjoyment of human rights and fundamental freedoms. There is however the hovering shadow of formalism. Article 5, establishes the formalistic boundaries of "concrete measures" under Article 2(2) and is generally understood as an acknowledgment to mean that "special measures" cannot involve impermissible "racial discrimination" (consistent with Article 1(4)) or impermissible "distinctions" as to race.

C. CERD's Narrow Lens

A careful examination of two similar discrimination petitions, one dealing with formal equality and another with affirmative action, reveals the tensions and contradictions emerging from CERD's narrow conceptualization of equality. Its failure to address structural discrimination involving systemic direct and indirect forms of discrimination becomes a first casualty.

On the one hand there is the recognition of a higher scrutiny—"careful consideration"—when distinctions are clearly made on the basis of a prescribed category—a suspect one. Yilmaz-Dogan v. The Netherlands is a classic formal equality case dealing with a simple analysis of equality with

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33 Id. at 239 (emphasis added).
34 Id. Article 1(4) provides that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination . . . ." Id. at 233. Article 2(2) provides that "States Parties shall . . . take . . . special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Id. at 233-34. Article 4 provides that "States Parties . . . undertake to adopt immediate and positive measures designed to eradicate all incidents to, or acts of" discriminatory speech and dissemination of discriminatory ideas. Id. at 234. Finally, Article 6 provides that "States Parties shall assure to everyone within their jurisdiction effective protection and remedies . . . ." Id. at 235. This last article is analogous to Article 8 of the UDHR, which provides that "[e]veryone has the right to an effective remedy" and therefore Justice Ginsburg and Professor Merritt argue that an "effective remedy," in the context of centuries of discrimination . . . must include at least some modes of positive governmental action." Ginsburg & Merritt, supra note 11, at 255.
35 See Race-Based Affirmative Action, supra note 27, at 666.
regards to the right to work. A Turkish woman was dismissed due to her employer's prejudice against foreign women workers after extended absences due to childbirth and illness. In a very straightforward fashion high scrutiny is presented as the standard of review.

CERD acknowledged that the employer's acts discriminated on the basis of nationality. It focused on the applicant's equal right to work, as provided under the formal equality of Article 5(e)(i), because of the state court's "failure to take into account all the circumstances of the case." CERD failed to give the careful consideration—a higher standard of scrutiny—afforded to prima facie cases of discrimination.

On the other hand, deference to state action via programmatic policies such as affirmative action turns the table on the characterization of suspect categories. In *E.I.F v. The Netherlands*, CERD deployed its deference to state justifications as a tool supporting a narrow reading of discrimination. Instead of focusing on the unequal treatment received by the applicant, CERD adopted the state's classification of authentic/inauthentic minorities.

In the context of a discrimination claim brought by a police academy student who complained that his dismissal was the result of the discriminatory treatment during his training, CERD held that racial discrimination

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38 *Id.* at 60. "When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest set-back disappear on sick-leave . . . . They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on." *Id.* (quoting an employer's address to request termination of a contract).

39 *Id.* at 63.


41 *Id.* The court noted that:

- He used to be told repeatedly that he was a bad learner, that his Dutch was insufficient and that he should pattern himself on the white male police officers;

- When a white student was late for his classes it was not registered. If the author arrived slightly late, it was registered, resulting in a permanent minus point;

- His sports teacher made him perform an exercise. When it appeared that he did not perform well enough the teacher told the group: "The muscles needed for performing this exercise well are poorly developed in apes";

- As part of a sports test, a distance had to be covered within a certain time. When the author had run the distance it appeared that the sports teacher had forgotten to register the time. White students did not experience such problems;

- The Academy received an invitation to participate in a football tournament. As a committee member of the sports group, the author had to decide on the composition of the team. One of the lecturers told him: "See to it that the academy is well represented, so don't select too many blacks . . . ."
was not apparent. It accepted the state’s definition of an authentic minority and failed to apply a “careful consideration”/higher scrutiny standard. In essence, CERD supported the state’s argument that the facts of this case were not covered by the findings of a committee set up to investigate the discriminatory treatment of minority students and which ultimately culminated in the implementation of a Police Ethnic Minorities Affirmative Action Plan. This plan was, however, designed for authentic ethnic minorities (unlike the plaintiff who, although born in Suriname, had been a Netherlands resident for six years prior to enrolling at the Police Academy).

CERD adopted the State rationale and held the applicant failed to demonstrate that he was a member of an authentic minority group deserving of a distinct set of evaluative standards. There was no inherently suspect “X” versus “X + Protected Category” distinction, as that found in Yilmaz-Dogan and, thus, no “careful examination” to the alleged nexus between the discrimination incidents and the dismissal was required.

The creation of an institutionally delineated “affirmative action” pool dilutes (and in the long-run destroys) the discursive force of suspectness attached to protected categories under formal equality analysis. Such a counter-intuitive move deprives suspect categories of a permanent status. To place the suspect nature of a classification at the mercy of the administrative, legislative, or judicial programs—i.e., programmatic rationality, stemming from institutionalized affirmative action programs—significantly weakens and dilutes any anti-discrimination analysis. In the E.I.F. case, the state, in fact, deprived CERD of having the last word on discrimination. It erased the suspect classification from the picture, thus banishing the “careful examination” standard.

D. Discrimination Under the European Human Rights Convention

The European Court of Human Rights (“ECHR”), in sync with its adherence to liberal principles of neutrality and acontextual versions of identity, primarily deals with formal equality. The record of denial of racism is omnipresent in the court’s reluctance to venture into a more complex and nuanced analysis of equality.

42 In the CERD’s own words, “it does not appear . . . that the decision to terminate the author’s participation in the Police Academy was the result of discrimination on racial grounds.” Id. (emphasis added).
43 Id.
44 Id.
The underdeveloped body of scholarly and activist work on race has also contributed to the huge abyss that separates the treatment of gender and racial discrimination. The relative influence that feminist theory and women’s activism has had on the conceptualization of equality is revealed through the European system’s embrace of positive action and gender mainstreaming. A fourth-generation conception of equality that, at multiple levels, encompasses respect for difference is gradually and steadily advanced for women. The negative conceptualization is substituted for “anticipatory and integrative methods.”

The ironic and unfortunate consequences of these advances is that women who suffer both racial and gender discrimination pay the high price of being often placed in the formalistic corners reserved for racial inequality. Women who belong to marginalized groups in which both the cultural and the biological dimensions of race and ethnicity are inferiorized, must still make a “practical” choice of forum and decide which form of discrimination they prefer in order to sustain their claim. The literature addressing intersectionality and the most recent label “multidimensionality” exposes the foundational flaws of compartmentalized discrimination.

1. Article 14

Article 14 lays out the anti-discrimination framework of the Convention, providing that the enjoyment of the rights and freedoms are to be secured without discrimination.

The equality mandate thus permeates the whole Convention, a fact confirmed by the ECHR decisions holding that states must implement the Convention on an equal basis with respect to its (domestic) beneficiaries, as well as through its characterization of Article 14 as an integral part of each of the Articles laying down rights and freedoms. According to the court, “the very essence of the Convention is respect for human dignity and

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47 Id. at 27.  
49 See Case “Relating to Certain Aspects of the Laws of the Use of Languages with Education in Belgium” v. Belgium, App. Nos. 00001474/62; 00001691/62; 00001769/63; 0001994/63; 0002126/64 (1968) [hereinafter the Belgian Linguistics Case], available at http://www.echr.coe.int/eng (last visited Feb. 20, 2004) (on file with the Connecticut Law Review) (“No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations . . . .”).  
50 Id.
human freedom.”51

Not all differences contravene the principle of equal treatment.52 The Belgian Linguistics case traced the boundaries between justified and unjustified distinctions. In essence, the court analyzed the state's purposes and objectives in light of prevailing principles in democratic societies. There must be a “reasonable relationship of proportionality between the means employed and the aim sought to be realized.”53

2. The Parameters of Article 14

Article 14 is dependent on the guarantees and rights recognized in the Convention. Its equality mandate lacks an independent existence since its enforcement is exclusively related to the enjoyment of the rights and freedoms guaranteed in the Convention.54 Its parameters therefore remain within those confines and fall short in constituting a centerpiece of a broader bill of rights framework that maps notions of a robust equality.

