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ETHNICITY AND GROUP RIGHTS

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INTRODUCTION

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When the Berlin Wall fell in 1989, liberalism appeared to many commentators as the only ideology which retained any validity or viability in the modern world. Initially, the collapse of communism seemed to many to signify the "end of history." But liberalism proved incapable of containing or defusing the ethnic conflicts which were unleashed in the former communist regimes, and what replaced communism in most of Eastern Europe and the former Soviet Union was not liberal democracy but ethnonationalism. As we approach the twenty-first century, commentators are increasingly wondering whether liberalism can contain ethnic conflict in the West. What used to be seen as stable liberal democracies are now riven by bitter disputes between ethnocultural groups over immigration and multiculturalism, and some even face the threat of secession.

The resurgence of ethnonational conflict in both the East and West has reignited interest in the issue of "group rights." However, it remains a comparatively unexplored topic within Western political philosophy. There is a long-standing literature on the idea of "group" or "collective" rights. But until recently it tended to focus on a narrow and somewhat formalistic range of questions. The major aim was to categorize rights as "individual" or "collective" along various dimensions; for instance, whether a particular right is exercised by an individual or group, or whether the beneficiary of a particular right is an individual or a group, or whether the

right logically entails the prior existence of a group. Using these sorts of criteria, various rights from all areas of the law (family law, corporate law, labor law, etc.) would then be categorized as either individual or collective rights.

There is an increasing recognition, however, that this familiar debate obscures as much as it reveals. In particular, it does not help us grapple with the normative issues raised by ethnocultural conflicts. For many of the claims raised by ethnocultural groups seem to fall on the "individual" side of the ledger. For example, the right to use one's mother tongue in the courts is a right exercised by individuals, as is the right to be exempted from legislative or administrative requirements which conflict with one's religious beliefs. Conversely, many of the most familiar features of a liberal-democratic order seem to fall on the "collective" side of the ledger. For example, the right of Oregon to send two representatives to the Senate, or the right of the American people to restrict entry into the United States. Even the rights to freedom of the press and assembly, or the right to a jury trial, have important "collective" elements. And in any event, many of the clearest cases of collective rights, such as the rights of unions and corporations, have nothing in particular to do with ethnic conflict.

Focusing solely on whether the rights are exercised by individuals or groups misses what is really at issue in cases of ethnocultural conflict. The important question is whether the familiar system of common citizenship rights within liberal democracies—the standard set of civil, political, and social rights which define citizenship in most democratic countries—is sufficient to accommodate the legitimate interests which people have in virtue of their ethnic identity. Are there legitimate interests which people have, emerging from their ethnocultural group membership, which are not adequately recognized or protected by the familiar set of liberal-democratic civil and political rights as reflected, say, in the American Bill of Rights, or the French Declaration of the Rights of Man?

This way of looking at the problem directs our attention away from the formal features of claims toward more substantive moral and institutional questions. To what sorts of interests do ethnic identity and cultural membership give rise? How does membership in an ethnic group differ from other groups, such as professional, lifestyle, or advocacy groups? How important is ethnicity to personal identity and self-respect, and does accommodating these interests require more than standard citizenship rights? How salient is ethnicity to political conflict, and does this require taking measures to ensure the adequate representation of ethnic groups? If so, how do we identify and individuate the relevant ethnocultural groups, and who should we accept as their legitimate spokespersons? How can we ensure that in protecting ethnic minorities from the majority, we don't allow the group to mistreat its own members? What forms of ethnocultural accommodations are consistent with democratic equality, individual freedom, and political stability?

The seventeen essays in this volume, all previously unpublished, address many of these questions. They discuss the distinctiveness of ethnicity as the basis for legal claims (Pogge, Anaya); the extent to which the expression of ethnic identities can (or should) be accommodated within traditional liberal institutions (Stolzenberg, Walker; Kukathas; Walzer; Addis); the potential for group representation (Young; Stark); and the capacity of groups to acquire legal status and exercise legal autonomy (Réaume; Nickel). Several authors also evaluate the strengths and weaknesses of various strategies for resolving ethnic conflict around the world, from secession to nation-building to multiculturalism (Horowitz, Jung and Seekings, Kaspin, Cohen, and Kane). They help illustrate the important progress which is being made in this previously neglected field, as well as identify areas where further research is needed.

I. Meanings of Ethnicity and Group Rights

To begin with, however, the next chapter provides an overview and typology by Jacob T. Levy of the rights-claims which are at stake in recent ethnocultural conflicts. Levy argues that normative work on the rights of ethnocultural groups requires a way to identify the rights-claims which are morally and institutionally similar, and those which are not. He identifies eight clusters of rights-claims which seem to have a similar normative structure and similar institutional implications. These are (1) *exemptions*

from an ostensibly neutral law which unfairly burdens a cultural minority; (2) *assistance* to overcome unfair disadvantages or burdens to engaging in the same activities as the dominant group; (3) *self-government*, whether through secession or autonomy within a larger state; (4) *external rules* limiting the freedom of nonmembers in order to protect an endangered culture or cultural practice; (5) *internal rules* which limit the freedom of members, and which must be obeyed for continued recognition as a member of group; (6) *recognition and enforcement of customary legal practices* by the dominant legal system; (7) *guaranteed representation* for minority group members within government bodies; and (8) *symbolic claims* about the nature of the polity and the representation of its constituent groups. Levy provides several examples within each category and identifies the kinds of arguments which are made for and against rights-claims in that category. He argues that this sort of typology is more useful than existing typologies, which tend to conflate different kinds of rights into two or three overly broad categories and which focus on the formal legal structure of rights-claims while neglecting their normative foundations and institutional implications.

II. The Idea of Toleration

Levy's chapter provides a helpful survey of the rights-claims being advanced by ethnocultural groups. But how should we evaluate these claims? For most of our authors, the primary concern is with the potential role of these rights within liberal democracies, and the next three chapters focus directly on this question.

The liberal tradition has been ambivalent towards the aspirations of ethnocultural groups. On the one hand, liberalism is an individualistic theory—indeed, it seems to be the quintessentially individualistic theory—with a marked tendency to view politics as solely about the relationship between individuals and the state, with little or no room for groups in-between, other than as transient outgrowths of the combinations of individual interests. This attitude seems antagonistic to the claims of ethnocultural groups.[1] On the other hand, liberalism is committed at a very deep level to the idea of toleration—indeed, many recent authors

argue that liberalism emerged as a generalization of the principle of religious toleration.[2]

These two aspects of liberalism—its individualism and its commitment to toleration—need not come into conflict if the ethnocultural group is itself individualistic and shares the basic liberal-democratic principles of the larger society. But what if an ethnocultural group is nonindividualistic—or perhaps even anti-individualistic—cherishing group solidarity or cultural purity while repudiating ideals of individual freedom and personal autonomy? Does liberal tolerance extend to such illiberal groups?

In chapter 3, Chandran Kukathas takes up this question by exploring the idea of toleration and its role within liberal theory. He focuses in particular on the extent to which a liberal society should tolerate minority communities and their practices when those practices seem 'intolerable' or illiberal. He concludes that even illiberal communities should be tolerated, for a number of reasons. The most important reason is that the conception of public reason which underlies liberalism can only emerge—and acquire normative authority among citizens—if such cultural differences are allowed expression. Toleration, on his view, requires and justifies a principle of nonintervention in the affairs of ethnocultural groups (so long as individuals have a right of exit). He ties this argument to a broader debate about the nature of liberalism. Indeed, one of his main aims is to defend an account of liberalism which views it as a doctrine recommending compromise and the accommodation of different ways of life, rather than as a doctrine offering a comprehensive moral view grounded in already-formulated principles of justice or freedom. For this reason, the ideal which lies at the core of liberalism is toleration.

Both Michael Walzer and Adeno Addis respond to Kukathas. Walzer argues that Kukathas's vision of a regime of toleration—in which there is no "common standpoint of morality"—is simply not viable. According to Walzer, Kukathas's ideal of toleration is only viable at the international level. Indeed, the international order already has many of the characteristics Kukathas associates with a tolerant regime, such as the absence of an overarching moral consensus or of an authoritative decision-making body, constant mutual adjustment and accommodation between

groups, and a general rule of nonintervention in the internal affairs of groups. Walzer argues, however, that the sorts of intergroup relations which exist *within* a state are necessarily very different from those which exist between states at the international level. The difference between national and international society, he argues, is ineradicable. International society lacks a common history and culture, but every domestic society inevitably develops a "common moral standpoint," however disputed, as a result of shared history and experience. Human beings invariably feel attached to and want to defend their society's common moral standpoint. Consequently, Walzer concludes, a society of the sort Kukathas advocates would either have to be "inhabited by beings of another sort" or else "break up in the radical way suggested by its international analogue."

Adeno Addis raises related concerns about Kukathas's project, and goes on to propose a quite different conception of toleration. He describes Kukathas's view as a form of "negative toleration"—that is, nonintervention. Defenders of negative toleration, like Kukathas, argue that not only does it minimize the risks of conflict, but it also provides the most secure protection to cultural and ethnic minorities. Addis argues, however, that negative toleration, as it is usually articulated, is not as generous to minorities as its supporters claim, nor will it provide the minimal level of solidarity among groups that liberal democratic societies need to sustain themselves over a long period of time. In place of negative toleration, Addis endorses what he calls "pluralistic solidarity," a way of imagining institutions and vocabularies that will affirm multiplicity while cultivating solidarity. His contention is that a genuine sense of pluralistic solidarity will develop only through a process where majorities and minorities are linked in institutional dialogue, rather than when they merely tolerate each other as the strange and alien Other. In particular, Addis argues that there are three institutions that are central to this discursive process—the education system, the media, and the law. He briefly discusses how each of these systems can be reformed so as to create genuine dialogue across differences.[3] According to Addis, this conception of pluralistic solidarity will not only help secure justice for ethnocultural groups but also help to protect individuals within those groups from abuse or mistreatment.

This perennial debate about the appropriate interpretation of liberal toleration shows no signs of abating. But it has become more urgent since the fall of communism. Graham Walker contends in chapter 6 that the only sort of constitutional settlement which has any hope of being realized in Eastern Europe and the former Soviet Union is one which accommodates strongly felt ethnonational identities and aspirations. The future of liberalism in these countries, therefore, may depend on the extent to which liberal theories, and liberal institutions, can be reformed so as to accommodate (some of) the claims of ethnocultural groups.

But even if liberalism can be reformed in these ways, it will still face serious obstacles in many parts of the world which lack traditions of individual liberty. This raises the question whether there is a nonliberal conception of toleration. Walker argues that there is, and that it provides the most appropriate approach for multiethnic countries in many parts of the world. Walker is strongly critical of American constitutional "Johnny Appleseeds," who have promoted the adoption of American-style liberal constitutionalism in Eastern Europe without considering the very different ethnocultural makeup and political traditions of these countries.

According to Walker, although constitutionalism has enjoyed a certain renaissance since the fall of communism, it is stymied by its conceptual conflation with liberalism. This excludes the only kind of constitutionalism likely to fit many world situations: a nonliberal kind, whose center of gravity is something other than individual liberty entitlements. Walker argues that recovering the idea of constitutionalism from its modern shrinkage of meaning is easier now that liberals have lost some of their triumphal certainty which accompanied the initial collapse of communism. Moreover, the constitutional experiences of countries like Israel, or the Native American nations, provide useful insight into forms of constitutionalism which are grounded not in individual liberty but in the promotion of certain collective ethnocultural goals. Walker argues that a nonliberal version retains constitutionalism's appeal as a superior objectivity that limits powerholders and thwarts despotism. It prevents the abuse of power and helps to protect minorities. It thereby makes the resources of constitutionalism more fully available where they are needed most—in the

postcommunist region and elsewhere where conditions preclude the political embrace of individualist liberalism.

III. The Normative Status of Ethnicity

Much of the debate about the claims of cultural groups—whether these are evaluated within a liberal or nonliberal framework—has focused on the rights of *ethnic* groups rather than lifestyle groups (e.g., gays), advocacy groups (e.g., environmentalists) or other identity groups (e.g., women, the disabled). This is understandable in one sense, insofar as ethnic groups have displayed greater potential to cause political instability, whether in the form of political violence or even secession. But the question arises whether ethnic groups differ in any principled way from other groups with which people identify. Are people's interests in their ethnic-group membership stronger, or more worthy of respect, than their interests in other forms of group membership?

Thomas W. Pogge's chapter is explicitly addressed to this question. He argues that we should oppose not only "low chauvinism," which values one ethnic or religious group over others of the same type, but also "high chauvinism," which values cultural groups of one type (ethnic, religious, linguistic, lifestyle) above those of other types. Pogge is especially concerned to challenge the privileging of ethnic groups and, more generally, the view that ethnic groups are owed greater accommodation by society than cultural groups of other types. Privileging ethnic groups is untenable, Pogge argues, for several reasons. For one thing, the distinction between ethnic and nonethnic groups is vague in several respects. But more importantly, privileging ethnic groups violates the requirement to treat citizens as equals, irrespective of the character of their deeper affiliations and identifications. To live up to this ideal, Pogge insists, we should not conduct separate debates about the rights of groups of different types but rather should consider the various types of groups together, aiming for a unified account of groups and group rights within a just society. Such an account will attach no importance to whether a cultural group is of this or that type. It will instead give weight to other, crosscutting factors, such as the role this group plays in the lives of those who are

affiliated or identified with it, and the strength and state of this group within society.

Pogge is not opposed to all group rights-claims. On the contrary, he takes certain group rights as an inevitable feature of any just and democratic society. However, he insists that the legitimate grounds for such rights—in particular, respect for identity and effective political self-government—can also be claimed by nonethnic groups.

In a brief commentary in chapter 8, S. James Anaya argues that Pogge tends to downplay—even trivialize—the extent to which the effective realization of equality requires in many instances differential treatment of ethnic minority groups in ways that are not necessary for, or even relevant to, other types of groups. In particular, Anaya argues, ethnic groups with distinctive cultural attributes are properly regarded differently from other types of groups to the extent that there is a widely shared interest in securing the integrity of diverse cultures. Furthermore, there are often good reasons to accord ethnic groups special protection or entitlements because of certain conditions related to minority status including historical or continuing patterns of discrimination. Anaya illustrates these points by reference to recent developments in international law, including recent provisions regarding the rights of indigenous peoples.[4]

IV. Group Rights and Group Agency

One source of discomfort with group or collective rights is the belief that many groups, particularly ethnic groups, are deficient as rights holders. Our next three chapters focus on the conditions which hinder or promote the ability of groups to become effective rights holders. In chapter 9, James W. Nickel discusses what he calls the "deficiency thesis." According to this thesis, assigning rights to groups is generally a bad idea, since groups are often unable to play an active role in exercising, interpreting, and defending their rights. The source of this alleged inability is that groups lack effective agency and clear identity. Nickel, however, denies that the deficiency thesis is true of all or even most groups but agrees that it may be true of some ethnic minorities—particu-

larly nonterritorial ones. He also defends the view that clear identity and effective agency are needed for groups to benefit from most of the rights that are currently put forward as group rights. Together, these two propositions imply that nonterritorial minorities should not be given legal rights as groups. But there are practical measures available to construct the clear identity and effective agency of minority groups, and Nickel concludes with some suggestions about how even dispersed minorities can become effective rights holders.