Notwithstanding expressions characterizing the Convention as a “living instrument”55 founded on “respect for human dignity and human freedom,”56 the ECHR hermeneutical process reveals a strong attachment to formalism.57

a. The Nature of the Obligation of States: Contrasting Developments Between Race and Gender Inequality

The recognition of a dormant positive dimension of equality in the realm of gender has also been acknowledged for family life and privacy. Non-interference is recognized as falling short and thus there is a need to

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53 Id. at 12. In Abdulaziz v. United Kingdom the court ruled that the notion of non discrimination applied to any situation in which a person or group is treated less favorably than another even if the better treatment is not required by the convention. Id. Then in Lithgow v. United Kingdom the court said that Article 14 safeguards persons (including legal persons) who are “placed in analogous situations’ against discriminatory differences in treatment...” Id.
54 As the ECHR has noted:

Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of these provisions—and to this extent it is autonomous—there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

57 This is a stronger attachment than that exhibited by the United States Supreme Court.
enforce positive state obligations.\textsuperscript{58}

In \textit{Abdulaziz v. United Kingdom}\textsuperscript{59} the court examined the validity of United Kingdom immigration policies imposing stricter conditions for granting a permanent visa to males looking to be reunited with their wives or fiancées. Female counterparts had to comply with less strict standards due to "long-standing commitments (based allegedly on humanitarian, social and ethical reasons) to the reunification of the families of male immigrants."\textsuperscript{60}

Moreover these stricter rules were not applied to members of the European Economic Community. Gender stereotypes on labor potential informed such policies. Males were expected to seek full-time jobs that would have an adverse impact on labor opportunities for nationals.\textsuperscript{61} The court struck down these immigration policies and held them to be discriminatory, concluding that sex equality is a major goal of the member states of the Council of Europe. Compelling reasons would have to be advanced in order to justify such discriminatory treatment.\textsuperscript{62} The court ruled that the difference in economic activity between men and women, as far as it can be substantiated, is not important enough to justify the difference in treatment.\textsuperscript{63} Gender differences in economic activities and endeavors fail to rise to a compelling level.\textsuperscript{64}

However, the court skirted the racial issue raised in the context of the particularly greater impact such policies had on immigrants from the New Commonwealth and Pakistan.\textsuperscript{65} In contrast with CERD, the court only took into account the intentions and the purposes of national immigration


\textsuperscript{60} \textit{Id.} at 478.

\textsuperscript{61} \textit{Id.} at 502.

\textsuperscript{62} \textit{Id.} at 501.

\textsuperscript{63} \textit{Id.} at 502.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 504.
laws and not their effects and consequences.\textsuperscript{66}

b. Treatment of Race by the ECHR

At the ECHR, racial issues belong to a \textit{terra incognita}.\textsuperscript{67} The court is trailing behind the increasing changes in European demographics, and has failed to offer a regional map which adequately apprehends equality beyond the formalities supporting assimilation and homogeneity. Not that Europe is a newcomer to these issues. Colonization and conquest is woven into its fabric. The novel factor is the scenario presented by a significant number of formerly colonized and currently neocolonized subjects arriving at their shores and challenging formal equality as conceived in the liberal democratic polis.

Furthermore, the end of the Cold War regime has unleashed suppressed ethnic and nationalistic sentiments, and has rendered irrelevant the ideological matrix through which these realities were previously filtered. The realities intersecting culture and religion and the reclaimed spaces present complex challenges to a court trained to manage assimilation. A sampling of cases follows.

\textit{Roma People: A Preview of Equality Analysis for Minorities in Europe}

Discrimination claims brought by Roma people offer a preview of future judicial developments on racial matters. The discrimination scenario against Roma people presents both the positive/negative strands of equality as well as the backward- and forward-looking dimensions of temporary measures advancing equality.

The legal treatment received by the errant/wanderer minority of Europe is plagued by all sorts of stereotypes. It resiliently insists on assimilation, and foretells the tensions awaiting a Europe increasingly challenged by a multicultural/polity rendition.

Race and ethnicity in its social, historical, and cultural incarnations present the court with the challenge of revising the equality baselines. Access to basic material resources such as education, health, and housing present the court with backward- and forward-looking challenges in crafting temporary affirmative special measures.

\textit{Whose Public Interest?}

A public interest which in essence covers up the preferences of a dominant sector has often been deployed by the court to sustain inequality. Planning regulations that, described as protective of the countryside "from

\textsuperscript{66} See id. (finding that because the rules did not make a race discrimination, they were non-discriminatory); see also van Boven, \textit{supra} note 29, at 129 (showing CERD's emphasis on effect and consequences).

\textsuperscript{67} See van Boven, \textit{supra} note 29, at 129 (detailing the CERD committee's approach to discrimination and comparing the approaches of the ECHR and CERD).
all but essential development," are used to deny permits to place caravans on Roma property.68

The doctrinal translation of deference into margin of appreciation exposes the limited independent evaluation that the ECHR performs with regard to racial discrimination. The assimilationist, integrationist tone of ICERD is even more marked in the ECHR framework. The invocation of the public interest—through a deferential evaluation of the legitimate pursuit of aims of public safety, the economic well-being of the country, the protection of health, and the protection of the rights of others—constitute a margin of appreciation recognized to states.69

There is no acknowledgment of the need to evaluate the exercise of cultural lifestyles, and in particular, the hegemony of dominant groups' cultural patterns portrayed as the "public interest." Nowhere has the neutrality of such public interest been questioned.

It is only through the dissenting opinions that these hidden values are exposed. In Buckley v. United Kingdom,70 Judge Repik criticized the superficial treatment of the margin of appreciation doctrine, awarding undue deference to state laws and policies that cover up discriminatory choices affecting a vulnerable minority such as the Roma people.71

Judge Lohmus' critique of the insufficiency of the equal treatment concept showed his concern with the need to recognize cultural diversity as an equality mandate.72 He stated that: "It may not be enough to prevent discrimination so that members of minority groups receive equal treatment under the law. In order to establish equality in fact, different treatment may be necessary to preserve their special cultural heritage."73

Judge Pettiti, in turn, alluded to a legacy of discrimination against the Roma people and acknowledged their consistent refusal to assimilate to the dominant lifestyle of the modern Western state.74 He unmasked the real

68 In Buckley v. United Kingdom, App. No. 20348/92, 23 Eur. H.R. Rep. 101 (1996) (Court report), the applicant, a British Gypsy (as the court describes her) requested a building permit in order to park her caravan on a piece of land owned by her. Based on planning regulations the aim of which was "to protect" and on the council's stand that enough land was allocated for Gypsies in that district, she was denied the requested permit. Id. at 106. The applicant argued that building codes coupled with the criminalization of "unauthorized camping" discriminatorily prevented Gypsies from pursuing their traditional lifestyle. Id. at 123. To force her to be in the designated public Gypsy camp site affected her freedom to travel with her family on school vacations (since there was no guarantee that she would have a place on the site when she came back) as well as her traveling lifestyle in general. The applicant charged the government with violations to her right to her private family life and to her home. Id. at 124.

69 Id. at 132.


71 Id. at 133-35 (Repik, J., dissenting).

72 Id. at 136 (Lohmus, J., dissenting).

73 Id. (Lohmus, J., dissenting).

74 Id. at 136-37 (Pettiti, J., dissenting).
public interest in this case as nothing more that the dominant group refusal to accept "gypsies" in their midst.\(^\text{75}\)

In a similar case, *Smith v. United Kingdom*, the court showed the role that the margin of appreciation doctrine, at least as applied under the operative standard of review in Article 8, played as a vehicle lending legitimation to states' political, administrative, and legal processes.\(^\text{76}\)

Substantive fairness is exchanged for its procedural counterpart. In ensuring that state processes are legitimate, the court applied a standard of review which revolved around a notion of procedural fairness. While national authorities had a wide margin of appreciation in the choice and implementation of planning policy, "it remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities."\(^\text{77}\) In particular it stated that the court must examine the fairness of the decisionmaking processes.

In the *Smith* case, after examining the applicant's available choices, the court saw no *rational* reason for her desire to stay in a prime-value green belt area that clearly exceeded her economic means:

In this context, the cost of a site compared with the applicant's assets, and its location compared with the applicant's desires are clearly relevant . . . . If the applicant's problem arises through lack of money, then she is in the same unfortunate position as many others who are not able to afford to continue to reside on sites or in houses attractive to them.\(^\text{78}\)

A finding for Ms. Smith implied a subsidy of an individual residential preference overriding the general interest.\(^\text{79}\) Such exceptional treatment required evidence demonstrating the essential need to settle in the disputed place.\(^\text{80}\)

Ms. Smith's claim was reduced to an irrational preference—a fancy taste quite beyond her means—that contravened the standard acts of an economically rational human actor. Her status as "a gypsy by birth" had

\(^{75}\) See *id.* (stating that it is "totally impossible for gypsy family to make suitable arrangements for its accommodation, social life and the integration of its children at school"); see also Fredman, *supra* note 46, at 33-34 (analyzing the Buckley case).


\(^{77}\) *Id.* at 740. The court notes:

In these circumstances, the *procedural safeguards* available to the individual applicant will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, it must examine whether the *decision-making process* leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.

*Id.* (emphasis added).

\(^{78}\) *Id.* at 744-45.

\(^{79}\) *Id.* at 745.

\(^{80}\) *Id.*
no bearing on her acknowledged suffering other than as an inequality of fortune giving rise to "humanitarian considerations"—not human rights violations.

Dissenters once again pushed the envelope and engaged in a structural analysis of equality. The court was bitterly divided on whether the claims showed a violation of Article 8 rights to private and family life. The joint opinion of the dissenting judges pointed out that the United Kingdom had a positive obligation to provide practical and effective opportunities for "gypsies" to enjoy their traditional lifestyle. Contrary to the majority opinion, the dissenting judges stated that the regulations and data concerning "gypsy" caravan sites offered no probative evidence that the applicants had any practical alternative to that of being expelled from one piece of land to another, thus rendering them perpetual errants.

The limited exposure of racial issues was highlighted in the case of Anguelova v. Bulgaria. In the context of a Bulgarian Roma woman whose son died from head injuries while in police custody, the court, through a minority opinion, addressed issues of race and ethnicity. The applicant argued that the police officers' and the investigating authorities' perception of her son as a Roma-gypsy was a decisive factor informing their attitudes.

The applicant's complaint alleged violations of the rights to life, freedom from torture and cruel treatment, security of the person, an effective remedy, and non-discrimination. After an investigation clarifying that the applicant's son died of injuries previous to the arrest and that police officers referred several times in their statements to his "gypsy" ethnicity, the court found a violation of the right to life. Furthermore, the court found violations of the state's obligation to conduct an effective investigation, an illegal deprivation of liberty, and a violation of the applicant's right to an effective remedy.

The court's treatment of race was paradigmatic of its inability to apprehend equality beyond its formal dimension. Out of nowhere the court came up with a highly restrictive new standard to prove discrimination: reasonable doubt. Although the court acknowledged the applicant's claim

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81 Id.
83 Id. at 436 (Bonello, Casadevall, Fischbach, Lorenz, Pastor Ridruejo, Stráznická & Tulkens, JJ., dissenting).
85 Id. at 25.
86 Id. at 30.
87 Id. at 32.
88 Id. at 33-34.
was based on serious grounds, the court held that the evidence for racial discrimination did not meet the Article 14 standard, that is, discrimination was not supported beyond a reasonable doubt.\(^\text{89}\)

Judge Bonello, in a partially dissenting opinion, strongly disagreed with the court and expressed his bewilderment at the fact that there was no single instance in its fifty years of existence in which the court has found a violation of the right to life or freedom from torture induced by race, color, or the national origin of the victim.\(^\text{90}\) In a forceful indictment against the court's blindness on these issues Judge Bonello stated: "Kurds, coloureds, Islamics, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence."\(^\text{91}\)

He harshly criticized the extrapolation of a criminal law evidentiary standard—beyond a reasonable doubt—to a series of cases clearly demonstrating the racial prejudice of the Bulgarian police against the Roma people.\(^\text{92}\) Numerous human rights organizations confirmed this reality, which had also been addressed by inter-governmental organizations, such as the Council of Europe and the UN.\(^\text{93}\)

The European Court and Positive Action

The court’s failure to critically consider equality, and thus its inability to consider race and ethnicity in the formation of identity and corresponding lifestyles, spills over and influences the court’s ultimate conceptualization of affirmative action as a backward- and forward-looking remedial

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89 Id. at 34-35.
90 Id. at 39 (Bonello, J., dissenting in part). In his dissent, Justice Bonello noted that: 
Leaving through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination.

Id. (Bonello, J., dissenting in part).
91 Id. (Bonello, J., dissenting in part).
92 Id. at 39-40 (Bonello, J., dissenting in part). See Velikova v. Bulgaria, App. No. 41488/98, 2000-VI Eur. Ct. H.R. 1, 30 (involving a Roma woman—the applicant—who complained of the death in police custody of her Roma life-partner, the father of her three children. The victim died from injuries after spending twelve hours in police custody following his arrest for suspicion of cattle theft. The court found violations of the right to life, right to an effective investigation and remedy, but did not find a violation to a right to equality, stating that "the standard of proof required under the Convention is proof beyond a reasonable doubt.") See also Assenov v. Bulgaria, 98-VIII Eur. Ct. H.R. 3264 (1998) (involving allegations of police brutality; the court held that because the evidence did not show whether the Roma family’s injuries were caused by the police, there was no violation of applicant’s rights).
tool. In fact, the court has not directly dealt with affirmative action.94

The failure to acknowledge the positive dimension of equality signals
the court's potential misapprehension of considering affirmative action as
an "objective and reasonable justification" for making distinctions.

One big irony is that the applicability of the margin of appreciation
doctrine can actually trigger a favorable review of a state's programmatic
policies in the affirmative action field. The court could hold that the state
is in a better position to determine if the disparate treatment embedded in
the affirmative action program is reasonably and objectively justified.95

c. New Development—Protocol 12 to the Convention

The Council of Europe's approval96 of a new protocol to the European
Convention on Human Rights—Protocol no. 12, opened up possibilities for
the so-called fourth generation of anti-discrimination provisions and thus
of a reconceptualized version of equality.97 Article 1 reads:

1. The enjoyment of any right set forth by law shall be se­
cured without discrimination on any ground such as sex,
race, colour, language, religion, political or other opinion,
national or social origin, association with a national mi­
nority, property, birth or other status.

2. No one shall be discriminated against by any public au­
thority on any ground such as those mentioned in para­
graph 1.98

Article 1 expands equality to cover any right guaranteed by law, not
only the rights provided in the Convention, as well as to any official act of
state. Equality moves up to an independent status. Slight optimism is
voiced by various scholars on this Protocol potential to improve ap­
proaches to racial issues.99

However, it must be noted that affirmative action remains linked to a

94 See Fredman, supra note 46, at 42 (noting that the new protocol "has not been refashioned to
bring in the possibility of positive action").
95 Prof. Romany thanks Einat Hurvitz, an L.L.M student in her Race, Gender, Ethnicity and In­
ternational Human Rights Seminar at American University School of Law for raising this point.
96 For an account of the process leading to the adoption of Protocol no. 12 and commentary on
the language see Council of Europe, Steering Committee for Human Rights ("CDDH"), Explanatory
97 CETS no. 177, adopted in Rome, Nov. 4, 2000. The Protocol will enter into force when ten
members of the Council of Europe ratify it. As of February 17, 2004 only five countries did (Bos­
nia/Herzegovina, San Marino, Croatia, Georgia and Cyprus) and another twenty-eight signed it. See
The Council of Europe Website, at http://conventions.coe.int (last visited Feb. 20, 2004) (on file with
99 See van Boven, supra note 29, at 129; Fredman, supra note 46, at 22.
formal equality version. The Protocol explanatory note provides that “such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable.” The traditional objection to view redistributive and forward looking measures as non-justiciable stemming from a highly static individualistic notion of rights and remedies is still alive and well.