In chapter 10, Denise Réaume develops this theme about the practical measures needed to construct a group's legal autonomy. She starts with the problem of judicial intervention. When courts are asked to resolve a dispute within a minority group, does this judicial intervention undermine the group's autonomy? There are two familiar approaches to this problem. According to the "deferential approach," the courts should look for an internal decision maker to whom the court can defer, while the "interpretivist approach" engages with the substantive dispute between the parties in order to provide the court's interpretation of the rule or practice at issue. Using two famous cases involving church property disputes as a case study, Réaume argues that these two seemingly doctrinal approaches are not that different after all. If each approach is understood to rely on a prior determination of the group's constitutional structure, they constitute complementary strategies for respecting minority group autonomy. The first step in resolving a dispute within a minority group must be to articulate the "rule of recognition" for the group, which requires ascertaining whether the group is constituted solely by reference to primary rules (which specify the obligations of members) or by both primary and secondary rules (which specify the rules for changing and adjudicating primary rules). In the case of a group consisting only of primary rules or of some primary rules beyond the scope of any of the group's secondary rules, the only way a court can respect a group's autonomy is to do its best to interpret the substantive rule in issue according to the group's own understanding. However, if a group has secondary rules which give internal decision-making bodies authority over the dispute at hand, respect for the group's autonomy requires deferring to those bodies. The latter form of constitutional structure enables a

group to enjoy a more robust form of autonomy, because the group is not only assured that its affairs will be regulated by its own rules but that members of the group itself will have the final say in interpreting or changing those rules. According to Réaume, this means that minority groups that have the most complete formal structure, whose internal organization most closely mimics a legal system, are in a position to ensure for themselves a greater degree of autonomy in the conduct of their affairs. This not only helps explain what measures are needed to construct group autonomy but also why some groups have had more difficulty in achieving autonomy than others. For example, religious groups seem have a greater ability to develop agreed-upon primary and secondary rules than do many ethnic groups.

Nomi Stolzenberg continues exploring this theme of the legal construction of a group's autonomy in chapter 11. Through a mix of legal analysis and political theory, Stolzenberg attempts to move beyond the familiar debate between liberals and communitarians regarding the accommodation of groups within liberal democracies. Liberals traditionally assume that ethnocultural and religious groups should remain in the private sphere, while communitarians denounce the "privatism" which liberal democracies impose on these groups. But Stolzenberg notes that this familiar debate ignores an important paradox inhering in a liberal political regime: namely, that groups, whose corporate identity has traditionally been recognized only in the private sphere, can in fact, under certain conditions, assume sovereign or quasi-sovereign authority within a given government locale. As evidence of this counterintuitive phenomenon, Stolzenberg focuses on the municipality of Kiryas Joel in upstate New York, a community of Satmar Hasidic Jews, which sought and ultimately gained state support for a public school district composed entirely of Satmar children. A telling foil to Kiryas Joel is that of Airmont, another municipality in New York state, which sought to stem the tide of Orthodox Jewish settlement by adopting zoning laws that strictly limited the creation of new synagogues and prayer halls within its boundaries. A close analysis of the litigation surrounding the two towns reveals that the boundary between private and public spheres of activity was frequently blurred to the extent that religious—or for that matter antireligious—groups could gain hold

of the reins of governmental power. One important result of her analysis is to problematize a set of distinctions long deemed sacred to the American constitutional order: those between religious and secular functions, general and particularistic concerns, and intent-based and effect-based conceptions of neutrality.

V. Group Representation

The authors in part 4 focus primarily on issues of group autonomy—on the capacity of groups to exercise meaningful forms of self-government. But many groups are most concerned, not with governing themselves in separate institutions, but rather with having greater participation and influence in the decisions of the larger polity. In particular, there is a concern among many groups about their lack of representation in legislative bodies. This has given rise to calls for some form of guaranteed representation of groups in the political process. These are taken up in part 5.

One of the most influential discussions of group representation is Iris Marion Young's book *Justice and the Politics of Difference*.[5] In that book, Young argued for a principle of special representation for oppressed and disadvantaged groups in political decision making. In her chapter for this volume, Young responds to some of the criticisms of her position. In particular, she focuses on the criticism that it is unrealistic to attribute a set of common attributes or interests to a particular group, insofar as this ignores the fact that any individual belongs simultaneously to many overlapping groups. Young agrees that treating gender or racial groups as fixed and unitary in their interests is problematic, because it "inappropriately freezes fluid relational identities into a unity," and "recreates oppressive segregations." Moreover, it implies that "the dominant group within the groups suppress or marginalize the perspective of minorities". In order to respond to these problems, while still increasing the representation of women and cultural minorities, Young argues that it is necessary to rethink the meaning and functions of political representation.

In opposition to the idea that a representative stands for the unified will of the citizens, Young interprets representation as a "deferring relationship" of authorization and accountability. On this view, constituents and representatives defer to each other's judgment, without ever assuming a unity of interests or identities. She argues that this conceptualization dissolves some of the problems that have plagued traditional theories of representation. Young then proposes that citizens should be represented along three dimensions: their interests, their opinions or principles, and their "perspective." She argues that while members of oppressed or marginalized groups are rarely unified in their interests or opinions, they often do share a certain perspective which emerges from their experiences as group members. She develops this notion of perspective as the basis for a new argument for the special representation of oppressed or disadvantaged groups.

Political theorists generally approach questions of group representation—such as what groups ought to be represented, and who should represent them—as they arise in legislative contexts. Much attention, for example, has been devoted to issues such as affirmative gerrymandering and proportional representation. But as Andrew Stark notes in chapter 13, nowhere in public discourse have issues of group representation been confronted more directly, and debated more richly, than in the realm of quasi-legislative advisory bodies, such as the President's Commission on AIDS, the White House Conference on Aging, the National Commission on the Observance of International Women's Year, and the Grace Commission on Cost Control in Government. The Federal Advisory Committee Act stipulates that such advisory groups must have "fair representation" of "affected interests." Since the inception of that Act, groups representing various interests have repeatedly gone to court seeking representation on such committees which, they claim, are not properly representative of the affected interests. In so doing, they have provoked a rich body of discourse—court decisions and briefs, legislative debate and legal commentary—over issues that centrally preoccupy theorists concerned with group representation in general: how do we determine what kinds of groups ought to be represented in different kinds of forums, and how do we identify both the membership of such groups and those who speak for them? Stark reconstructs a discourse surrounding the principle of "fair representation" on quasi-legislative bodies, and draws from its structure a framework within which to assess quasi-legislative representation.

In particular, he focuses on debates over the definition of

committee mandates (and hence who is affected by their deliberations) and over the representativeness of groups (and hence who a group can claim to speak for). He argues that these disputes often reflect divergent conceptions of the nature of political power (do political bodies always seek to expand their jurisdiction and thereby affect more interests, or do they stay within clear and restricted mandates?) and of group behavior (do group leaders pursue their own interest, or do they accurately reflect the interests of group members?). He points out a number of interesting and seemingly paradoxical tendencies of these debates. For example, those people who have a benign conception of political power (as nonexpansionary) often have a cynical conception of group behavior (as elite-manipulated), whereas those who have a benign conception of group behavior (as public-interested) often have a cynical conception of political power (as inherently expansionary). Stark concludes that resolving disputes over group representation will require greater research into the sociologies implicit in the contending positions.

VI. Dynamics of Inclusion and Exclusion

The final five chapters explore strategies for resolving problems of intergroup relations, each of which involves its own distinctive dynamic of inclusion and exclusion. At one end of the spectrum are strategies which seek to reduce ethnic conflict by separating the groups, through ethnic cleansing, racial segregation, or secession. At the other end of the spectrum are strategies which seek to reduce ethnic conflict by integrating ethnocultural minorities into the larger society, through various forms of cultural assimilation and "nation-building." In-between are various models of multiculturalism and group rights, although where exactly to locate these models on the integration-separation model is of course a matter of great debate.

One of the most common responses to ethnocultural diversity, historically, is to create and maintain some sort of sharp separation between different racial or cultural groups. Separatist strategies often reflect a fear of the other and a desire to retain cultural or racial purity. However, two of the more familiar forms of separatism—namely, ethnic cleansing and racial segregation—are

now almost universally denounced as illegitimate, and as a violation of basic human rights (although both continue to be practiced around the world). Secession, by contrast, is enjoying something of a renaissance, both in theory and practice.[6]

Donald L. Horowitz provides a critical assessment of the secessionist strategy for resolving ethnocultural conflicts. As he notes, this renewed interest in secession comes after a remarkable period of stability in territorial boundaries. For nearly fifty years after World War II, most irredentist movements were dormant, and most secessionist movements failed. Now, however, secessionist movements have begun to meet with greater success, and new justifications for ethnoterritorial self-determination have emerged in political philosophy and in international law. Horowitz begins by clarifying the conditions under which secessions and irredentas arise and explaining the reasons for the rarity of successful cases until recently. He also explores the historical ambivalence about ethnic self-determination within Western political thought. He goes on to suggest that new justifications for ethnic self-determination have been advanced without adequate consideration of the conditions that foster and inhibit ethnoterritorial change, and argues that the encouragement of territorial self-determination will neither reduce ethnic conflict nor enhance the treatment of minorities. Most groups will need to find ways to live together in the same territory, rather than seek illusory territorial "solutions" to their ethnic conflict.

The remaining chapters explore such strategies of "living together." In chapter 15, Deborah Kaspin explores one such strategy—namely, nation building—as it was practiced in Malawi. Thirty years of dictatorship ended in Malawi in 1994 when President Hastings Banda was voted out of office and replaced with Bakili Muluzi in the country's first multiparty election. Many commentators were dismayed to see the electorate divided on regional lines, since regionalism was understood to mean tribalism and to point to Malawi's inevitable fragmentation. However, Kaspin argues that these so-called tribal constituencies were in reality multiethnic regional constituencies which became seats of political identity as a result of President Banda's "nation-building" policies for national development. These included programs for economic growth predicated on regional favoritism and a policy of official

nationalism that politicized ethnicity while purporting to meld a multiethnic population into a national citizenry. These policies favored the Chewa population and attempted to give the Chewa language and culture official status in Malawi. This was bitterly resisted by the non-Chewa groups in Malawi, a fact reflected in the 1994 elections, and the new government has reversed many of these policies. But Kaspin argues that Banda's nation-building policies were not entirely unsuccessful and have left an ambiguous legacy. On the one hand, these nation-building policies failed in their effort to subordinate minority identities to an official Chewa-based national identity. On the other hand, they did succeed in focusing the attention of all groups on the national level. Minority groups may have disagreed with the attempt to imbue Malawian identity with Chewa content, but the response of these groups has been to politicize the issue of national identity, not to retreat from the national level into regional or ethnonationalist separatism. According to Kaspin, the Malawi example illustrates the power of the state to create a nationality and its internal divisions at one and the same time, and to do so within a fairly narrow time frame.

In chapter 16, Courtney Jung and Jeremy Seekings discuss emerging forms of integration in the postapartheid South Africa. Until recently, South Africa was perhaps the paradigmatic example of the strategy of racial segregation. But the government now is committed to a "nonracial" South Africa, and to the full integration of racial minorities into the larger society. The worry remains, however, that the scars of racism run too deep to allow this integration to occur. Jung and Seekings examine discourses of race among white South Africans living in Ruyterwacht—a poor suburb of Cape Town—to see how much attitudes have changed.

According to Jung and Seekings, the predominant discourses of race in South Africa resemble the "modern" forms of racism found in contemporary America more closely than the "old-fashioned" forms of racial bigotry found in America up to the 1960s and in South Africa in the heyday of apartheid. Discourses of race in Ruyterwacht are characterized by a mix of egalitarianism and prejudice. Negative representations of black people are not explicitly based in characterizations of blacks as racially inferior but rather are linked to (1) the attribution of "unacceptable" behavior

to particular (and not all) black people, or (2) the perception that black South Africans are collectively acting "unfairly" (e.g., in demanding affirmative action). The predominance of discourses of race corresponding to modern forms of racism is tentatively attributed to the uneven transformation of public discourse and power relations in the "new"—i.e., democratic and postapartheid—South Africa. While this modern form of racism is pervasive, Jung and Seekings see a greater openness to integration—especially of the Coloureds—among the whites.

Apartheid in South Africa involved a system of officially recognizing ethnic and racial groups, for the purposes of segregating them. In other countries, recognition is given to ethnocultural groups in the hope that this will aid in their integration into the larger society. This is the motivation for the "multiculturalism" policies which initially emerged in Canada and Australia in the 1970s. John Kane's chapter explores this multiculturalism strategy in the Australian context. As he notes, Australia is often cited as an exemplary success story for the political ideal known as multiculturalism. But the image this presents is radically at odds with that presented throughout most of Australia's history. The Australian polity has moved in the past thirty years from a practice of excluding ethnic minorities through a racially restrictive immigration policy to a policy of what Joseph Raz calls "affirmative multiculturalism." The latter goes beyond mere toleration, seeking instead to integrate polyethnic immigrant groups into a politically unified Australian society by positively affirming the value of their separate identities.

Kane's chapter traces the historical path that Australia has taken from a strong assertion of a common racial identity to a belief in the possibility and desirability of political unity within cultural diversity. It uses the Australian experience to explore some of the themes thrown up by multiculturalist theory, in particular that of the limits of multicultural toleration of ethnic practices. He concludes that the real value of multiculturalist theory in Australian society may lie less in the political practices that issue from it than in its symbolic rejection of its racist past, in the assurance this extends to immigrant groups of their place in society, and in the positive image it projects abroad to potential trading partners in Asia.

In our concluding chapter, Cathy J. Cohen explores the limits and consequences of an ethnic model of inclusion as it is currently being employed by many marginal groups. She uses the term *ethnic model* to refer to those political strategies used specifically by white immigrant groups in the United States to win formal inclusion, equal opportunity, and often equal results. This model promises that, in the tradition of white ethnic groups, members of any marginal group who can prove themselves "deserving" will eventually be assimilated and integrated into the dominant society. Cohen is interested in the requirements and costs of inclusion through such a model. What must marginal groups do to gain the label of "deserving" necessary for inclusion? Why do groups or classes of people who have a history of exclusion or marginalization from dominant institutions and social relations undertake more traditional political strategies, such as the ethnic model of inclusion, to win both recognition and rights?