An Invitation to Self Reflection

The anti-discrimination jurisprudence of the ECHR only has meaning to the extent that it is reflective upon the underlying principle of equality. However, basic human rights principles have been undermined by competing prerogatives of institutional need supported by traditional international law discourses.

A reflexive examination of court law on the subject of discrimination reveals that the ECHR elaboration of Article 14 is driven by a highly formal and individualistic framework—an idealistic notion of the individual human subject enjoying certain inalienable rights. The focus on individual subjectivity has prevented the ECHR from developing an alternate conceptual framework that can properly deal with group and collective justice claims. This partially explains the ECHR failure to elaborate thus far upon a corpus of racial discrimination jurisprudence.

The ECHR’s discursive strategy allowing states wide latitude with respect to the discrimination through the margin of appreciation doctrine confines the ability of normative discourse to steer state action.

Furthermore, the court’s “practical and effective” holdings are grounded on a normative standard that never gets articulated. There is reliance on democracy and state consensus, that is, on the necessities of democratic society and the determinations of “state consensus” that might provide only a measure of legitimacy and consistency.

The ECHR’s treatment of the Roma people elicits the court’s selective approach in the application of its “practical and effective” sensitivities. The dynamism inherent in shifting social conditions reflected in state consensus is only reserved for those social sectors the court opts to declare visible, which does not include the Roma lifestyle. Although they appear neutral, dominant cultural forces, in reality, dictate assimilation.

At a conceptual level, the dichotomization of the practical and the theoretical dimensions of human rights illustrates the high price of shifting valorizations. Values are respectively assigned to the abstract, normative, and concrete realms in a manner that appears arbitrary. To the extent that the court precludes the subjection of its Manichean value structure to critical engagement, it remains conceptually isolated from other forms of

Fredman, supra note 46, at 42.
norm-generating discourses. State consensus/margin of appreciation, and individual/community interests therefore constitute dyads in a limited, unchanging series of given variables that the court combines to reach particular decisions. Cases that blur the dyadic variables become off-limits. The result is a conspicuous sense of inconsistency between facts and judgment and, more importantly, a lingering sense of injustice among those, like the Roma people, upon whom the court imposes social straightjackets wholly unrelated to their lived experiences.

The silencing of both inconsistency and injustice is symptomatic of the court’s refusal to engage in alternative discourse structures. Within the ECHR discourse, there seems to be no escape from a rational discipline that prevents the engagement with critical discourse transcending formal equality.

III. EXPANSIVE DIALOGUES AT THE INTERNATIONAL LEVEL: THE WORLD CONFERENCE ON RACISM

A value driven approach to equality that privileges expansive dialogues and participation both at the national and international fronts, and that generates dialogized pluralism, can begin to adequately address the gaps.

At the global level, international human rights scripts centered on a global discourse can also facilitate the consolidation of a “cosmopolitan solidarity” based on some kind of moral convergence. Solidarity does not generate radical changes in state conduct. But the increasing incorporation of the world into the mesh of mass communication, facilitating a level of closeness among individuals, groups, and communities across the globe, renders the emergence of “global publics” through the active participation and initiatives of grassroots movements and NGOs more likely.

The 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (“Conference”) captured this incipient global public, alongside state representatives, and updated basic principles of anti-discrimination.

Expanding communication exposed “denied lacunae in normative systems,” which may radically modify their operation as normative facts in the world. In the arena of international human rights, expanding communication to include NGOs as well as government actors can lead to a fuller understanding of the dynamics of human rights violations which might spur a reassessment of human rights norms.

During the Conference, representatives of various NGOs and groups from around the world gathered with governmental representatives to combat racial intolerance. The Conference provided a forum in which NGOs and community representatives updated erstwhile human rights norms in

light of new perspectives, offering proposals to implement human rights in more substantial and effective ways. This expanded communicative participation showed that a more comprehensive human rights agenda was required to combat racism.

The Programme of Action reflected this modification of human rights by lifting the conceptual barriers between individual and group rights, public and private spheres of life, and public and private economies. It conceived of the individual as more intersectional, subject to overlapping forms of discrimination. These altered norms became incorporated in the Programme of Action because the Conference brought together formerly marginalized voices in a legitimate process of opinion- and will-formation at the international level. Thus, by bridging the normative and procedural aspects of legitimacy, NGOs and community groups were able to fill in voids in the normative framework of human rights with new expressions and meanings.

The NGO Forum Programme of Action, adopted in the NGO Conference Forum held a week before the official Conference, offered a rich account of racial injustice. It recounted history. Paragraph 194 stated that, "[r]acism, racial discrimination, xenophobia and related intolerance are forms of discrimination based on historically unjust social, economic and political orders. These phenomena mutate, re-invent and continue to manifest themselves in contemporary societies, causing severe psychological scars and perpetuating deep inequality and poverty."
In addition, paragraph 195 stated that, "[r]acism and racial discrimination are founded on ideologies of racial supremacy that have historically and systematically denied certain groups of people full enjoyment of their human rights and fundamental freedoms. The restoration of dignity to those who have suffered the consequences of these ideologies is central to our humanity." 107

Although the language of the official Conference Programme of Action is more subdued than its NGO counterpart, it was nevertheless motivated by similar historical and systematic accounts of racial injustice. 108

This example of expanded communicative action altering human rights norms at the international level offers ways in which domestic institutions could broaden their democratic bases. In the case of Brazil, as recently as twenty years ago, official discourse denied the existence of a racial problem and treated the increasing racial tensions in the country as a non-issue. 109 These tensions began to emerge as public issues in the mid-1990s, when organizations and interlocutors held rallies and publicized articles calling for policies promoting racial equality. However, the push that consolidated racial issues in the public arena was Brazil's preparatory efforts, beginning in 2000, for the Conference. This national effort captured the attention of the mass media and the public, spurring debates across different areas in civil societies, such as universities. 110 This entrenchment of racial issues in public discourse resulted in various local, regional, and national affirmative action measures such as quotas. Brazil is one of the rare cases in which the struggle against racism has become a salient issue in public discourse. Granted, many problems face affirmative action programs thus far instituted, and these programs ultimately depend on the continued sanction of the government. However, the Brazilian case shows the possibility that opening up communicative action to include voices formerly excluded can generate a public dialogue that is informed by rich life experiences.

A. Refining the Lessons

1. Social Identity and Agency

There is still significant room for improvement. The Conference revealed the deep conceptual divide between stalwart defenders of "liberal values" and those who advanced a "victim-oriented" approach to human

107 Id.
108 Paragraph 48 of the report "urges States to recognize the effect that discrimination, marginalization and social exclusion have had and continue to have on many racial groups living in a numerically based minority situation within a State..." Id.
110 Id. at 2.
rights protection—symptomatic of a highly specialized and institutionalized structure of international human rights discourse that turns a blind eye to critical discourses. As noted above, such a divide underscores the incongruities of a system predicated on the freedom of the individual subject and on the primacy of the free will in determining personhood at the expense of a social identity. It also surfaces the liberal narrow construction of a self that in claiming a cultural, racial, and gender identity is deprived of its agency. The unshackling of the traditional liberal perspectives on free will presupposes the acknowledgement of a subject that can both think and act in a consistent manner, not with abstract precepts but with choices derived from personal stories that affirm or reject the validity of given social roles and values. The acknowledgment of critical abilities thus constitutes a key element for the affirmation of the self in society. When symbolic processes and structures of human rights discourse can neither accommodate nor interpret critical expressions, then self-affirmation is severely thwarted with often violent consequences.