Throughout, Cohen focuses on the power relationships found within marginal communities, exploring the specific strategies used by more privileged members of marginal groups to "police" or regulate the behavior and/or "culture" of other group members deemed nonconformist or nondeserving. For the purposes of the essay, Cohen focuses on the politics of lesbian, gay, bisexual, and transgendered communities, using the framework of marginalization to highlight the limits of an ethnic model of inclusion as it is currently being promoted within these communities. Whereas Kane and Jung and Seekings are comparatively optimistic about the potential for integrating previously excluded or segregated groups into a liberal polity, Cohen emphasizes that this inclusion has often come at a high price for many of the most vulnerable members of these groups.[7]

NOTES

1. For an influential statement of this view, see Vernon Van Dyke, "The Individual, the State, and Ethnic Communities in Political Theory," *World Politics* 29/3 (1977): 343–69; and "Collective Rights and Moral Rights: Problems in Liberal-Democratic Thought," *Journal of Politics* 44 (1982): 21–40.

2. See, in particular, John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

3. As Addis notes, to emphasize the importance of institutional dialogue among various groups seems to presuppose that there is a common language or languages in the polity. He briefly explores some of the ways in which pluralistic solidarity (with its emphasis on institutional dialogue) can be reconciled with linguistic pluralism. But in the end, he concludes that if linguistic pluralism is inhibiting shared deliberation, then the latter will have to take precedence. He argues that a stable and just political community requires that its ethnic and cultural communities be linguistically capable and willing to communicate with one another, a requirement which may justify the imposition of a majority language. This is an important issue which has not yet received the attention it deserves. It is remarkable, for example, how often "discourse ethics" or "deliberative democracy" is invoked as a means for addressing intergroup conflicts, without even asking in which language this discourse/deliberation will take place.

4. For a more extended statement of Anaya's views, see his *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996).

5. Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); cf. "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," *Ethics* 99/2 (1989): 250–74.

6. Allen Buchanan, *Secession: The Legitimacy of Political Divorce* (Boulder, Colo.: Westview Press, 1991).

7. Indeed, it is interesting to note that the evidence from South Africa discussed by Jung and Seekings bears out some of Cohen's concerns. It seems that the integration of Coloureds in South Africa has been achieved, at least in part, precisely by distancing themselves from blacks, and by emphasizing that they are more "respectable" than blacks.

David P.
Forsythe

Human Rights in International Relations

9 The politics of liberalism in a realist world

This book has clearly shown the extent to which human rights has become a routine part of international relations. Michael Ignatieff has captured the trend succinctly but brilliantly: "We are scarcely aware of the extent to which our moral imagination has been transformed since 1945 by the growth of a language and practice of moral universalism, expressed above all in a shared human rights culture."[1] The language and practice of universal human rights, and of its first cousin, regional human rights, has been a redeeming feature of a very bloody and harsh twentieth century.

But the journalist David Rieff reminds us of a more skeptical interpretation of universal human rights. "The universalizing impulse is an old tradition in the West, and, for all the condemnations that it routinely incurs today, particularly in the universities, it has probably done at least as much good as harm. But universalism easily declines into sentimentalism, into a tortured but useless distance from the particulars of human affairs."[2] Or, to drive the same point home with a more concrete example, whereas virtually all states formally endorse the abstract principles of human rights in peace and war, "Combatants are as likely to know as much about the laws of war as they do about quantum mechanics."[3]

The international law of human rights is based on liberalism, but the practice of human rights all too often reflects a realist world. State interests rather than personal rights often prevail, interpersonal equality often gives way to disrespect for – if not hatred of – "others," violent conflict is persistent, and weak international institutions are easily demonstrated.[4]

[1] Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Metropolitan, 1997), 8.
[2] David Rieff, "The Humanitarian Illusion," *The New Republic*, March 16, 1998, 28.
[3] David Scheffer, "The Clear and Present Danger of War Crimes," Address, University of Oklahoma College of Law, February 24, 1998, unpublished.
[4] To expand on notions of realism discussed in chapter 1, see further among many sources Jack Donnelly, *Realism in International Relations* (Cambridge: Cambridge University

It is a type of liberal progress in keeping with Ignatieff's view that we now recognize the enslavement and other exploitation of the persons in the Congo river basin between about 1460 and 1960 as a violation of their human rights.[5] It is a testament to the continuing explanatory power of David Rieff's realism that we note the lack of effective or decisive international response to the massacres and other gross violations of human rights in the Congo river basin after 1960, whether one speaks of Zaire or the Democratic Republic of Congo.

To review

Given the ground covered in this work thus far, a brief review of main points is in order. Dichotomies and paradoxes characterize the turbulent international relations of the turn of the century in 2000, as we noted in chapter 1. International human rights are here to stay, but so is state sovereignty. The latter notion is being transformed by the actions, *inter alia*, of intergovernmental and transnational non-governmental organizations. But state consent still usually matters legally, and state policy and power still count for much in human affairs. One historian – tongue in cheek – quotes a British diplomat to the effect that we need an additional article in the UN Charter: "Nothing in the present Charter should be allowed to foster the illusion that [state] power is no longer of any consequence."[6] Our moral imagination has been expanded by the language of universal rights, but we live in a world in which nationalism and the nation-state and national interests are frequently powerful barriers to effective action in the name of international human rights. Trade-offs and compromises between liberal and realist principles are legion, as human rights values are contextualized in a modified nation-state system of international relations.[7]

As covered in chapter 2, the International Bill of Rights and supplemental standards give us the modern international law of global human rights. For all of its defects, noted in various critiques covered below, it is far more developed (meaning specified and structured) than some other parts of international law pertaining to such subject matter as ecology or even trade.

Press, forthcoming). On the difference between human and national interests in international relations, see especially Robert C. Johansen, *The National Interest and the Human Interest: An Analysis of US Foreign Policy* (Princeton: Princeton University Press, 1980).

[5] Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Boston: Houghton Mifflin, 1998).

[6] Geoffrey Best, Book Review, *Los Angeles Times*, August 16, 1998, 8.

[7] See further Rein Mullerson, *Human Rights Diplomacy* (London: Routledge, 1997).

Like all law it is the result of a political process, frequently contentious. Surely it comes as no surprise that transnational standards pertaining to the right to life or to the right of freedom of religion or to freedom from discrimination, *inter alia*, should prove controversial. The existence of international human rights law owes much to the western-style democracies – their liberal values and their hard power (the liberal values themselves can be a type of soft power). Still, internationally recognized human rights were also affected by the old communist coalition, and certainly by the newly independent states of the global south after about 1960.

It cannot be stressed too much that whereas certainly the practice of politics on the basis of respect for the notion of human rights was extensively developed in certain western states, the idea of human rights is a defense against abuse of power everywhere.[8] Wherever the bicycle was invented, its utility is not limited to that historical and geographical situation. So it is also with the idea and practice of human rights.

The human dignity of especially those without great power and wealth normally benefits from the barriers to injurious acts of commission and omission provided by human rights standards. Intentional mass murder and neglectful mass misery are equal affronts to any conception of human dignity. Mass misery no less than mass murder can be changed by human endeavor, and is thus grist for the mill of human rights discourse. As often noted, there is no material or moral reason for world hunger, save for the way we choose to organize ourselves as inhabitants of the planet earth. We create territorial states whose governments are sometimes said to have responsibility only to their citizens; foster a type of nationalism that tends to restrict morality to within national borders; and internationally endorse a harsh form of *laissez-faire* economics despite its rejection on moral grounds at home. The idea of universal human rights seeks to change those psychological facts.

But human dignity itself, and human rights as a means to that end, are contested constructs whose meaning must be established in a never-ceasing process of moral, political, and legal debate and review. Beyond mass murder and mass misery, the dividing line between fundamental personal rights and myriad optional legal rights is a matter of considerable controversy.

In chapter 3 we saw that the UN has moved beyond the setting of human rights standards toward the systematic supervision of state

[8] See further Thomas M. Franck, "Is Personal Freedom a Western Value?," *American Journal of International Law*, 91, 4 (October 1997), 593–627.

behavior. This is a very broad and accelerating development, unfortunately partially undermined not only by a paucity of resources that states allow the overall UN human rights program, but also by the disjointed nature of the beast. The sum total of the diplomacy of shaming, or the politics of embarrassment, certainly has had an educative effect over time, even if the calculated violation continued in the short term.

At least at first glance it was encouraging that the United Nations Security Council after the Cold War should pay so much attention to human rights issues in the guise of threats to international peace and security. The Council's deployment of field missions under the idea of second-generation or complex peacekeeping, mostly directed to producing a liberal democratic order out of failed states, showed a willingness to deal with many of the root causes of human rights violations – as long as the principal parties gave their consent to the UN presence. Such missions clearly were on the progressive side of history in places like El Salvador, Namibia and Mozambique.

It was also noteworthy that the Council should authorize enforcement actions on behalf of democratic governance and other humane values in places like Haiti and Somalia, even if the job had to be contracted out to one or more member states, and even if the follow-up left something to be desired. Unfortunately the Council was heavily dependent on the one remaining superpower, the United States, to make its enforcement actions effective. The result was a very spotty record of UN accomplishments, especially where the USA saw few traditional national interests to sustain a complicated involvement. In the Kosovo crisis of 1999 the United States tried to enforce human rights protections via NATO, but without Security Council authorization and through a highly controversial military strategy.

On balance the UN was paying more attention to human rights, not less. It was being creative in the interpretation of Chapters VI and VII of the Charter, in calling emergency sessions of the Human Rights Commission, in expanding the authority of its monitoring mechanisms, in creating the office of the High Commissioner for Human Rights, in utilizing NGO information, and in other ways.

Some of this UN creativity had to do with the establishment of the two *ad hoc* international criminal courts by the Security Council, as we saw in chapter 4, with a third being discussed – but unlikely – for the remaining leadership of the Khmer Rouge in Cambodia. The new standing international criminal court, whose statute was overwhelmingly approved in 1998, was to be loosely associated with the UN. This renewed foray into international criminal justice was a noteworthy

development after a hiatus of some fifty years. It triggered a new round of debate about peace v. justice, and about what was central to peace as compared with a moral sideshow. Ignatieff is again brilliantly concise when he writes, "Justice in itself is not a problematic objective, but whether the attainment of [criminal] justice always contributes to reconciliation is anything but evident."[9] New efforts at international criminal justice also caused national policy makers to calculate carefully about how vigorously to go after those indicted for war crimes, crimes against humanity, and genocide, for fear of undermining larger objectives or incurring human costs difficult to justify according to traditional notions of national interest.

The permanent court particularly was bitterly opposed by conservative circles in the USA, who saw the projected infringements on state sovereignty, if such they were, as completely unacceptable.[10] There was nothing more frightening to them than an effective international law that would really circumscribe their freedom of national decision making. That the USA should be actively pushing a new international criminal tribunal for Cambodia at the same time that it was fending off the new permanent court that might (but probably would not) wind up exercising jurisdiction over Americans was a double standard too blatant to ignore. That the USA was in favor of criminal justice for those in the former Yugoslavia and the Great Lakes Region of Africa, but not as applied to itself, was – smokescreen arguments aside – a position which undermined US attempts to exercise influence on these questions.

What started out in 1993 as mostly a public relations ploy, namely to create an *ad hoc* tribunal to appear to be doing something about human rights violations in Bosnia without major risk, by 1998 had become an important global movement for international criminal justice formally accepted at the first stage by 120 states. Such were the unexpected outcomes of a series of "accidental" or *ad hoc* decisions, as states muddled their way through complex calculations of media coverage, popular pressure, traditional national interests, and state power. Private armies might commit many of the violations of human rights, and private human rights groups might be players in the legislative process, but ultimately it was states that decided. Even the normally cynical British and French split with the USA over the issue of a permanent court, endorsing its establishment.

This might have been the case in part because, as we saw in chapter 5,

[9] Ignatieff, *The Warrior's Honor*, 170.

[10] See for example John Bolton (former US Assistant Secretary of State for International Organizations), "The Global Prosecutors: Hunting War Criminals in the Name of Utopia," *Foreign Affairs*, 78, 1 (January/February 1999), 157–164.

the British and the French and most other European states had become accustomed to having supranational courts make judgments on human rights in both the Council of Europe and the European Union. French policy in particular had undergone a considerable change. Like the USA, France long considered its record on human rights beyond the need for the type of international review provided by individual petitions and a supranational regional court. But France – and Turkey – shifted over time, providing at least a glimmer of hope that eventually US nationalism might prove more accommodating to multilateral human rights developments.

Be that latter point as it may, European protections of civil and political rights remained a beacon of rationality and effectiveness in a troubled world. The Council of Europe and the European Union proved that liberal principles of human rights could indeed be effectively combined with realist principles of the state system. Of course European developments transformed the regional state system in important ways, as states used their sovereignty to restrict their independence of policy making. Yet states continued to exist in meaningful ways, as did their views of their national interests. But an international view on protecting human rights also mattered in very important ways, mostly through the judgments of the supranational courts existing in Strasburg and Luxemburg.

In less striking, more diplomatic (as compared with legal) ways the Organization for Security and Cooperation in Europe mattered regarding especially the diplomatic protection of national minorities. That NATO should be used to try to protect Albanian Kosovar rights in 1999 was indicative not only of the importance of regional organizations, but also of the importance of international action for human rights in Europe. It was not hyperbole to say that commitment to human rights was the touchstone of being European. Beyond Europe, the human rights agencies associated with the Organization of American States, especially the InterAmerican Commission on Human Rights, at least generated some impact sometimes on some issues. While the short-term view regarding African regional developments for human rights was even less encouraging, it was at least possible that the Banjul Charter and the African Commission on Human Rights were laying the foundations for long-term progress. After all, both the European Commission and Court had mostly undistinguished records during their first decade of operation, although both operated in an environment more conducive to real regional protection compared with Africa (and historically the Western Hemisphere).

Permeating all these international developments on human rights was

state foreign policy, as we saw in chapter 6. It is states that take the most important decisions in most inter-governmental organizations, and it is states that are the primary targets of lobbying activities by traditional advocacy groups. State sovereignty is being transformed by transnational interests and movements, but states and their conceptions of sovereignty remain an important – indeed essential – aspect of world affairs at the turn of the century.

Contrary to some realist principles, rational states do not always adopt similar foreign policies despite their existing in anarchic international relations. Because of history, culture, ideology, and self-image, some states do strongly identify with international human rights. They may take different slants and emphases when incorporating human rights into their foreign policies. But increasingly many states wish to stand for something besides independent existence and power. States certainly have not abandoned self-interest and pursuit of advantage, but more so than in the past they often seek to combine these traditional expediential concerns with concern for the human rights of others. The liberal framework of international relations, embedded in international law and organization, pushes them in that direction.

To be sure the result is usually inconsistent foreign policies that fall short of the goals demanded by the human rights advocacy groups. But in empirical and relative terms, there is now more attention to human rights in foreign policy than was the case in the League of Nations era. In a shrinking world, states that profess humane values at home find it difficult to completely ignore questions of human rights and dignity beyond their borders. Their self-image, their political culture, mandates that linkage. States that initially seek to bypass issues of individual human rights, like China and Iran, find themselves drawn into a process in which they at least endorse, perhaps in initially vague ways, human rights standards.

Traditional human rights advocacy groups have been active concerning both legislation and implementation of norms, as we traced in chapter 7. Basing their actions on accurate information, they have followed a self-defined moral imperative to try to "educate" public authorities into elevating their concerns for internationally recognized human rights. Frequently coalescing into movements or networks entailing diverse partners, they have engaged in soft lobbying (viz., lobbying that bypasses electoral and financial threat). Mostly relying on the politics of embarrassment or shaming, they have sought to use reason and publicity to bring about progressive change.

It has usually been difficult to factor out the general but singular influence of this or that human rights NGO, or even this or that move-

ment. Nevertheless, given the flood of information they produce and the persistent dynamism the major groups like Amnesty International exhibit, it is difficult to believe that the same evolution concerning international human rights would have occurred over the past thirty years without their efforts. In some cases and situations NGO influence can indeed be documented. It is certainly true that the international system for provision of emergency relief in armed conflict and complex emergencies would not be the same without private groups such as the International Committee of the Red Cross. Likewise, there are numerous groups active for "development," or social and economic rights, like Oxfam, Save the Children, etc., and they often provide an important link between the donor agencies and the persons who presumably benefit from "development."

Increasingly it is necessary to look beyond not only states and their inter-governmental organizations, but also beyond the private groups active for human rights, relief, and development for an understanding of the fate of human rights in the modern world. We especially need to look at transnational corporations, as we did in chapter 8. Given their enormous and growing power in international economics, and given the dynamics of capitalism, it is small wonder that their labor practices have come under closer scrutiny. It may be states that formally make and mostly enforce human rights norms. But it is private corporations, frequently acting under pressure from private groups and movements, that can have a great impact on the reality of human rights – especially in the workplace. Sometimes states are rather like mediators or facilitators, channeling concern from private advocacy groups and movements into arrangements that corporations come to accept.[11] Such was the case with the US government concerning labor standards in the apparel industry, and with the German government concerning child labor in the international rug industry.

One of the more interesting developments concerning international human rights at the close of the twentieth century was the linkage between student activism and labor standards at many universities in the global north. This merger resulted in growing pressure on particularly the apparel industry to end the use of not only child labor but sweatshops by their foreign sub-contractors. But progressive developments were not limited to that one industry, as corporations selling coffee and other products felt the need to protect their brand name and bottom line by opening their foreign facilities to international inspection under

[11] See further B. Hocking, *Catalytic Diplomacy* (Leicester: Centre for Diplomatic Studies, 1996).

international labor standards. It was not so much muscular international law and established inter-governmental relations that brought about new developments. Rather it was a movement made up of consumer groups, unions, the communications media, and traditional advocacy groups that brought about codes of conduct with inspections and public reports.

Still, one should not be pollyannish. Many of the corporations dealing in extraction of natural resources had compiled a record quite different from at least some TNCs in the American-based apparel industry. And many companies seemed more interested in public relations than in genuine commitment to either human rights or other means to human dignity.

Toward the future

The future of international human rights is not easy to predict with any specificity. One might agree with the statement attributed to the Danish philosopher Kierkegaard: life is lived forward but understood backward. Or one might agree with a statement from Vaclav Havel, first President of the Czech Republic: "That life is unfathomable is part of its dramatic beauty and its charm."[12] Nevertheless, one point is clear about human rights in international relations. We will not lack for controversy.

Human rights has indeed been institutionalized in international relations, but that discourse will remain controversial. This is paradoxical but true. Debate is inherent in the concept of human rights. I do not refer now to the effort by philosophers to find an ultimate metaphysical source of, or justification for, the notion of human rights. Rather I refer to debates by policy makers and others interested in practical action in interpersonal relations. There is debate both by liberals of various sorts who believe in the positive contributions of human rights, and by non-liberals such as realists and Marxists.

Controversies in liberalism

Enduring questions

Even for those who believe that international human rights constitute on balance a good thing, there are no clear and fixed, much less scientific, answers to a series of questions. What defines universal human dignity? What are the proper moral human rights, as means, to that dignity? Which are truly fundamental, and which are optional? Which are so

[12] Vaclav Havel, *Summer Meditations* (New York: Vintage, 1993), 102.

fundamental as to be absolutely non-violable, even in war and other situations threatening national security or the life of the nation, and thus constituting part of *jus cogens* in international law (legal rules from which no conflicting rules or derogation is permitted)? When moral rights are translated into legal rights, and when there is conflict among legal rights, who resolves the conflicts, and on what principle?

Traditional principles

If we focus on particular principles that are said to be human rights principles in contemporary international law, derived from liberalism, we still cannot avoid debate. Revisit, if you will, the principle discussed in chapter 2 and codified in Article 1 of the two International Covenants in the International Bill of Rights: the collective right of the self-determination of peoples. How do we define a people with such a right – the Kosovars, the Quebecois, the Basques, the Ibos, the Kurds, the Slovaks, the Chechens, the Ossetians? Who is authorized to pronounce on such definitional issues? If we could define such a people, what form or forms can self-determination take? And why have states in contemporary international relations been unable to specify authoritative rules under this general principle that would prove relevant and helpful to conflicts over self-determination? Why is the evidence so overwhelming that most of these disputes are settled by politics, and frequently on the basis of superior coercive power, rather than on the basis of legal rules about collective rights?

Even if we take the widely shared principle of freedom from torture, we cannot avoid controversy. The classic counter-example involves the hypothetical prisoner who has knowledge of an impending nuclear attack. Is it moral to observe the no-torture principle if it results in death or serious injury and sickness to millions? A similar real life dilemma confronted Israel in the 1990s.[13] Various respected human rights advocacy groups, along with the UN Human Rights Committee, concluded that Israel had engaged in the torture of certain Palestinian detainees, in the context of repeated terrorist attacks on Israeli civilians (and in the context of a host of other debates about who had committed "original sin" in the larger Arab-Israeli conflict over about a century). Israeli authorities insisted that their interrogation methods were absolutely essential for the security of Israel, were carefully specified and supervised, had been reviewed by Israeli judicial authorities, and fell short of either mistreatment or torture. In short, Israel argued that its methods

[13] See further the statements by Amnesty International, News Service, 102/99, 25 May 1999.

were reasonable in context for the protection of a democratic society facing a clear and present danger. The controversy continued.

Even if we take the widely shared principle about a right to religious freedom, we cannot escape controversy.[14] This is so even in countries that recognize the principle (and thus I exclude for the moment various controversies about Saudi Arabia and other states that reject the basic principle). What is a religion? The US government says that scientology is a religion, whereas the German government says it is a dangerous, perhaps neo-fascist cult. Do certain Native Americans in prison have a right to use marijuana as part of their arguably religious practices? Is religious belief a valid basis for refusal to serve in the military? Should religious freedom be elevated to those basic rights of the first order, as demanded at one point by the Republican-controlled Congress in the 1990s, and be made the object of special US concern? Or should religious freedom be considered one of many rights, and deserving of no automatic priority over other rights – for example, freedom from torture – in state foreign policy? The latter was the position of the Clinton Administration, although as noted it did respond to congressional pressures by creating a special office in the State Department to deal with religious freedom.

New claims

Certainly if we observe the demands for acknowledgment of a new, third generation of human rights in international relations, we cannot escape the reality of continuing controversy. Should the principle be recognized of a human right to a safe environment? If so, would the enumeration of specific rules under this principle provide anything new, as compared with a repetition of already recognized civil rights about freedom of information, speech, association, and non-discrimination? On the other hand, is it not wise to draw further attention to ecological dangers by recasting norms as human rights norms, even at the price of some redundancy? Then again, given that many states of the global north already have extensive legal regulations to protect the environment, why is it necessary to apply the concept of human rights to environmental law? Do we not have a proliferation of human rights claims already? Do we not need a moratorium on new claims about human rights, perhaps until those rights already recognized can be better enforced?[15]

[14] See further Kevin Boyle and Juliet Sheen, eds., *Freedom of Religion and Belief: A World Report* (London: Routledge, 1997).

[15] See further W. Paul Gormley, *Human Rights and The Environment: the Need for International Co-operation* (Leiden: W.W. Sijthoff, 1976); and Human Rights Watch, *Defending the Earth: Abuses of Human Rights and the Environment* (New York: Human

Process priorities

As should be clear by now, classical and neo-liberals do not always agree on how to direct attention to human rights, how much emphasis to give, and what priorities to establish when desired goals do not mesh easily. The classical liberal places great faith in persistent emphasis on law, criminal justice, and other punishments for violation of the law. The neo-liberal argues for many avenues to the advancement of personal dignity and social justice, of which attention to legal rights, adjudication and sanctions is only one.

As a neo-liberal, I see no alternative to a case-by-case evaluation of when to stress human rights law and adjudication, hard law, that is, and when to opt for the priority of other liberal values through diplomacy. I believe, for example, that it was correct to pursue the Dayton accord in 1995 for increased peace in Bosnia, even if it meant not indicting and arresting Slobodan Milosevic for his support for and encouragement of heinous acts. The persons of that area benefited from increased peace, decline of atrocities, and the attempt to establish liberal democracies in the region. I believe it was correct to go slow in the arrest of indicted persons in the Balkans, lest the United States and other western states incur casualties, as in Somalia in 1993, that would have undermined other needed international involvement, as in Rwanda in 1994.

I believe it was correct to emphasize truth commissions rather than criminal proceedings in places like El Salvador and South Africa, despite the gross violations of human rights under military rule in San Salvador and under apartheid in Pretoria. Long-term national reconciliation and stable liberal democracy may be advancing in those two countries, whereas pursuit of criminal justice may have hardened animosities between the principal communities On the other hand, I think it a good idea to try to hold Augusto Pinochet legally accountable for crimes against humanity, including torture and disappearances, when he ruled Chile. His extradition from Britain and prosecution in Spain would perhaps make other tyrants more cautious about violating human rights. I believe modern Chilean democracy can withstand the pressures from Pinochet's followers that his arrest has produced thus far.

Given the Chinese elite's preoccupation with national stability, in the light of their turbulent national history and the closely watched disintegration of the Soviet Union during Gorbachev's political reforms, I

Rights Watch, 1992). But see Philip Alston, who opposes the development of most new categories of human rights when the older categories are not well enforced, in "Conjuring Up New Human Rights: A Proposal for Quality Control," *American Journal of International Law*, 78, 3 (July 1984), 607–621.

believe it is correct to take a long-term, diplomatic approach to the matter of improvement of human rights in China. I believe we should use the international law of human rights as a guide for diplomacy and a goal for China's evolution. But in the absence of another massacre as in Tiananmen Square in 1989, or some comparable gross violation of human rights, I believe that constructive engagement is the right general orientation.

None of these policy positions is offered as doctrinal truth. Many of them depend on the evolution of future events which are unknowable. All are offered as examples of policy choices that the typical neo-liberal might make, that are based on liberal commitment to the welfare of individuals over time regardless of nationality or gender or other distinguishing feature, and that sometimes avoid an emphasis on criminal justice and other forms of punishment in the immediate future.

The neo-liberal approach allows for a great deal of flexibility and guarantees a certain amount of inconsistency. The neo-liberal may support criminal justice for human rights violations in one situation, e.g., Spain regarding Chile, but not in another, e.g., Cambodia regarding the Khmer Rouge. The neo-liberal might well regard major sanctions as mostly inadvisable for Chinese violations of human rights, but find them useful in dealing with Iraq, or Afghanistan, or Burma, or Yugoslavia – or maybe not.

What we are certainly going to continue to see, even among liberals, is considerable debate about policy choice.

Feminist perspectives

Even the most radical feminists do not reject the international law of human rights, in the last analysis,[16] and thus I list feminist perspectives as part of liberalism despite great variety among feminist publicists. Much of the feminist critique of extant human rights actually turns out to be gendered liberalism or neo-liberalism.[17]

[16] Eva Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in the Human Rights Discourse," *Human Rights Quarterly*, 19, 1 (February 1997), 140–141.

[17] It can be noted in passing that one strand of feminism reflects a "post-modern" or "critical" or "essentialist" approach in that it argues that unless one is female, one cannot understand female human dignity and the rights (and perhaps other institutions) needed to protect it. Male observers and scholars, as well as policy makers, are simply incapable of comprehending either the problem or its solution. I myself would not consider this approach part of the liberal tradition, for liberalism stresses a common rationality and scientific method available to all without regard to gender. See further Christine Sylvester, "The Contributions of Feminist Theory to International Relations," in Steve Smith, Ken Booth and Marysia Zalewski, eds., *International Theory: Positivism and Beyond* (Cambridge: Cambridge University Press, 1996), 254–278.

The traditional feminist critique of human rights centers on the argument that those norms, being produced in a male-dominated legislative process, focus on the public rather than private domain.[18] The public arena is the man's world, while women have been confined to the home as sexual object, mother, unpaid domestic worker, etc. Thus it is said that international human rights fail to deal adequately with domestic abuse and oppression of women. International human rights have supposedly been gendered to the detriment of women, despite an active role for some women in the drafting of the Universal Declaration of Human Rights (as noted in chapter 3).

One feminist critique attacks one half of the International Bill of Rights as it exists today, preferring to emphasize supposedly feminist values like caring and responsibility.[19] Here the argument is that a rights-based approach can only lead to negative rights of the civil and political variety. If one wishes to move beyond them to adequate food, clothing, shelter, and health care, one needs a feminist ethics of care that stresses not rights but the morality of attentiveness, trust, and respect.

Parts of international human rights law are being revised to respond to the first critique. International and more specifically comparative refugee law now stipulates that private abuse can constitute persecution and that women can constitute a social group subject to persecution. Thus a woman, crossing an international border to flee such behavior as female genital mutilation, or a well-founded fear of such behavior, particularly when the home government does not exercise proper protection, is to be provided asylum and is not to be returned to such a situation. Canada and the United States have led the way in reading this new interpretation into refugee law, acting under advisory guidelines establishing by the Office of the UN High Commissioner for Refugees.[20]

As for the second critique, it should be repeated that the discourse on human rights does not capture the totality of ethics pertaining to

[18] See further, from a growing literature, Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994). See the extensive literature cited regarding women's rights on the Internet at www.law-lib.utoronto.ca/diana. See further the extensive citations to women's issues in international relations at www.umn.edu/humanrts/links/women/html.

[19] Fiona Robinson, "The Limits of a Rights Based Approach to International Ethics," in Tony Evans, ed., *Human Rights Fifty Years On: A Reappraisal* (Manchester: Manchester University Press, 1998), 58–76.

[20] In general see Stephen H. Legomsky, *Immigration and Refugee Law and Policy*, 2nd edn (New York: The Foundation Press, 1997). See also Connie M. Ericson, "In Re Kasinga: An Expansion of the Grounds for Asylum for Women," *Houston Journal of International Law*, 20, 3 (1998), 671–694.

interpersonal relations. No doubt an ethics of care and responsibility has its place. Whether such an ethics in international relations is particularly feminine, and whether it can be specified and encouraged to better effect than the human rights discourse, are interesting questions. It is by no means certain that a rights approach must be limited to negative rights, and cannot adequately lead to minimal floors for nutrition, clothing, shelter, and health care.[21]

The second feminist critique overlaps with parts of the neo-liberal argument in arguing the merits of at least supplementing legal rights with action not based on rights but still oriented to the welfare of individuals. Once again we find that much of the feminist critique of human rights reflects some form of liberalism, mostly gendered neo-liberalism. One needs the concept of human rights, if perhaps revised to take further account of special problems of dignity and justice that pertain to women, but one may also need to go beyond rights to extra-legal or a-legal programs that do not center on adjudication.