2. The Over-Privileging of "Victimhood"

A liberal approach to justice, which creates law in a realm detached from people's critical discourses, will inevitably show fundamental crevices in breadth and effectiveness. The solution does not lie, however, in subscribing to radical poles which elude the possibility of dialogues. A radical disengagement of institutionalized discourses in favor of giving normative value to actual life experiences freezes dialogue in the corner of over-privileging. Either you come from "embodied objectivity"\(^{111}\) of the truth that emerges from lived experiences, or you are stationed in the detached realm of the acontextual self. To over-privilege the voice of the victim fails to unshackle human rights discourse from its Manichean theoretical-or-practical structure.

Moreover, in its radical denial of the status quo, "embodied objectivity" cannot get involved in the enterprise of reforming the legal structure of international human rights law. There is not much room for dialogue. Therefore, an acceptance of a purely empirical account of normativity—one that exclusively relies on the actual life experiences of the marginalized—ultimately hinders the creation of "cosmopolitan solidarity."\(^{112}\)

3. Communicative Action

Jürgen Habermas' discourse theory offers insights for the design of an


\(^{112}\) See Jürgen Habermas, Learning by Disaster? A Diagnostic Look Back on the Short 20th Century, 5 Constellations 307, 318 (1998).
appropriate conceptual balance between institutionalized and individualized discourses in the elaboration of human rights norms. Although Habermas' theory of communicative action contains assumptions that prevent him from considering non-"discursive" and diverse forms of action and expressions, he nonetheless significantly contributes to open up spaces for critical expressions. Principles of popular sovereignty and of human rights are not deemed mutually exclusive, but presuppose and depend on one another. State sovereignty is not lost by virtue of a human rights discourse strengthening global publics. However, this discourse no longer compels victims to read a liberal-welfare political script in discursive form. The normative force of the justice claims of excluded victims does not descend from institutionalized texts but arises, literally, in their dust.

As such, expanding Habermas' communicative action to include different critical voices generates possibilities for a richer elaboration and understanding of human rights. Expanded communication scrutinizes the international legal system at a systematic level, exposing violations that remain unrecognized from a neutral point of view. Inclusion of NGOs and grassroots movements into the international human rights structure can lead to a fuller understanding of the dynamics of human rights violations.

Oppression is Janus-faced. It is not only confined to "the horror of existing unreason[,]" but also exists within the rational institutionalized machineries of modern societies. A revised elaboration of human rights norms must not lose sight of the rational and irrational aspects of our social existence. This balancing can only be maintained if human rights discourse keeps its point of reference in critical human voices. These voices, however, have truth value to the extent that they adequately reflect the identity of their speakers. Thus, the possibility of developing human rights norms depends on a conception of being faithful to human identities, one that at least prevents their "closure."

Against these conditions, expanding communication allows publics to scrutinize "undetermined" actions, e.g., the existence of racial disparities in power, wealth, etc. It becomes clearer that these disparities exist because of systematic disadvantages arising out of structural processes that "turn facially neutral norms and standards into a system of exclusion and subor-

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114 See Jörgen Habermas, On Social Identity, 19 TELOS 91, 101 (1974) (stating that norms of rational discourse are "those universal and inevitable presuppositions which, however counterfactually, are so much an inherent part of language, and thereby of the sociocultural life form, that they establish a link between the process of socialization and the imperatives for the formation of ego and group identities").

115 BETWEEN FACTS AND NORMS, supra note 113, at xlii.
In 2002, the Special Rapporteur for the UN Commission on Human Rights seemed oblivious to the Durban struggle to update the meaning of equality and of its concomitant temporary and remedial measures. A final report on the concept and practice of affirmative action framed the issue of affirmative action as “how to decide which groups are sufficiently disadvantaged to deserve special treatment.” The Rapporteur’s framing assumed that special treatment without “sufficient” justification contravened the principle of equality. The international court’s standard requiring a “relevant” connection between a legitimate aim pursued and the means to achieve those aims was highlighted without due attention to any critical perspective.

According to the Special Rapporteur, certain protected categories such as race bore no relevance to the calculation of any legitimate aim. This includes affirmative action programs because such grounds of distinction are inherently antithetical to the concept of equality.

Competence and due attention to meritocracy, fully inserted within the liberal model, permeated the report. In the fields of employment and education, for example, the relevant criterion was “competence.” The appropriate remedy to redress the vestiges of past discrimination in these fields was “affirmative mobilization” and “affirmative fairness,” which respectively deal with skills development programs that ensure equal opportunity and transparent methods of evaluation.

The redistributive nature of affirmative action was a key concern informing this report. Policies of affirmative action were to be carefully...
scrutinized given that they entailed the distribution of social goods on such irrelevant grounds as race and gender.\textsuperscript{123}

Due to their unfair impact on innocent individuals who bear their costs, past discrimination is an insufficient justification for affirmative action programs. The strictly negative and formalistic understanding of equality is explicitly acknowledged: "In no case may someone be deprived of a basic right on the pretext that doing so would help particularly disadvantaged groups better to overcome the consequences of previous discrimination."\textsuperscript{124} The rhetoric of past or systematic discrimination cannot magically legitimate state action that would otherwise violate the principle of formal equality:

An injustice cannot be repaired by another injustice. It is not because the descendants of the victims of the past are substituted for the descendants of the oppressors of the past, that a discriminatory measure ceases to be illegal and becomes consistent with the requirements of the protection of human rights and fundamental freedoms.\textsuperscript{125}

The Rapporteur's selection of examples was extremely revealing. Structural realities of subordination were trivialized. The competence of a violinist in the elite world of a symphony orchestra was used to illustrate the importance of meritocracy. His example is worth quoting:

For instance, in matters of employment and education, the principal criterion is competence. A classical example is the hiring of a violinist for an orchestra. The decisive criterion has to be the competence of the candidate in playing the violin. It is not relevant to take into account the colour, the sex, the religious faith, the language or the political persuasion of the candidate. Only the competence of the candidate in playing the violin should be the determining factor. . . .\textsuperscript{126}

The individualistic perspective was uncritically adopted. The realities of racism and human suffering were diluted in a discourse that centered on an unencumbered competence.\textsuperscript{127} Fairness in distribution requires a critique of the meritocracy myth\textsuperscript{128} and the need to move beyond the confines of formalistic/negative equality. The reconciliation of the positive and

\textsuperscript{123} See id.
\textsuperscript{124} Id. at 25 (internal citations omitted).
\textsuperscript{125} Id. at 24.
\textsuperscript{126} Id. at 22-23.
\textsuperscript{127} See, e.g., MATSUDA, supra note 23, at 52 (stating that critical race theory scholars "suggest that rights, formality, and rules are more than shuttlecocks in a game of law-reform badminton. They are dead-serious promises broken at the expense of human well-being.").
\textsuperscript{128} See Spann, supra note 11, at 27.
negative components of equality that affirmative action can bring about is lost in a shallow rhetoric contradicted by the global realities of marginalization brought about by racism and inequalities. True equality of opportunity and merit requires “substantive racial equality in areas like housing, health, economic development, and education . . . .” 129 The Special Rapporteur’s strictly formalistic approach to affirmative action supports critical racial theorists’ idea that hegemonic discourses deny the existence of systemic dominance. 130

The Special Rapporteur failed to recognize that affirmative mobilization and fairness programs often cannot alter entrenched networks of discriminatory practices. 131 The fact is that discrimination is so entrenched in systems of meritocracy that the promotion of equality requires profound transformation on a supra-individual level. 132

V. THE INTERNATIONAL HUMAN RIGHTS SYSTEM: A NORMATIVE AND STRUCTURAL DIAGNOSIS

The failure of the international human rights system to provide strong, active support for domestic and international affirmative action efforts reflects fundamental normative and structural deficiencies of the international human rights system as a whole. Normatively, international human rights discourse has increasingly distanced itself from its anti-racist origins and has become ever more unlikely to mediate the fundamental normative tension between rational choice and claims of moral personhood, which respectively correspond with the negative and positive aspects of the equality principle. The heavily bureaucratized structure of human rights bodies, their increasing focus on criminalizing discrimination, and perhaps an inherent structural racism, hinder the development of an inclusive human rights discourse.