Controversies beyond liberalism

When considering the future of human rights, I have tried to indicate the tip of the iceberg of controversy even when one accepts the concept of human rights as a beneficial part of international relations. But there is controversy of a different order, based on a more profound critique of human rights as that notion has evolved in international relations. This second type of controversy, which takes different forms or schools of thought, is based on the shared view that individual human rights based on liberal philosophy is misguided as a means to human dignity. The dominant critique, at least for western liberals, has been by realists. But we should also note, at least in passing, the views of Marxists.[22]

[21] Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Dartmouth, 1996).

[22] It should be stressed that there are numerous approaches to understanding international relations, and the place of human rights therein. A short introductory overview such as this one cannot be expected to be comprehensive. See further Scott Burchill and Andrew Linklater, eds., *Theories of International Relations* (New York: St. Martin's Press, 1996). As noted in chapter 1, Michael Doyle has shown that one can gain many insights by concentrating on liberalism, realism, and Marxism/socialism. The present book follows that approach. Some authors stress not liberalism versus realism but liberalism versus communitarianism – the idea that the community, not the individual, is the proper dominant concern. All liberal orders have to deal with individual rights and autonomy versus the rights and needs of the larger community. We have covered part of this controversy when discussing "Asian values."

Realism

Realism in its various versions has historically captured some prevalent features of traditional international relations. Its strong point has been its emphasis on collective egoism, as numerous political leaders, claiming to speak for a nation, have indeed acted frequently on the basis of narrow self-interest. It has also been accurate in emphasizing calculations of power and balance – or more precisely distribution – of power, however elusive the objective perception of power and its distribution might prove. Such calculations have indeed been a prevalent feature of international relations. In being state-centric, realism captures much of the real strength of nationalism and national identity.

The central weakness of realism has always been its inability to specify what comprises the objective national interest, and therefore its inability to say what is the rational pursuit of that interest based on power calculations. Realism assumes the permanence of a certain nineteenth-century view of international relations in which the dominant principles are state sovereignty understood to mean independence, non-intervention in the domestic affairs of states, and the inevitability of interstate power struggles cumulating in war.

Realism discounts the possibility that states would see their real security and other national interests advanced by *losing* considerable independence – e.g., by joining supranational organizations. Realism discounts the possibility of the rise of important transnational interests so that the distinction between domestic structure and issues and international relations loses its meaning. Realism discounts the possibility of a decline if not elimination of hegemonic global war among the great powers, and thus does not contemplate the irrationality of saving one's major preoccupations for a war that will not occur – perhaps at all and certainly without great frequency.

Realism discounts the emergence of values such as real commitment to universal human rights and instead posits, in the face of considerable contradictory evidence, that states will always prefer separateness and independent policy making over advancement of human rights (or for that matter quest for greater wealth through trade or for better environmental protection). Realists are prepared to look away when gross violations of human rights are committed inside states; morality and state obligation tend to stop at national frontiers – and anyway the game of correction is not worth the candle. To realists, international liberalism, and the international human rights to which it gives rise, is a utopian snare left over from the European enlightenment with its excessive belief in human rationality, common standards, and capacity for progress.

In situations *not* characterized by fear, suspicion, and the classic security dilemma, however, realism misses much of the real stuff of international politics. Where states and governments do not perceive threats to the life of the nation as they have known it, they behave in ways that realism cannot anticipate or explain. Realism is largely irrelevant to international integration in Europe through the Council of Europe and European Union. Realism has no explanation for NATO's unified commitment to a democratic Europe, and hence to its intervention in Federal Yugoslavia to protect Kosovars, save for the argument that the entire policy of intervention is irrational. Realism cannot explain international human rights developments over the past fifty years, except to suggest that most of the states of the world have been either hypocritical or sentimental in approving human rights norms and creating extensive diplomatic machinery for their supervision. Realists like Kissinger were out of touch with important developments in international relations when he opposed the human rights and humanitarian aspects of the 1975 Helsinki Accord, and when he came to accept those principles only as a useful bargaining tool with, and weapon against, the European communists. Even then, he was more comfortable with traditional security matters as Metternich and other nineteenth century diplomats would have understood them.

In some types of international politics realists are relevant, but in other types they are anachronistic.[23] Some states will pursue human rights abroad only when such action can be made to fit with traditional national interests. But some states in some situations will pursue human rights through international action even at the expense of certain traditional interests, such as independence in policy making, or even – rarely – blood and treasure (as in Kosovo). Realists do not understand that some states, like some natural persons, wish to stand for something besides independent power, obtained and used in other than a machiavellian process.

Marxists

The Marxist critique of international human rights merits a separate book. But it is accurate to say here, albeit briefly, that Marxists consider individual legal rights a sham in the context of economic forces and structures that prevent the effective exercise of human rights. Legal human rights on paper are supposedly negated by exploitative capitalism that leads to the accumulation of profit rather than the betterment of

[23] See further Robert O. Keohane and Joseph H. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977). In their view, realism is not very relevant to that type of international relations called complex interdependence.

human beings. When large parts of the world manifest persons earning less than one dollar per day, extensive human rights in legal form are meaningless. In this view international human rights have been used more since 1945 to legitimate international capitalism than to protect human beings from predatory capitalistic states and corporations.[24]

There is some overlap between Marxists and neo-liberals. Both would agree that the international financial institutions such as the World Bank and the International Monetary Fund need to consider further the human hardship caused by their structural adjustment programs. Both argue the futility of seeing and dealing with human rights apart from their socio-economic context. Neo-liberals differ from Marxists in believing that regulated capitalism, and its primary global agent the transnational corporation, can be a force for progress and is not irredeemably exploitative. Neo-liberals also differ from Marxists in seeing in western history an effort to combine political freedom, economic freedom, and checks on gross abuses of human dignity, and not a record of unrelenting exploitation.

In summary of these two illiberal critiques, one can say that realism has been the most important historically. Realism has been the dominant prism in the powerful western world for understanding international relations. It has argued that national liberals, if rational, would not be liberal in anarchical international relations, or if they understood the evil "nature of man." Nowhere has the *practice* of Marxism led to an attractive model of human development entailing an acceptable degree of personal freedom.[25] Marxism, perhaps in the form of democratic socialism, however, would seem to have continuing relevance by reminding us of the exploitative tendencies of unregulated capitalism, and of the weakness of legal rights when divorced from certain social and economic facts – e.g., minimal achievements in education and income.

In the final analysis even most of the critics of what I have termed classical political liberalism at the close of the twentieth century do not reject entirely the concept of universal human rights. They argue for its validity, but stress various cautions, reforms, and refinements. Even Kissinger and most other realists tolerate international human rights, although they do not give them high priority and they are unwilling to greatly complicate traditional diplomacy with much attention to them. Fukuyama may yet be proved correct, however, in that no theory save

[24] See, for example, Norman Lewis, "Human Rights, Law, and Democracy in an Unfree World," in Evans, ed., *Human Rights Fifty Years On*, 77–104.

[25] See further Zbigniew Brzezinski, *The Grand Failure: The Birth and Death of Communism in the Twentieth Century* (New York: Scribner, 1989).

some type of liberalism offers much prospect of a better world in the twenty-first century.

Final thoughts

In the early 1980s the conclusion to one overview of human rights in international relations started with a discussion of Stalinism in the Soviet Union and finished with a discussion of apartheid in South Africa.[26] In the late 1990s neither the Soviet Union nor legally segregated South Africa existed. Things do change, and sometimes in progressive fashion.[27] That is one reason for a guarded optimism about the future of human rights.

Both European Stalinism and white racism in southern Africa are spent forces. Each yielded to persistent criticism over many decades. Along the way elites in Moscow and Pretoria were staunchly committed to gross violations of human rights, albeit rationalized in the name of some "higher good." In the case of communism it was the quest for a future utopia. In the case of apartheid it was betterment through separate development. Prospects for radical change often seemed bleak. And yet a historical perspective shows a certain progress.

But in areas of both former European communism and former white racism in southern Africa, violations of human rights remain. Far too many in both areas lack adequate food, clothing, shelter, and health care mandated by internationally recognized human rights. Corrupt judges and police officers make a mockery of many civil rights, as does rampant crime – much of it organized transnationally. In some areas the right to political participation is not secure. Nor are minorities.

And so the quest for better protection of individual and collective human rights continues. All human rights victories are partial, since the perfectly rights-protective society has yet to appear. The end of Stalinism in the Czech Republic seems to have done little to change discrimination against the Roma in that country. Some human rights victories are pyrrhic, since the *ancien régime* can look relatively good in historical perspective. Tito's Yugoslavia did not implement anything close to the full range of internationally recognized civil and political rights. But it did not engage in mass murder, mass misery, ethnic cleansing, and systematic rape as a weapon of war. These things did appear, however, in both Bosnia and Kosovo in the 1990s.

[26] David P. Forsythe, *Human Rights and World Politics* (Lincoln: University of Nebraska Press, 1983), ch. 6.

[27] See further especially Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998).

The various levels of action for human rights – whether global, regional, national, or sub-national – were not likely to wither away because of lack of human rights violations with which to deal. Pursuing liberalism in a realist world is no simple task.

Discussion questions

- Do the past fifty years show that serious concern for personal rights can indeed improve the human condition in the state system of international relations?
- If one compares the Congo during King Leopold's time with the Democratic Congo (formerly Zaire) today, has anything changed about the human condition?
- When is it appropriate, if ever, to grant immunity for past violations of human rights, and otherwise to avoid legal proceedings about human rights violations, for the sake of improving the human condition?
- Are the demands for a third-generation of human rights to peace, development, and a healthy environment well considered?
- Do internationally recognized human rights require radical change so as to properly protect women's dignity?
- Even after the political demise of European Marxism, are Marxists correct that capitalism and the transnational corporation are inherently exploitative of labor? What social values can markets advance (e.g., efficiency?), and what social values can they not advance (e.g., equity?)?
- Should one be optimistic or pessimistic about the future of human rights in international relations?

Suggestions for further reading

Alston, Philip, "Conjuring Up New Human Rights: A Proposal for Quality Control," *American Journal of International Law*, 78, 3 (July 1984), 607–621. A plea for a moratorium on more human rights until protection improves for those already recognized.

Boyle, Kevin, and Juliet Sheen, eds., *Freedom of Religion and Belief: A World Report* (London: Routledge, 1997). An encyclopedia on the subject.

Brzezinski, Zbigniew, *The Grand Failure: The Birth and Death of Communism in the Twentieth Century* (New York: Scribner, 1989). An overview of what went wrong particularly with European communism, written in engaging style by the National Security Advisor to President Carter.

Cook, Rebecca J., ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994). A good and broad coverage of feminist perspectives on human rights.

Franck, Thomas M., "Is Personal Freedom a Western Value?," *American Journal of International Law*, 91, 4 (October 1997), 593–627. Suggests that the West has no monopoly on the desire for personal freedom.

Gormley, W. Paul, *Human Rights and the Environment: The Need for International Co-operation* (Leiden: W.W. Sijthoff, 1976). An early study based on the premise that we need a third-generation human right to a healthy environment.

Hochschild, Adam, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Boston: Houghton Mifflin, 1998). A gripping history of the lack of human rights in Central Africa when the Congo was the personal fiefdom of the King of Belgium.

Hocking, B., *Catalytic Diplomacy* (Leicester: Centre for Diplomatic Studies, 1996). Argues that in the modern world what governments frequently do is organize others for agreement and action, rather than establish a foreign policy completely independent from other actors.

Ignatieff, Michael, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Metropolitan, 1997). A cosmopolitan and Renaissance man reflects on whether humane limits can be applied to ethnic war, arguing for the importance of traditional conceptions such as military honor.

Johansen, Robert C., *The National Interest and the Human Interest: An Analysis of US Foreign Policy* (Princeton: Princeton University Press, 1980). Shows clearly that if one starts with realist principles of state interest, one winds up with different policies than if one starts with liberal principles of human interest.

Keohane, Robert O., and Joseph H. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977). A major study arguing that there are different types of international relations. Realism may be appropriate to some, liberalism or neo-liberalism to others. Argues that realism is less and less appropriate to contemporary international relations.

NOMOS XXXIX

Ethnicity and Group Rights

Edited by

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7

GROUP RIGHTS AND ETHNICITY

THOMAS W. POGGE

In political philosophy, the topic of group rights raises moral questions of the form: May/should a just society grant legal group right(s) *R* to group(s) *G* on moral ground(s) *M*? I address only one aspect of this complex: Should ethnic groups, as such, be favored in the distribution of legal group rights? My negative answer exemplifies the broader view that different types of groups should be considered together and on a par. Here "group" stands for any set of persons who are identified with this set: viewed as belonging together. And the relevant types of groups are, in the first instance, ethnic, religious, linguistic, and lifestyle groups.[1] My main thesis is then that, in deciding what group rights we, as a society, may or should grant to various groups, we ought not to favor groups of one type, as such, over groups of another.

This principle is the generalized analogue to one now widely accepted, namely the principle that we ought not to favor some religious (or ethnic, or lifestyle) groups over others. This latter principle does not preclude us from treating groups of the same type differentially, from conceding more extensive group rights to the Amish than to the Anglicans, for example. But such special treatment must not be based on the mere fact that they are the Amish. It must be based on relevant differences, on grounds that bring out that, though they are treated differently, these groups and their members are nonetheless treated with equal respect and concern. In the example at hand, one might say, for instance,

that the Amish religion is much smaller and more remote from the American mainstream (hence stands in greater need of special protections) and also tends to play a much deeper role in the lives of its adherents. My principle is proposed in the same spirit. It precludes differential treatment of types of groups, not differential treatment of groups of different types. This means that differential treatment of groups must never be based on their difference in type.

We might confront ethnic or religious chauvinism with a version of the Golden Rule: Base any claims you make for your own ethnic (religious) group on principles that you would be prepared to extend to any other ethnic (religious) group. I support a generalized Golden Rule: Base any claims you make for some group(s) on principles by which you would be prepared to judge the claims of any other group as well. Here is one neat way to "enforce" this rule: Whenever someone claims group rights for some group, or for groups of some type, we take her to hold that these rights should be granted to any other claimant group as well. If she believes that the rights should be extended only to some or to none of these other groups, then the burden is on her to show that the groups she proposes to exclude are dissimilar to hers in a way that renders them ineligible for the rights in question.

One reason for an evenhanded treatment of groups of different types is that the distinctions between types of cultural groups cannot, in the end, be given the clarity and sharpness they would need to support significant normative political differentiations. While the classification of many groups is straightforward, others involve overwhelming empirical complexities. In the case of the North American Jews, for instance, ethnic, religious, linguistic, and lifestyle elements are all intertwined and, moreover, their relative importance in the mix has changed significantly over time and also varies widely from one Jew to the next. How can we let the group rights of Jews depend on their unavoidably arbitrary classification?