130 See, e.g., Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies, in LESLIE BENDER & DAAN BRAVE-MAN, POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER, 32, 32-33 (1995) (“Most talk by whites about equal opportunity seems to me now to be about equal opportunity to try to get into a position of dominance while denying that systems of dominance exist.”).


132 See Moran, supra note 131, at 2418 (“Although individual discrimination might be corrected through consciousness-raising or incremental legislation, subordination is so deeply entrenched that it can be eliminated only through profound transformations in the body politic.”).
A. The Normative Vacuum in Human Rights Discourse

European powers were completely at a loss in dealing with the discrimination claims of recently decolonized states, and their international discrimination jurisprudence (in the UN human rights system and the regional European system) therefore embodies a "quality of the evolving international standards . . . ."\(^{134}\)

International society's short memory is at stake. It has forgotten the pivotal role race played in the birth of human rights\(^{135}\) and its institutional development.\(^{136}\) This denial of race in international discourse makes it harder to recognize that racial discrimination is the pre-eminent subject-matter of international human rights.\(^{137}\) As such, international human

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\(^{133}\) For example, note how Theo van Boven addresses his European audience in explaining the recently adopted ICERD. In explaining the success of incorporating the optional petition mechanism, van Boven states that: "The delegation from Ghana was surprisingly constructive in this respect."\(^{134}\) van Boven, supra note 29, at 182 (emphasis added). This surprise was generally directed towards African delegations in general:

They were emotionally involved because the combating of racial discrimination was at issue. This emotional involvement did not prevent them from working on the whole with tact and insight. The manner in which, for example, the representative of Ghana defended his proposals, was full of conviction, vision and enthusiasm, and commended the admiration of many.\(^{134}\) McDougall, supra note 12, at 593.

\(^{135}\) See, e.g., van Boven, supra note 29, at 191 ("[T]he actions to combat racism and racial discrimination had, at least at the level of the UN, a spearhead function on the road to the progressive development of strategies and policies for dealing with the promotion and protection of human rights in general.").

\(^{136}\) For example, the apartheid system in South Africa prompted the UN to recognize that Article 2(7) of the UN Charter (prohibiting intervention in matters essentially within domestic jurisdiction) does not apply to any "massive human rights violation."\(^{134}\) Id. at 190. Racial discrimination in colonial Rhodesia and South Africa prompted the UN Security Council, for the first time, to use its Chapter VII powers to impose mandatory trade and arms embargoes.\(^{135}\) Id. The development of special fact-finding missions originated in light of anti-racist and anti-colonial contexts and "only gradually extended to human rights violations at large."\(^{134}\) Id. Finally, the right to individual petition originally developed to benefit "people living under the trusteeship system or in non-self-governing territories where policies and practices of colonialism and racial discrimination were interlinked."\(^{134}\) Id. at 191.

\(^{137}\) Malcolm X stated that: "It's all racism . . . . And when these people in these different areas see that the problem is the same problem . . . then the oppressed people of the earth make up the majority that can demand and not as a minority that has to beg." Dorothy Q. Thomas, Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy, 9 HARV. RTS. J. 15, 18 (1996) (citing MALCOLM X: THE MAN AND HIS TIMES 257-58 (John Henrik Clarke ed., 1969)). Also, W.E.B. Du Bois stated that: "the problem of the color line, is international and . . . it cannot ultimately be settled without consultation and cooperation with the whole civilized world." McDougall, supra note 12, at 571 (citing Henry J. Richardson, III, The Gulf Crisis and African-American Interests Under International Law, 87 AM. J. INT'L L. 42, 62 (1993) (quoting W.E.B. Du Bois, Peace and Foreign Relations, CRISIS, Nov. 9, 1923)). Also Du Bois, during the 1900 Pan-African Congress stated:

The problem of the twentieth century is the problem of the color line, the question as to how far differences of race . . . will hereafter be made the basis of denying to over half the world the right of sharing to their utmost ability the opportunities and privileges of modern civilization.
rights law leaves unresolved, on the issue of affirmative action, the inherent normative tension between the negative aspect of equality (rational choice) and its positive corollary (claims of moral personhood). This normative determination is crucial and inevitable in the context of the affirmative action debate. In describing the affirmative action jurisprudence of the United States Supreme Court, Girardeau Spann argues that the Court’s adjudication of affirmative action cases involves the application of a predetermined normative baseline. In those cases the current allocation of resources constitutes the proper baseline, and the Court’s invalidation of an affirmative action program is nothing else but “an effort to preserve that natural state and to prevent a usurpation of resources by racial minorities.” According to Spann, “the act of selecting an appropriate baseline is ultimately the act of asserting a normative preference.” Baseline determinations are thus wholly dependent on a normative judgment.

B. The Structural Limitations of the International Human Rights System

Structural limitations in the human rights system manifest in several ways. First, international and regional systems have weak implementation mechanisms, that are still very much impaired by the reluctance of the international systems to fully recognize the individual as a subject of international law. The system is thus ill-equipped to be effectively responsive and unable to confront unprecedented forms of violence derived from ethnic conflict, guerrilla warfare, and terrorism. Individual pre-eminence is recognized in the context of violent conflict and humanitarian law; often times international criminal law is closely watching developments. Most of the international community’s efforts to consolidate the individual as a legitimate subject of international law have come in the context of violent conflict, such as the ethnic cleansing violence in the former Yugoslavia and Rwanda, merging human rights with the law of warfare (humanitarian law) and international criminal law.

Consequently, international human rights bodies are focusing expressly on

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Jennings, supra note 129, at 597 (citing Address to the Nations of the World, in W.E.B. DU BOIS: SPEECHES AND ADDRESSES, 1890-1919, at 125 (Philip S. Foner ed., 1977)).
138 Spann, supra note 11, at 73.
139 Id.
140 See, e.g., THE INCLUSION OF THE OTHER, supra note 14, at 167 (discussing Kant’s idea of perpetual peace that did not conceive of ethnic and civil wars, or guerilla warfare and terror bombing); van Boven, supra note 29, at 193 (“In many situations of deep-rooted ethnic, racial, national and religious conflicts, often taking a heavy toll on human life, the international community has as yet failed to find effective and adequate responses.”).
141 See van Boven, supra note 29, at 205 (describing how ICERD adopted a working paper focusing on “early warning measures” and “urgent procedures” that tie racial discrimination with the imminent advent of massive social unrest and violence in response to a 1992 report of the Secretary General).
violent forms of racial discrimination.\textsuperscript{142} Remedies thus increasingly refer to criminal law,\textsuperscript{143} with the resultant focus on individual culpability—the search for the individual perpetrator gains the spotlight. Structural and systemic discrimination continue to lag behind and remain at a distant background, thus leaving affirmative action strategies and remedies in an underdeveloped doctrinal stage. In the United States context, critical racial theorists have been quick to point out these fatal flaws in conceptualization. The anti-subordination model, espoused by critical perspectives in the United States, reveals a broader framework that needs to be addressed in transcending an individualistic perspective. Unconscious racism\textsuperscript{144} is often presented as another tool illustrating neutral rules that disproportionately impact marginalized sectors and perpetuate power privileges.\textsuperscript{145}

Finally, the institutional sociological profile cannot be overlooked. The racial hierarchies embedded within the legislative and adjudicative frameworks must equally be addressed. The ECHR example reveals an ongoing pattern of a highly homogeneous racial and ethnic profiling at the political and economic higher echelons as well as in academia, particularly legal academia.

International human rights organs have yet to give the normative urgency to racial hierarchy as well as to "institutional racism"\textsuperscript{146} that they have given to the violent forms of racial discrimination.

VI. NOTES FOR DECISION-MAKERS: THE WIDE ANGLE LENS

The Self: Culture and Identity

The analysis of the limitations of current human rights law with regard to equality/positive-affirmative action must challenge the normative accounts of self, culture, and identity which inform the formal equality principle. In exposing the arbitrary configuration of its premises and assumptions lie the possibilities of rearticulating the equality paradigm. Such ex-

\textsuperscript{142} See id. at 189 (discussing the broad scope of racial discrimination).