A stronger reason for evenhandedness derives from the ideal of treating all citizens as equals, regardless of their identifications and affiliations. This ideal claims authority not in our private lives, but only where we, as citizens, participate in the design of policies,

laws, and social institutions. It does not demand that all persons and groups should be equally important to me, that I should value them equally. It demands only that, in the political domain, I should recognize them as of equal intrinsic importance or value, as having an equal claim to respect and support from society at large. It thereby opposes high chauvinism, which holds some type(s) of groups to be more valuable than others, just as it opposes low chauvinism, which holds some ethnic (or religious or language or lifestyle) group(s) to be more valuable than others. In either case, discounting the value of groups is tantamount to discounting the value and equality of their members and is therefore unacceptable in a just society.

High chauvinism is sometimes explicit, even entrenched in the law, as when only religious objectors may apply for exemption from military service, when religious groups are favored by the tax laws, or when only ethnic groups are deemed eligible for limited self-rule.[2] More often, however, it takes a different form: Authors and public figures consider groups of a particular type and make sweeping claims in behalf of such groups without considering whether what they claim can reasonably be granted to relevantly similar groups of other types as well.[3] In this case, there is no explicit claim that (identifications with) groups of the chosen type are more valuable than others—only a suggestion to this effect. I want to challenge this trend as well: We should not conduct separate debates about the rights of groups of different types but should consider the various types of groups together, aiming for common standards by which to assess the validity of their claims. Only through a unified account of groups and group rights within a just society can we live up to our democratic ideals by explaining to all citizens how our institutions and laws are treating them as equals, irrespective, in particular, of (the type of) their identifications and affiliations. Such an account will attach no importance to whether a group is of this or that type. It will instead give weight to other factors, such as: how deep and structuring a role being affiliated or identified with this group plays in the lives of its members, what status the group has within the wider society (e.g., whether it is strong or weak, revered or despised), and, to some extent, what its history has been (e.g., what its members were led to rely upon regarding the group's future rights).

As these examples show, the factors that should be given weight cut across the (vague) divisions between types of groups. So the unified account I envision—once the relevant factors have been fully identified, specified, and brought to bear—will not only oppose high chauvinism but will also avoid reaching high chauvinist conclusions by another route: It will not yield the result that groups of some type(s), though of no greater intrinsic value, should nevertheless be favored over the rest. We may find, of course, that in our world ethnic groups have more frequently than others the special characteristics that strengthen their claim to legal group rights. We may also find societies in which only ethnic groups (though hardly all of them) qualify for a particular legal group right. But such rough and contingent correlations would not show that the account favors ethnic groups as such—let alone that it favors them (in an ethnic high chauvinist way) as being of greater intrinsic value.[4]

While the dangers of religious high chauvinism are receding in North America, those of ethnic high chauvinism seem to be in ascendancy, as ethnicity is acquiring a certain moral prestige and mystique. By seeking to undermine this prestige, I am not opposing group rights for ethnic groups. I believe that rather extensive group rights can be based on the classic individual rights to freedom of association and full political participation, and on classic liberal concerns for equal protection and for fair adjustments to legal change. Being rather liberal about group rights in general, I can concede to the proponents of ethnic group rights much of what they want—though I would concede analogous rights to many other claimant groups. What I wish for, then, is a certain cultural pluralism (or multiculturalism, if you like) which understands "cultural" very broadly as covering, equally, the whole range of citizens' affiliations and identifications. But my main concern here is to argue not for the extensiveness of group rights but for their fair distribution among groups of different types. I want to challenge the ethnic high chauvinists and their political allies to overcome by argument the straightforward null-hypothesis:

(N0) It is irrelevant to the moral assessment of a claim to legal group rights whether the group for which the rights are claimed is or is not (part of) an ethnic group.

I. Some Clarifications Concerning Legal Group Rights

Begin with a distinction between active and passive rights. An active right is a right to do something if one so chooses; it is violated when its possessor, while trying to exercise it, is prevented from doing so in certain specified ways. A passive right is a right not to have certain things done to oneself; it can be violated even while its possessor is not doing or trying to do anything.

This distinction can be complicated. Some standard rights contain active and passive components. The right to vote, for instance, contains the passive right that elections be held, as well as the active right that one's attempt to vote at an appropriate place during the scheduled time be successful. Also, some standard rights can be construed as active or passive. A right to some benefit, construed actively, is violated only when an eligible person's attempt to take the benefit in the appropriate way is improperly blocked. Construed passively, it is violated when an eligible person is not given or offered the benefit even though this person has made no effort to obtain it.

The expression "group rights," which I have thus far used in a broad and crude sense, may cover at least three different kinds of legal rights:

1. Group rights proper, or simply (henceforth) group rights: These are rights that a group has as a group (and, if active, exercises as a group through its group-specific decision mechanism)—for example, Oregoneans may have an active right, collectively, to delegate two appropriate persons to the U.S. Senate or a passive right to be consulted before construction of a nuclear power plant on Oregon soil.

2. Group-specific rights: These are rights had only by members of a certain group rather than by all—for example, Oregoneans (but not all others) have the active right to vote in Oregon elections, Sikhs (but not all others) have the active right to ride a bike without a helmet, blacks (but not all others) have the active right to receive favorable consideration in university admissions, and those neither officially accused nor convicted of a crime (but not all others) have the passive right not to be imprisoned.

3. Group-statistical rights: These are rights that protect or en-

hance the aggregate status of the members of a group—for example, blacks may have the passive right that no more than 50 percent of any age cohort be conscripted or the active right to have 80 percent of their credit applications approved. Many group-statistical rights protect or enhance the representation of the group in certain segments of the population—as when some parliamentary seats are set aside for members of a national minority, or when a certain minimum representation is guaranteed for persons of a certain color or gender in university admissions, say, or in the awarding of government contracts. Such rights, too, may be active or passive: In the first case, the right is violated only when group members seeking entry do not get entry on favorable terms; in the second case, it can be violated even when insufficiently many group members are motivated to seek entry in the first place. Rights of this third kind are funny rights: Not really the rights of groups, because it is individuals who take sole possession of the objects of the right (seats in parliament, university educations). And not really individual rights either, because no individual is entitled to anything (so long as the objects of the right go to sufficiently many of her fellow group members).

Rights of all three kinds may also be defined in relative terms, that is, *in relation to other groups*: The people of Oregon may have a group right to send as many delegates to the Senate as the people of any other state. Sikhs may have a group-specific right that their donations to their religious organizations receive the same tax treatment as donations by Christians to Christian churches. And blacks may have a group-statistical right that—correcting for income, perhaps—the rejection rate for their credit applications to any bank should not run more than 25 percent above that for its entire applicant pool.

I shall concentrate my normative discussion on group rights and group-specific rights because this is the domain in which I expect my position to be most controversial. At least in our part of the world, it is rarely argued that ethnic groups should be favored over nonethnic groups in the granting of group-statistical rights. In the United States, for example, affirmative action programs have targeted women and the disabled, along with African Americans, Hispanics, and Native Americans.[5]

In thinking normatively about group(-specific) rights,[6] we

should appreciate that such rights are at the very heart of our international order. This order assigns two group rights to the citizenry of each state: the right collectively to own and control a certain delimited territory (with its resources, airspace, etc.) and the right collectively to determine how the interactions among the persons living on this territory will be structured (through a shared political system, laws, economic institutions, and so on).[7] These group rights ordinarily involve group-specific rights such as the right of adult U.S. citizens (not convicted of a felony) to participate in the U.S. political process. The eligibility criteria for these group-specific rights are sometimes (though rarely) defined in ethnic terms—or rather: in terms of descent (*lex sanguinis*)—as when ethnic Germans from Russia who speak no German are eligible to become citizens of Germany while ethnic Turks who have lived there all their lives are not.

Though the question of whether and how these two group rights, and the associated group-specific rights, can be justified is of the utmost importance, I here discuss legal group(-specific) rights within one state. To simplify, I also stipulate away the existence of noncitizens on the state's territory. So we begin with the ideal case of a state that exists on a determinate territory and within which all persons are full citizens. And we ask what legal group(-specific) rights are morally required, optional, or impermissible in various sorts of circumstances. In thus asking what rights of these kinds may or should be granted, we leave aside the further important question how and by whom the various decisions about granting and rescinding such rights are to be made. For now, we worry only about the correctness of such decisions.

II. Some Clarifications Concerning Ethnicity

To constitute an ethnic group, a set of persons must satisfy three conditions: commonality of descent, commonality of continuous culture, and closure. The members of the set must understand themselves as descendants of members of an historical society (in a broad sense, including tribes, principalities and the like, as well as systems of interacting tribes or principalities).[8] They must share a common culture, or partial culture, which they take to be connected, through a continuous history, with the culture of their

ancestors (however different from the latter it may have become in the process). And the group must contain all, or nearly all, of the persons who, within the relevant state, are taken to share the descent and culture definitive of the group.[9]

The first condition is necessary to distinguish ethnic groups from mainly religious and from mainly linguistic groups, such as the Mormons or Hispanics. The second is necessary to distinguish ethnic from mainly racial groups, such as African Americans or U.S. residents of Hungarian descent. And the third is necessary to distinguish ethnic groups from subgroups, such as the Organization of Chinese American Women (which excludes men and children, and contains only a fraction even of all Chinese American women).

This definition clearly includes various national majorities (such as the English in Britain and the Han in China) and minorities (such as the Québecois, the Welsh, and the Italo-Swiss). But it is also quite vague in two respects: vague about which groups should count as ethnic groups and vague also about which persons should count as members of such a group. This vagueness should arouse suspicion, because, as I have said, it helps my argument insofar as we have reasons against attaching normative political significance to a fuzzy term. My defense is that this vagueness is not of my own making, that the term has no more precise meaning in either common or academic English, and that any attempt to legislate greater precision would, without compelling need, end up drawing arbitrary boundaries within a dense and multidimensional continuum.

To eliminate vagueness, one would need to specify how broad or narrow the commonalities required by the first two conditions must be and also how far they must extend backwards in time. Depending on how we fine-tune these parameters, we might either view Native Americans, Asian Americans, and perhaps even Hispanics and African Americans, as ethnic groups or regard the first three as containing several ethnic groups (including Navajos and Sioux, Chinese Americans and Korean Americans, Mexican Americans and Puerto Ricans). One may think that progress can be made here by examining how the members of candidate ethnic groups identify themselves, how they think, feel, and behave in respect to their purported ethnicity. I endorse this strategy. But I

see little promise in it, because, in problematic cases, these persons are often themselves conflicted (e.g., about whether they are primarily Asian or primarily Japanese American) and, if some are clear, others of the same group are clear the other way.

One would also need to specify how deep and important the commonalities must be felt to be. Do Arab Americans share enough in common to constitute an ethnic group? When did Italo Americans or German Americans lose this status? And how much must one have in common with the core members of an ethnic group to belong to this group? How important is it for qualifying as a Navajo, for example, what fraction of one's ancestry is Navajo, whether one checks off the "Native American" category on affirmative action questionaires, how much one knows about Navajo history, culture, and affairs, how one is regarded by other Navajos (and how good *their* Navajo credentials are)?

Stipulative definitions have their uses, of course, but when they are imported into politics and the law, when tangible advantages and disadvantages are made to depend on them, the arbitrary discriminations they involve are bound to lead to resentment. Moreover, the more legal and political significance we attach to whether some group is or is not an ethnic group, and to whether some person does or does not belong to such a group, the greater is the danger that persons' professed identifications will be, and be suspected of being, guided by self-interest—a further source of resentment and discord.

Let me forestall another sort of lexislative maneuver which involves not a sharpening but a revision of ordinary meanings. If religious groups are defined as all those groups that share deeply and conscientiously held commitments, then it does indeed seem plausible that they should be favored over other groups in regard to, say, eligibility for conscientious objector status. And if ethnic groups are defined as all disadvantaged minorities, then they and only they should perhaps be granted certain compensatory group rights. These "definitions" may be too bizarre to be taken seriously. But the point is nevertheless worth making in preparation for section V, where I discuss the objections that ethnic groups should be favored over others, because only they involve an inherited cultural identity, and that ethnic groups should be *dis*favored, because only they involve unacquirable membership. In re-

sponding to these objections, I will take them to invoke not (far-fetched) definitions but empirical generalizations subject to rebuttal. I will assume throughout that my definition, rough and vague as it is, limits how the expression *ethnic group* may be used.

III. Ideal Theory: Conventional Group (-Specific) Rights

It is occasionally held to be impossible, or very difficult, to "make room" for group rights within the context of our standard Western or liberal values, centering around the ideal of a democratic society of free and equal citizens. But this is false, as each of the following two considerations will show.

First, our Western societies are very strongly committed to freedom of association and freedom of contract. This commitment requires and justifies legal group rights, such as the rights of the set of owners of a corporation, the rights of the set of members of a political party or club, and so forth. Marriage, too, involves various group rights (the two spouses have an active right to make various decisions together about their assets and the upbringing of their children) and group-specific rights (each of the two spouses, but no one else, is entitled to spend from the family finances, to incur liabilities for both, and officially to represent the interests of their children).

Second, every democratic society assigns to the group of its active citizens (excluding children and also, perhaps, felons and the insane) group-specific rights to political participation. These citizens (but not all others) may run for various political offices and may also participate in the exercise of their group right to determine the national government through nationwide elections. Moreover, every democratic society contains political subunits (provinces or states, counties, municipalities, voting districts, etc.) in which significant local decisions are made by a bounded local electorate and its representatives. Such decentralized political decision making involves additional group rights (e.g., of the people of Oregon) and group-specific rights (e.g., of those eligible to vote in Oregon). These additional group(-specific) rights also have a clearcut democratic rationale: The point of democratic procedures is to enable persons to participate in shaping

the social context that shapes their lives. This value is far better promoted when we all have rather more influence upon the social context in our own locale than if we all had rather little influence equally spread throughout the country (so that every mayor, say, would be chosen by the entire citizenry). This thought supports decentralization in the making of political decisions that can vary locally (about local officials, schools, public transportation, city services, zoning, parking, and so on).

When we ask, as the title of this volume suggests, how the legal device of group rights may or should accommodate the concerns of ethnic groups within an ethnically heterogeneous society, the question therefore cannot be whether we should depart from our ordinary practice of recognizing only equal rights of individuals by granting group(-specific) rights to ethnic groups and their members. There is no such ordinary practice. Group rights and group-specific rights are staples of standard Western liberal thought.

The debate about group rights and ethnicity must then be about whether ethnic groups and their members should be favored in the shaping and/or distribution of group(-specific) rights. I will answer this question in two parts, arguing, in the remainder of this section, that the standard justifications for conventional group(-specific) rights do not support favoring ethnic groups over groups of other types, and then, in the next section, that other ways of justifying group(-specific) rights, which appeal to special circumstances, do not support favoring ethnic groups either.