\textsuperscript{143} See, e.g., id. ("Racial discrimination, particularly in its vicious manifestations, is a matter of criminal behaviour and should be dealt with accordingly in terms of legal action.").

\textsuperscript{144} Moran, supra note 131, at 2413.

\textsuperscript{145} Racism transcends individual animus and invades the innermost reaches of our lives. See, e.g., Darren Lenard Hutchinson, Unexplainable On Grounds Other Than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 U. ILL. L. REV. 615, 668 (arguing that attaching a mens rea element to racial discrimination "immunizes from judicial invalidation facially neutral state action that harms oppressed populations").

\textsuperscript{146} Moran, supra note 131, at 2413 (defining institutional racism as "racial status-enforcement influenced in an unrecognized manner by racial institutions") (quoting Ian F. Haney Lopez, Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109 YALE L.J. 1717, 1769 (2000)).
posure bares the dialogue opportunities—melts crusts of privileges and paves the way for solidarity—at a higher plane than mere tolerance. First, racial discrimination law has to confront—as a category inserted within the context of social status, history, and culture—the acontextual and a-historical premises embedded in the conceptualization of the liberal self. A remedial framework that emerges from a more contextual understanding of that self in the scenario of race/culture and identity will certainly trigger a deeper understanding of inequality and discrimination, thus offering a remedial framework full of creative possibilities in the struggle against racial discrimination and racial/gender discrimination. Second, a normative rendition of a contextualized identity, not imprisoned in its context, and which exhibits a shared human agency, is similarly in order.

**Culture**

In continental Europe, culture emerged as a Romantic revolt coincident with the rise of nationalism, as a self-conscious political project against Enlightenment values and in opposition to civilization. On the other hand, culture also emerged as a socially equivalent indicator of human evolutionary advancement, consisting of sets of knowledge, beliefs, and customs ranked in a primitive-to-civilized hierarchy. Sociologists and anthropologists in the early twentieth century reformulated the concept out of this hierarchical framework of understanding in more pluralistic terms, and recognized the variety and complexity of “elements, traits, and configurations that constitute lifeways . . .”

The categorization-account cannot obscure the fact that for individuals culture is not a mere set of anthropological signifiers. Intimate accounts of cultural boundaries surface. A culture defines a community, signaling to its members their shared interests and distinctiveness. Basic elements of a community’s way of life—such as language, non-verbal methods of expression, beliefs, and practices—form a psychological mesh giving shape to one’s moral agency and social orientation. The experiences of be-

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148 SITUATED LIVES: GENDER AND CULTURE IN EVERYDAY LIFE 1-2 (Louise Lamphere et al. eds., 1997) [hereinafter SITUATED LIVES].
149 Id. at 2.
151 Whether cultural membership provides the basis for moral agency is an unresolved issue. See, e.g., JOHN SIMMONS, JUSTIFICATION & LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 82-83 (2001) (stating that there is no necessary connection between one’s sense of identification with a political community or social setting and a moral obligation to associate with this community or setting).
152 See POOLE, supra note 147, at 124 (discussing the necessity of social interaction in a new culture).
longing and otherness in a group reveal psychological centrality.\textsuperscript{153}

Currently there is general agreement on the variability and ill-
definitions contained in cultural definitions and values.\textsuperscript{154} Globalization
and the emergence of a world-culture,\textsuperscript{155} characterized by the global
movement of capital and the concomitant fragmentation of modes of pro-
duction, technology, and the global media, evidence the disintegration of
static conceptual understandings of culture.\textsuperscript{156}

\textit{Culture and a Politics of Recognition}

This diversification of cultural notions acquires political expression
through greater demands by non-traditional groups for recognition in the
democratic process. In \textit{Inclusion and Democracy}, Iris Marion Young ar-
gued that traditional channels of political discourse are inadequate to ad-
dress erstwhile structural inequalities of housing, employment, education
property relations, etc., maintained by dominant power relations, par-
ticularly to the detriment of those groups placed outside the borders of politi-
cal-discursive jurisdiction.\textsuperscript{157} Young argued that, as a complement to these
traditional channels, the state should facilitate discourses in other civic
domains where citizens with fewer resources and political standing can
participate in sustained public discussion.\textsuperscript{158}

\textit{Rabid Critiques}

Group affinities and their political impact in renewed democratic dia-
logues are often demonized by a liberal culture that impersonates neutral-
ity. Brian Barry’s work \textit{Culture and Equality} is an example. Barry was
critical of Young for her political legitimation of “group affinities.”\textsuperscript{159}
Conceivably, any group with political capital could claim special privi-
leges, possibly transforming the democratic process into a battleground of

\textsuperscript{153} See id. at 124-25 (describing a “national culture” and expectations of participation by citizens
or immigrants in that culture).

\textsuperscript{154} See, e.g., \textit{POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 4-5} (Duncan Ivison
et al. eds., 2000) (“Claims of cultural difference have to be balanced against the dynamic nature of
cultural practices and traditions and the ways in which cultures borrow and import practices and beliefs
from outside of themselves.”);

\textsuperscript{155} POOLE, \textit{supra} note 147, at 150 (“[T]hough there is a vast amount of
cultural production with a diversity of audiences, it is enormously fragmented, and does not provide an
integrated framework of representations through which its audience can identify themselves as mem-
bers of the nation.”).

\textsuperscript{156} POOLE, \textit{supra} note 147, at 148. Poole, however, argues that the emerging development of a
world culture has given rise to a massive diversification of cultural forms, instead of creating global
homogeneity. \textit{Id.}

\textsuperscript{157} See IRIS MARION YOUNG, \textit{INCLUSION AND DEMOCRACY} 5 (2000).

\textsuperscript{158} \textit{Id.} at 156.

\textsuperscript{159} BRIAN BARRY, \textit{CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURAL-
ISM} 98 (2001).
interest-group politics.\textsuperscript{160}

Multiculturalists, according to Barry, politically reify culture. For Barry multiculturalists grossly misrepresent the social complexities of contemporary inter-group dynamics through reliance on "bad anthropology."\textsuperscript{161} It is one thing to claim that society is composed of an eclectic multiplicity of groups and identities, but it is another thing to assert that this multiplicity forms the basis of social conflict giving rise to a normative need for a "politics of difference," a basic claim in multiculturalism.\textsuperscript{162} In his view, groups and group identities should not be politicized, given that cultural and group differences per se do not give rise to conflict, at least not the normative kind characteristic of the religious clashes in the past. Therefore, mobilization at a sectarian or national level, based on some distinctive cultural identity, distorts group analysis and hinders a clear identification of other distinguishing features that are more compatible subjects of liberal democratic deliberation.\textsuperscript{163}

Identity, Context and Agency

The concept of identity eludes simple definitions. Generally, identity refers to the proposition that there is a constitutive linkage between the subjective and the objective, that a person has an identity because he or she identifies with figures or representations made objects of his or her conscience.\textsuperscript{164} In a psychological sense, identity refers to that point of divergence during a person’s adolescent life where the forms of one’s social life (family, school, friends, etc.) fail to meet or resolve his or her demands or conflicts, resulting in an "identity crisis."\textsuperscript{165} Identity therefore originates and develops as a process of conflict resolution; values and commitments are derived and ultimately require the individual’s affirmation.

Identity Politics and Equality

Identity politics requires an individual, as an agent of a determinate identity, to position himself or herself in political discourse through the

\textsuperscript{160} This could happen because
\textsuperscript{161}Id. at 21
\textsuperscript{162}Id.
\textsuperscript{163}Id. at 23.
\textsuperscript{164}POOLE, supra note 147, at 44-45.
\textsuperscript{165}Id. at 44.
creation of new spaces and languages. Multiculturalists seek to extend this new political space beyond the traditional boundaries of economic and class discourse.

The discourse on political multiplicity has closer affinities to assimilationist rather than to pluralist politics, yet it does not neatly fall into either category. Historically, states favored assimilation as the means to address issues of diversity. In its open form, assimilation favored minimizing or eliminating salient differences among groups in order to construct a homogeneous national and political culture and identity. States adopting such policies were openly intolerant of, and effective in, their efforts to eradicate old cultures. The subtler “melting-pot” version of assimilation allowed newly visible cultures to transform the dominant culture to produce a richer, different mixture; yet this mixture invariably meant that these new cultures would shed their distinctiveness as soon as they became incorporated into the public and body politic. Conceiving of identity-formation as a union of internal identities and the external other over time and in a common discursive space apparently makes this transformation (or loss) inevitable.

During the interwar period in the United States, spurred by heated debate on ethnic diversity brought about by the enormous flood of immigrants (mostly from Europe), cultural pluralists such as Randolph Bourne and Horace Kallen raised the fear that nativist, xenophobic, and reactionary public sentiment would result in the abuse of new immigrants, such as suspecting them of disloyalty. Pluralists found a solution within mainstream political thought by incorporating culture within the framework of

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166 The politics of language “is fundamental in the process of creating new space in political discourse and, ultimately, new political settlements.” Paul Spoonley, Constructing Ourselves: The Post Colonial Politics of Pakeha, in JUSTICE & IDENTITY: ANTIPODEAN PRACTICES 104 (Margaret Wilson & Anna Yeatman eds., 1995).

167 “Non-class ideologies and non-economic forms of resistance and mobilization have played a much more critical role, and have gained a new status as a basis for political action.” Id. at 104 (emphasis added).


169 Id. at 1927-28.

170 POOLE, supra note 147, at 125-26.

If cultural minorities and marginal groups are to contribute to the ongoing debate about the content and meaning of the national culture, they cannot themselves claim that their own cultures and positions should be protected from its outcome . . . . Once a culture enters the sphere of politics it loses its protected status. If it is to transform the self-understanding of a nation, it may well find that its own self-understanding is transformed in the process.

171 Schuck, supra note 168, at 1926-27.
negative autonomy. Although cultural pluralists attacked the assimilationist agenda in favor of toleration, inclusiveness, and resistance to monocultural conformity, they also harbored a certain fear, lingering still in American liberalism, that pluralism might fall prey to ethnocentric tendencies and thicken inter-group boundaries.

Democracy seems to have a paradoxical, inherent fear of noises, of cacophony. At first glance, this is ironic because a (liberal) democratic state in the classic sense is predicated on the open deliberation among free, autonomous citizens on the basis of fairness and interest in mutual understanding—that is, predicated on the sameness of the political deliberants. Yet, given their fundamental irreconcilability, sameness-as-assimilation has always expressed itself to be in tension with difference-as-pluralism, and vice versa, in different equilibrium over time.

Each group or cultural identity is unique and frames the possible range of experiences for the individual members of a community. In this sense, group and community voices mutually "transcend" the possibilities of each other's experience. One can discern within the limits of possible experience certain common themes in different groups' voices. This commonality forms the basis of what Fred Evans called social "solidarity," or "the mutual immanence of mutually transcendent voices, the sense in which each voice is simultaneously inside and outside, the identity and the other of, the rest." Difference is therefore not absolute incommensurability as between group voices, or incompatibility, as between experience and moral values.

More concretely, one may frame the proposal as Patton did: "Perhaps here, in the idea of a difference that is not reducible to opposition or exclusion, but is rather to be understood as specificity or variation, we can find some intimations of a different idea of both society and justice, one that does not entail the assimilation of one culture by another." Members of a community will continue to adopt hybrid habits despite efforts of the cultural elite and sympathetic outsiders to maintain commu-

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172 The pluralists "conceived of it almost entirely as a matter of autonomous group activity undertaken in a private sphere and little affected by a laissez-faire state whose main role, insofar as group life was concerned, was to avoid impinging on that autonomy." Id. at 1926.

173 The acceptance of diversity values in the United States today "reflects the widespread belief among Americans that we can to some considerable extent have it both ways—that the study, celebration, and maintenance of diverse traditions is compatible with assimilation to core American values." Id. at 1933. Peter Schuck offers an alternate metaphor to describe this ambivalent attitude towards diversity: "a mosaic composed of permanent and visible fragments, or a lumpy chef's salad containing diverse ingredients." Id.


nal "values." Intra-group minorities will incorporate human rights into their sense of self and lives, aware that they can combat injustice and that their life is not a mere inevitable misfortune. These "discontents" will remain integral elements of the larger group identity (absent expulsion or exile, of course), part of the doubts, anxieties, hopes, and dreams of the group's narrative history, of its voices. Their status as outsiders within the group does not erase the cultural contextual nature of their disruptive voices. Such disruption is no less culturally grounded than the one provoked by the cultural mainstream.

At the same time, the diverse claims of culture have made it less tenable, given how boundaries of indeterminacy make our perception and understanding of ourselves and of others imperfect, to maintain a universal conception of rights. *A fortiori*, a compelling moral basis emerges—as common stake or "social solidarity"—affirming that there ought not be a closure of identities. Why not let ethnic groups cleanse themselves if they see it fit and their strength (coupled with indifference from others) allows it? Or allow national groups to secede and reorganize themselves in ways more consonant with their national histories? Or permit minority groups to set up their own languages, sacred places, schools, local governments, courts, administration, etc., more in tune with their specific group orientations? Or let individuals wear their traditional clothes on public roads, in public schools and workplaces; talk publicly about their histories in their own vernaculars; and claim a right to equal access, jobs, voting, universities, money, and political power? Why is it that "we" should care about others?

Any legal structure that leaves outside of its agenda of corrective action this political and institutional exclusion will always fall short of its purported objectives. Any model—including its remedial framework—requires the inclusion of a framework that facilitates the expansion of a social epistemology capable of creating a space for reducing the tensions between self-valuation and social judgment, be it ethical or institutional.

**VII. CONCLUSION: MORAL REFLECTION, HUMAN AGENCY, AND THE CONTEXTUALIZED SELF**

It is in this framework that the individual human must engage through moral reflection, in the pursuit of her own ends. Such a process does not occur in a solipsistic and abstract world. Culture provides the parameters of self-expression, parameters which are not straightjackets. Self-identification with a culture that is permeable, and which, through dialogic interactions enjoys the richness of cross-fertilizations is one of the expressive cores we bring to those processes of moral reflection, where freedom accompanies our assessment of social hierarchies.

A critical rendering of liberal freedom and choice does not presuppose
a dichotomous conception of the self as abstract or totally constituted by culture, as national or cosmopolitan. As Drucilla Cornell reminded us, the "person is not just a given, but implicates a practice in and through which [she] is constantly engaged, a process of assuming self-responsibility through moral reflection on the question, 'What should I do?'"\textsuperscript{176} The fact that our cultural identification has political and ethical dimensions does not preclude the freedom to re-imagine or expand such identification.\textsuperscript{177}

The imaginary domain, as the aesthetic idea that helps us apprehend personal significance to abstract ideals, the "moral dimension of experience," constitutes a compass for the assessment of the right and wrong attributes of social facts.\textsuperscript{178} It is a scenario that, according to Cornell, challenges the belief in the ability of a "thin" ideal of the liberal person to offer political and legal insight into the concrete and embodied concerns of everyday life.\textsuperscript{179}

State-imposed assimilation under a script of neutrality constitutes a major disruption of a scheme which attempts to make liberal values compatible with critical views of identity. Cornell, in her critique of assimilation, labeled it as degradation.\textsuperscript{180} Cornell argued that assimilation violates the "degradation prohibition" required for the exercise of the right to the imaginary domain.\textsuperscript{181} To degrade is to claim as unworthy the process of self-identification necessary to engage in moral reflection. As argued elsewhere, to colonize, assimilate, and to systematically subordinate, while simultaneously proclaiming freedom of cultural choice and equality, ultimately betrays the core values of liberalism.

\textsuperscript{177} Id. at 675.
\textsuperscript{178} Id. at 668.
\textsuperscript{179} Id. at 667.
\textsuperscript{180} Id. at 689.
\textsuperscript{181} Id.