Should ethnic groups and their members enjoy a more extensive freedom of association (so that associations they form would have more extensive group rights, say, than other associations) or should their interests receive special consideration in the shaping of electoral districts and political subunits? The next two subsections will explore the contention that ethnic groups and their members should be so favored over groups of other types in regard to group rights connected with freedom of association (III.1) and/or full political participation (III.2). The contention is that whether these conventional group rights ought to be granted or not will sometimes depend on whether the group demanding them is (part of) an ethnic group or (part of) some

other type of group; this factor has a certain weight and can therefore be decisive even when all other things are equal. This contention must be sharply distinguished from a different one, according to which ethnicity has a certain derivative prominence—the view, namely, that, within some specific spatiotemporal region, claims for such conventional group rights by ethnic groups are more often justified, by standards that do not themselves involve reference to ethnicity, than claims for them by nonethnic groups. I have no quarrel with this latter view, but I do want to examine critically the first. I do this by confronting it with the null-hypothesis stated in the introduction. To evaluate this dispute, we must provide some account of how, according to (N0), claims to conventional group rights are to be assessed. If a group's being an ethnic one cannot contribute to the justification of such rights, what can? Following my earlier remarks about freedom of association and the right to full political participation, let me add some further content to my null-hypothesis as follows:

(N1) Legal group(-specific) rights may be justified on account of the free associative choices of individuals and they may also be justified insofar as they maximize and equalize citizens' ability to shape the social context in which they live (regardless of whether the group in question is or is not an ethnic group).

This principle is not meant to indicate the only ways in which group(-specific) rights may be justified (see section IV). But it is meant to apply equally to claims put forward by ethnic and nonethnic groups. It will support some such claims by ethnic groups, but it may also, and in the same way, support some claims by groups of other types. Subsections III.1 and III.2 will discuss, respectively, the two parts of (N1).

III.1 Freedom of Association

Under the first part of (N1), members of ethnic groups would be free to organize ethnic associations, such as firms, churches, hospitals, political parties or lobbying groups, and private educational institutions. Since such associations have legal rights, their formation as ethnic associations would create group rights and also (since some of the rights of such associations are active rights) group-specific rights limited to a particular ethnic group. Only members of the ethnic group would be eligible for these group-specific rights—though only those participating in the ethnic association would actually have them.

Four interdependent questions arise about the scope of this freedom to form ethnic associations: What sorts of associations may be formed in a way that ties them exclusively to a particular ethnic group? What constraints may, and should, society place on their internal structure and content (i.e., the curriculum, in the case of schools and universities, or the treatment methods, in the case of hospitals)?[10] How exclusive should ethnic associations be allowed to be—how free should they be not to employ, offer their services to, and/or do business with, citizens outside their own ethnic group? And what special benefits and burdens may or should society assign to ethnic associations—may or should ethnic private schools, for instance, be tax exempt or be entitled to the same public support (per pupil, say) as public schools receive? In order to answer these questions, one may have to ask, on the next higher level, how deep a role their ethnic affiliation plays in the lives of those who would participate in the relevant associations and how important the group(-specific) rights they claim are for their prospects of leading lives that they can appreciate as successful and worthwhile. One may further have to ask whether the ethnic group in question is strong (numerous, wealthy, well organized) or weak, in absolute terms and also relative to other groups with whom it competes or whose members would be especially affected by being excluded: What costs would the rights they claim, and the causes they pursue, impose on other persons, other groups, and society at large? And there are surely further relevant factors as well.

I have no space to discuss the balancing of these considerations in any detail. All I want to maintain is that there is no reason why this balancing should proceed differently when the (prospective) association for which group rights and group-specific rights are claimed is defined in ethnic terms. Why should two otherwise similar associations be treated differently merely because one defines itself in ethnic and the other in religious terms? A society should find a principled way, supervised by the courts, to decide about particular claimed associative freedoms on the basis of criteria that do not include, or take account of, the type of associa-

tive identity at issue.[11] Departing from this impartial approach would inevitably suggest that some identifications are more valuable, more worthy of respect and protection, than others. And this is incompatible with recognizing all citizens—irrespective of the character of their deepest identifications—as equals.

III.2 Full Political Participation

Under the second part of (N1), ethnic groups may be entitled to accommodation in the design of the political process and in the shaping of political subunits. Let's begin with the former. In many existing democratic societies it has long been impossible for ethnic minorities to gain anything like proportional representation in the legislature. This impossibility is now widely understood to reflect an injustice—an understanding confirmed by the demand that societies should maximize and equalize citizens' ability to shape the social context in which they live. On a plausible interpretation of this demand, it implies that an ethnic group that constitutes n percent of a society's adult population should be able to determine the composition of n percent of the legislature.[12] Of course, it is up to the members of the group whether they, or some of them, choose to form a coalition for the purpose of filling a proportionate number of parliamentary seats. But the political process should be so designed that, if (some or all) members of an ethnic group choose to form such a coalition, they should be able to send a proportionate number of representatives to the legislature (who, according to their choice, may or may not be members of their ethnic group).[13]

While I accept this institutional imperative, my thesis here is a different one: Whatever we demand from a just and fair political process for ethnic minorities, we should also demand for any other minorities: If enough citizens share a certain identification and are willing to form a coalition for the sake of securing representation for themselves in the legislature, then they should be able to gain such representation, irrespective of the type of their identification (and of whether they are geographically concentrated or dispersed). In this case, it may even be plausible to go well beyond our standard group types (ethnic, religious, linguistic, lifestyle) to include also dentists, dog-lovers, stamp collectors, war

widows, socialists, and Porsche drivers.[14] Of course, many of these imagined coalitions will never actually emerge. A just political process may well produce representatives of ethnic and religious groups, though hardly of Porsche drivers and stamp collectors. But this outcome should occur because of the distribution of deep identifications among the citizenry and not because the structure of the political process advantages citizens with some types of deep identifications over citizens with other types of such identifications.

In the case of political subunits, matters are more difficult, because the reasons for territoriality as well as geographical closure and compactness—which themselves derive from the goal of maximizing citizens' ability to shape the social context in which they live—are here much stronger. A geographically highly dispersed dentist county is not workable, to put it mildly. I have said above that political decentralization (through the creation of political subunits) increases political participation by enhancing the power of citizens to shape the conditions that shape their lives. There are always many ways of decentralizing political decision making: We can institute more or fewer levels of subunits, for example, we can define subunits territorially or nonterritorially, we can set them up to be nested or overlapping, and we can draw the boundaries of subunits in diverse ways. In wondering how to decentralize, we can invoke the ideal of full political participation. This gives us two values for comparing alternative decentralization schemes: Political decision making should be decentralized so as to *maximize* and *equalize* citizens' ability to shape the social context in which they live. Since these are two competing goals, we may in practice have to engage in trade-offs between the two; but we need not worry about this complication yet.

Subject to the compactness constraint, citizens can and should be free to shape political subunits in whatever ways they like. To make this idea more precise, let me propose, as a first approximation, the following two procedural principles for territorial subunits:

1. The inhabitants of any contiguous territory may decide—through some majoritarian or supermajoritarian procedure—to join an existing political unit whose territory is adjacent to theirs and whose population is willing—as assessed through some ma-

joritarian or supermajoritarian procedure—to accept them as members. This liberty is conditional upon the political unit or units that are truncated through such a move either remaining viable (with a contiguous territory of reasonable shape and sufficient population) or being willingly incorporated, pursuant to (1), into another political unit or other political units. The liberty is also conditional upon the proposed enlarged unit being of reasonable shape: Its area should not have extremely long borders, for example, or borders that divide towns, integrated networks of economic activity, or the like.[15]

2. The inhabitants of any contiguous territory of reasonable shape, if sufficiently numerous, may decide—through some majoritarian or supermajoritarian procedure—to form themselves into a political unit of a level commensurate with their number. This liberty is subject to three constraints: There may be subgroups whose members, pursuant to their liberty under (1), are free to reject membership in the unit to be formed in favor of membership in another political unit. There may be subgroups whose members, pursuant to their liberty under (2), are free to reject membership in the unit to be formed in favor of forming their own political unit on the same level. And the political unit or units truncated through the requested move must either remain viable (with a contiguous territory of reasonable shape and sufficient population) or be willingly incorporated, pursuant to (1), into another political unit or other political units.[16] According to these or similar procedural principles, ethnic as well as nonethnic groups could map out an appropriate territory in which they form a majority and make it into a political subunit.

It isn't crucial for present purposes whether these principles are part of the best specification of the ideal of full political participation. What matters, rather, is that there is no principled reason to prefer citizens whose deeper identifications or affiliations happen to be ethnic by favoring ethnic groups in the shaping of political subunits. And there is no pragmatic reason either. As my proposal shows, we can be quite permissive in accommodating ethnic groups without thereby losing the ability to be equally accommodating to nonethnic groups as well.[17]

This leaves the question what political subunits should be free to do within their territory. I will not discuss this issue, because my

challenge thesis, here again, is that this freedom must be the same for political subunits that define themselves in ethnic terms as it is for all others. If we allow political subunits whose citizens define themselves in ethnic terms to control land sales to outsiders, then we should grant the same liberty to other such subunits whose citizens define themselves in terms of some religion or lifestyle.[18]

In the two justifications discussed in subsections III.1 and III.2, group-specific rights were justified *via* group rights. I have argued that citizens ought to have the freedom to form groups with certain sorts of group rights, namely, in particular: to form various associations with rights to control participation, to form voting coalitions that can win proportional representation in the legislature, to form territorially based political subunits that democratically govern their own internal affairs, and to form territorially based groups that may reshape internal political boundaries. Some of the group rights of these four sorts are active rights, whose exercise must be determined by some or all of the group members who then have corresponding group-specific rights to participate: in the decisions of their associations and voting coalitions, in elections and referenda within their political subunit(s), and in determining the shape of political subunits in their part of the country. I have argued that, though the groups referenced by group (-specific) rights of these sorts may be ethnic groups, they may also be groups of various other types. Citizens should be free (within certain limits) to form and maintain whatever groups they choose; and citizens who want to form or maintain ethnically defined groups should be no more, and no less, free in this regard than citizens who want to form or maintain groups defined in other ways.

IV. Real-World Theory: Contested Group (-Specific) Rights

Having discussed two justifications for group(-specific) rights which are widely accepted, at least in general, let us now consider two further justifications of such rights which are contested, i.e., rejected wholesale by significant segments of Western societies. In these cases, group(-specific) rights are claimed as due compensa-

tion for disadvantages suffered or as required to honor legitimate expectations on the part of their claimants. I endorse these justifications here, at least in principle, partly because I believe them to be valid in some cases. More relevant, however, is another reason. Only if these justifications are valid sometimes, can they undermine the principle I defend in this essay. Only then can what I deny be true, namely: whether a group is or is not an ethnic one affects how plausibly it can invoke these justifications in support of a claim to group(-specific) rights. Let me then offer this further extension of my null-hypothesis:

(N2) Legal group(-specific) rights can be justified as compensation for unfair disadvantages that groups and their members suffer in comparison to others, and they can also be justified by appeal to legitimate expectations arising perhaps from promises made to a group and honored since (regardless of whether the group in question is or is not an ethnic group).

Both of these justifications have been used in arguments about the conventional group(-specific) rights of the preceding section (where I have mentioned the first as a potentially relevant factor). But they have also been used to support claims to other group-specific rights, e.g., to various subsidies, preferences, exemptions and immunities. I maintain that, insofar as such justifications are valid at all, they do not favor ethnic over nonethnic groups.

Some ethnic groups claim group(-specific) rights as compensation for disadvantages they suffer in comparison with members of the dominant culture.[19] Justifications for such claims come in two main variations. Variation one goes like this: Society at large cannot be organized so as to be neutral between all ethnicities. Its social institutions, its official language(s), its public holidays, its official symbols (flag, money, etc.), its public buildings and museums, the curriculum of its public schools—all these things will be more closely associated with the history, culture, and tradition of a dominant ethnic group than with those of smaller and weaker ones. Such a dominant ethnic group therefore receives considerable official support, which provides much of what it needs to ensure the continued flourishing of its community and culture. A small and weak ethnic group is not only cut off from such official support. It is also disadvantaged by its lesser size, which increases even further what its individual members must

contribute to sustain their community and culture. Because it is so much harder and more expensive for members of ethnic minorities to maintain their shared culture and to lead a life they deem worthwhile, fairness demands that they be granted compensating legal group(-specific) rights.[20]

My response to such claims is, once again, that they are not at all specific to groups defined in terms of ethnicity. One can use the same sort of argument to claim group(-specific) rights for groups defined in religious or ethical or linguistic terms and even for groups defined by age, gender, or sexual orientation, by handicap or obesity, by hobby, consumer preferences, or way of life. Let me give some examples: The members of a religion can point out that English is closer to Anglicanism than to their own religion (which would favor Hebrew, perhaps, or Sanskrit) and can seek compensation for being disadvantaged through the choice of English as a public language and through the choice of public holidays and the numbering of calendar years as well. Atheists can object to the "In God We Trust" on dollar bills and to the deductibility of donations to religious associations. Rock-and-roll fans can object to the fact that opera is subsidized with tax monies, while their favorite music is not. Native speakers of Spanish can demand compensation for being disadvantaged by the fact that administrative and legal regulations are written, and legal procedures conducted, in English. Fat persons can ask to be compensated for the use of tax monies for public seats that are for them too small. Homosexual couples can demand compensation for being denied the advantages of marriage. Persons who are handicapped or claustrophobic can argue that they should be compensated for tax monies spent on subway systems which they cannot use. Persons who cherish certain unpopular sports or hobbies can claim that they should be compensated for the fact that their pursuit would be cheaper (through economies of scale) if it were more popular. Others, who cherish certain popular sports or hobbies, can claim that they, too, should be compensated when great demand drives up the price of their pursuit. Childless persons can demand exemption from property taxes targeted for day care centers and public schools. The old and the sick can demand compensation for publicly supported sports events (like a marathon). The list of possible claims is much

longer than I can make it here, so let me conclude by pointing out that the examples I have given are not purely academic: Many of the claims here listed have actually been made by members of the groups in question, and some have even been litigated in the United States.

Seeing that, in this domain as well, the claims that can be made for ethnic groups are continuous with claims that can be made for other groups, it seems, once again, sensible to work out a principled response to all such claims, and a response that does not make reference to the type of group in question. Such a response might sort claims into three (not necessarily mutually exclusive) categories:

1. Some claims can be deflected by reorganizing society in a way that is more neutral. Public holidays can be replaced, so that citizens be allowed to pick any seven from a list of twenty. Divisive references or allusions can be removed from money and public buildings. Some narrow seats can be replaced by wider ones or benches. Subways and public buildings can be made wheelchair accessible. Museums can be funded which balance the stories of dominant groups (e.g., "how the West was won") with those of others (e.g., about North America before Columbus, about the destruction of Indian societies, or about the lived reality of slavery). Public funding can be withdrawn entirely from various domains (such as the arts).

2. Some claims can be dismissed. Differential treatment of groups does not seem unfair so long as the special benefits and burdens can be expected roughly to balance out over a lifetime. And where differences are unfair even over a whole life, compensation need not be called for: A society cannot make official every public holiday, any of its citizens prefer. And where some preference(s) must and not all can be satisfied, it is better to satisfy those shared by more citizens rather than those shared by fewer. This means that some preferences will remain unfulfilled while others are honored. But it does not follow that those whose preferences remain unfulfilled should be entitled to compensation. Society can simply let stand the good bad luck of those who find their linguistic or holiday preferences in the majority/minority—just as, clearly, it should let stand the economic consequences of the preference distribution: Some

not compensate me for the higher price I must pay for front property as a consequence of my compatriots' love of es, or for the higher price I must pay for a guided tour oodland as a consequence of my being the only would-be mer.[21]

Some claims, finally, should be accepted. A translator can be ied at public expense to help citizens in their necessary ngs with courts and the bureaucracy. Public funding can be available to private schools that offer alternative curricula ned for the members of various minorites. Persons who want art in our car culture can be given a special tax break.

nce we determine that the members of some group suffer vantages for which they ought to be compensated through group(-specific) rights, we still have to determine which such would be appropriate and how extensive they should be. hese questions, as well, we ought to seek general answers. We d never be reduced to saying, in response to the members of dvantaged nonethnic group seeking parity with a disadvan- ethnic group, that they will not be granted equivalent p(-specific) rights just because theirs is not an ethnic group. riation two (on which, to save time, I will not elaborate) to justify group(-specific) rights for members of ethnic ps as compensation for the effects of past crimes and/or for nt disrespect and discrimination.[22]

In regard to both variations, it is not important to my hesis by what criteria exactly claims to group(-specific) rights mpensation should be assessed. What is important is that criteria should not make reference to whether the group at is an ethnic or a nonethnic group. It is true—re variation —that some ethnic groups (various Indian tribes in the d States and Canada; the Inuit in Canada; Sami in Norway, and Russia) have a culture of their own, one that differs edly from the society's mainstream culture which, directly indirectly, receives a great deal of offical funding, recogni- and support. Such ethnic groups have a very good claim to ensatory group(-specific) rights. But the same could be said some religious and linguistic groups as well, such as the (Quakers, Mormons) or Hispanics in the U.S. It is also —re variation two—that some ethnic groups (the Indian

tribes of North America, Gypsies in Eastern Europe, Arabs in France, Koreans in Japan) are suffering the effects of historical crimes and/or present discrimination. Such ethnic groups, too, have a very good claim to compensatory group(-specific) rights. But, once again, the same could be said about various nonethnic groups as well, such as African Americans, Muslims in India, the Bahai in Iran, Christians in China, and women almost everywhere. All these groups have plausible claims to group(-specific) rights, which should be decided upon by criteria that contain no essential reference to ethnicity—criteria by which some ethnic and some nonethnic groups will qualify.

Sometimes ethnic groups claim group(-specific) rights not on the basis of present disadvantages (including present effects of past crimes) but on the basis of past historical facts such as treaties in which such rights were specifically promised. These cases pose no challenge to my main thesis: If and insofar as such treaties with ethnic groups ought to be honored, similar contracts with nonethnic groups ought to be honored as well.[23] Whether such treaties or contracts ought to be honored depends not on what type of group they were made with but mainly on the moral and economic costs compliance would impose on the society's citizens and on whether they have been honored in the more recent past, thereby giving rise to legitimate expectations on the part of the present members of the relevant group.[24]

These considerations can be extended to "grandfathering" more generally. We may find that there exist in our society certain group(-specific) rights that we should not or need not grant to all other relevantly similar groups and yet also should not simply rescind because of the legitimate expectations that would thereby be disappointed. Many very different groups may have plausible claims to such grandfathering. We are all familiar with claims by men, native tribes, continuing immigrant communities, religious orders and denominations, entrenched "elites," trade unions, chartered universities and foundations, aristocratic families, as well as linguistic, lifestyle, and professional groups to the effect that the rights and privileges they and/or their members have enjoyed up to now must be maintained.[25] In assessing such claims, we will, once again, have to weigh their moral and economic cost against the morally significant value of honoring legitimate

expectations. I would think that, in cases where extraordinary group(-specific) rights are associated with morally significant costs,[26] they should be rescinded or appropriately modified. This can be done in a gradual, phased manner, determined and publicized well in advance so as to minimize the disappointment of legitimate expectations. Consider, for example, some Indian tribe that has thus far enjoyed an extraordinary degree of regional autonomy that allowed it to perpetuate anachronistic punishments and an inferior status for women. I see strong reasons against outlawing its practices from one day to the next, as this might cause a major shock to a (perhaps already fragile) cultural group with disappointment and disorientation of its members. But these reasons become much weaker when we imagine the offending practices to be phased out gradually over the span of years or decades: It is much harder to adjust to an immediate and dramatic change in gender relations, say, than to a slow change that will mainly affect one's children. In any case, whatever may be the right way to handle extraordinary group(-specific) rights backed by legitimate expectations, there seems to be no reason for being more accommodating to ethnic groups in this regard than to nonethnic ones.

Or is there? Kymlicka argues at length for the moral significance of historical consent. He holds that national minorities have a better claim to grandfathering than other groups because the latter have consented to the institutions of their society, typically through immigration.[27] In response, we should first note that this distinction, once again, cuts across the ethnic-nonethnic divide: There may be linguistic and religious groups whose continuous existence on the present state's territory predates the formation of this state (see note 9, above), and there certainly are, as Kymlicka himself points out, ethnic as well as nonethnic immigrant groups. Moreover, it is questionable whether so general a claim is sustainable: National minorities may have consented in ways other than immigration. Immigrant groups and indeed other nonnational groups may not have been in a position to give their free and informed consent or may have consented to an earlier set of institutions (e.g., with the understanding that the inferior status of women, or blacks, would continue forever). Finally, it is not clear why the plausibility of present claims to

group(-specific) rights should be affected by what much earlier group members may or may not have consented to. Suppose we find out that some Indian tribe now enjoying extraordinary group(-specific) rights had once, two hundred years ago, waived any claims to special treatment, or that some immigrant group came here at that time on the explicit understanding that they would be allowed to practice infanticide (though they have not wanted to do so until now). Would these newly discovered facts really make it (more) permissible to strip the Indians of their special rights, or give us reason to allow infanticide? As I see it, historical consent does not have much independent moral weight,[28] but matters, if at all, only insofar as it inaugurates a continuous history of legitimate expectations.

V. Two Objections

In response to an earlier version of this essay, Will Kymlicka has objected that the plausibility of groups' claims to special treatment depends importantly on whether or not the group is defined in terms of an inherited identity. Insofar as memberships in groups are chosen, rather than inherited, society may plausibly hold citizens responsible for choosing their memberships so that they are consonant with its institutions and culture. Some inherited memberships (e.g., gender, disability) typically do not involve deep identifications with the group. But the remaining groups, which define themselves in terms of a shared inherited cultural identity, deserve the utmost accommodation in the assignment of group(-specific) rights, because their members share a deep identification that they were not free not to choose. The groups defined through this conceptual intersection, however, are precisely ethnic groups. Therefore, contrary to the thrust of my argument, we ought to favor ethnic groups over nonethnic groups in the granting of group(-specific) rights. So there are, after all, claims to such rights which only ethnic groups can plausibly make.[29]

In response, let me first press upon the chosen-versus-inherited distinction. One has not chosen, of course, whether or not to have Hopi blood in one's veins. But blood alone is not an identity,

let alone a cultural identity. Even a pure-blooded Hopi is free to go to work for IBM or New York University. She may not find such a choice appealing or even conceivable. But, if so, it is not her blood, but her upbringing that stands in the way: She was raised as a Hopi and therefore finds modern city life a nightmare of barrenness and isolation. She has not chosen this upringing, and Kymlicka is therefore right to insist that there is such a thing as a shared inherited cultural identity.

But two qualifications must nevertheless be made. First, the distinction between chosen and inherited identities is vague: a matter of degree. It is probably impossible to raise minimally intelligent human beings so that it is not possible for them to shed their cultural identification. There is always some element of choice and responsibility. To accommodate this fact, we should then have to say that the plausibility of claims to group(-specific) rights depends in part on the degree to which the identity in terms of which the relevant group is defined is an inherited rather than a chosen one. Yet this refinement would introduce not only problems of measurement but also problems of averaging: Group members differ in the degree to which their identifications with the group are inherited rather than chosen, but they and their group must nevertheless be assigned a single legal status in the public realm. With coveted rights at stake, there will be disagreement about both measurement and aggregation, which would probably make the special accommodation Kymlicka proposes for groups with an inherited cultural identity socially divisive and impractical.[30] The second qualification is that the distinction between chosen and inherited cultural identities does not track that between ethnic and nonethnic groups: Many members of ethnic groups do not identify with their ethnicity; and it seems quite doubtful that all those who do identify in this way do so without choice.[31] We could interpret "shared inherited cultural identity" broadly, perhaps, so that it nevertheless covers all ethnic groups. But it will then also include many religious, linguistic, and lifestyle groups in which children also come to have unchosen values, knowledge, and concerns. To be sure, there is no genetic component in being a Mormon, a native speaker of Spanish, or a nudist, while there is a genetic component in being a Hopi. But if, as I

have argued, a genetic component is neither necessary nor sufficient for inherited cultural identity, then this difference is irrelevant to the distinction Kymlicka deems morally significant.

We have seen that the predicate "being a group with a shared inherited cultural identity" is quite vague and also cuts across the ethnic-nonethnic divide; and no more, it seems, needs to be said in response to the objection. But the moral significance of the distinction also seems dubious. Why should the accommodation we owe to citizens distinguished by some shared cultural identity vary with whether this identity is chosen or inherited? If a group of like-minded parents arrives at certain new ideas about schooling and wants to found an appropriate new school for their children, why should their proposal be held up to a higher standard than that of Catholic or Navajo parents who want their children to be schooled in accordance with their own inherited cultural identity? Or do persons discriminated against on the basis of inherited memberships really have a better claim to compensation than others discriminated against on the basis of chosen memberships? (We want to preclude that citizens are penalized for having been raised as, and being, Navajos or Catholics, to be sure. But do we not also want to preclude, and just as strongly, that citizens are penalized for being communists, or members of a subculture with Cherokee hairstyles and nose rings?) Why should cultural contents that citizens choose on their own be any less deserving of respect and accommodation than ones they have internalized before they reached the age of reason?

In sum, I believe there are strong reasons against following Kymlicka's proposal to make politically significant a distinction between *inherited* and *chosen cultural identities*. And, *even if* we did give it such significance, it would not track the (similarly vague) distinction between ethnic and nonethnic groups: There are not only ethnic, but also religious, linguistic, and lifestyle groups at the "inherited" end of the chosen-inherited spectrum.

The other objection I will briefly discuss comes from the other side of my null-hypothesis. It is inspired by the polar opposite of the pro-ethnic positions I have been challenging thus far, by the contention namely that ethnic groups should be *dis*favored in the distribution of group rights.[32] It opposes group rights for ethnic

groups in particular, because such rights are especially exclusionary: In the case of other groups, all citizens have open to them some reasonably viable paths for becoming members of the relevant group and thereby joining those who benefit from and control these rights. One can convert to Catholicism, learn Spanish, join the New Agers, or move to Oregon. But, try as one may, one cannot become a member of an ethnic group. While the first objection relies on the claim that members of ethnic groups are especially unfree to choose to be nonmembers, the second protests that nonmembers of ethnic groups are especially unfree to become members.

My response to this objection involves moves matching those made in response to its predecessor. To begin with, the distinction between acquirable and unacquirable memberships is not clear-cut. Ethnic groups differ in the extent to which they accept new members and are willing to let them become beneficiaries of any of their group(-specific) rights—for example, after marriage to one of their own. And there are variations in the extent to which new members are accepted even by the same ethnic group (whether an outside spouse will be accepted into an Indian tribe will often importantly depend on this person's gender or race). Like the chosen-inherited pair, the notion of acquirability does not, then, reference a simple binary distinction but a multidimensional continuum, so that normative political lines drawn on the basis of it are bound to be arbitrary to some extent, and therefore controversial and divisive.

Moreover, the distinction between acquirable and unacquirable memberships does not track that between ethnic and nonethnic groups. In the case of many ethnic groups, full membership is, I admit, typically difficult to attain for outsiders. But, if this suffices for the predicate "unacquirable," then this same predicate must be extended to many groups of other types as well: Some religious denominations are very reluctant to welcome converts and never accept them as full participants or potential leaders. Similar phenomena occur in some linguistic and lifestyle groups. And membership in racial and gender groups is, for biological reasons, virtually impossible to acquire at all, at least at the present stage of medical technology. The distinction between

acquirable and unacquirable memberships is thus not merely vague, a matter of degree, but also cuts across the ethnic-nonethnic divide.

Once again, these considerations suffice to defeat the objection. But let us briefly look at the analogue to the last point as well, which challenges the moral significance of the distinction. Here I find the second objection to be in better shape than the first: In some cases, at least, a group's claim to legal group (-specific) rights does seem to be weakened by the fact that membership in this group is hard to acquire. For example, we generally allow group(-specific) rights associated with collective ownership of firms or residential properties only when every citizen (really every citizen with money) can buy into them and we therefore require that every present stakeholder be free to sell to anyone (without being encumbered, e.g., by restrictive covenants). The unacquirability of group(-specific) rights granted as compensation or to honor legitimate expectations, by contrast, often seems far more acceptable. Here it matters less that other citizens cannot acquire these rights, because the excluded are already as well off without these rights as the rights' beneficiaries are with them. They do not have to suffer the disadvantages that are meant to be compensated or, respectively, the disappointment of expectations that would result if the rights were rescinded.[33]

The distinction invoked by the second objection is then morally more significant than that invoked by the first. But the objections nevertheless both fail, and for the same basic reason: The distinctions they invoke do not track that between ethnic and nonethnic groups.

VI. Conclusion

My main thesis in this paper has been that our political decisions about what group(-specific) rights may or should be granted to particular groups ought to be made in terms of a principled account that does not favor any particular type(s) of groups as such and, in particular, not ethnic groups. I have not developed such an account. But I have sketched some of the main values it might plausibly incorporate—freedom of association, full political participation, equalizing protection of the disadvantaged, and fair adjustment to legal change—arguing that each of these values could be as plausibly invoked by nonethnic groups as by ethnic ones. In this way, I have made a preliminary case for a more sweeping null-hypothesis: It is irrelevant to the moral assessment of a claim to legal group rights whether the group for which the rights are claimed is or is not (part of) an ethnic group. According to this hypothesis, there ought to be no group rights for which, as a matter of principle, only ethnic groups can qualify (though there may, of course, be such rights for which, as a matter of contingent circumstance, only ethnic groups happen to qualify in some particular region and period). I am confident that it is a matter of some importance, in the current debates about pluralism and multiculturalism and in the present climate of proliferating claims to disadvantaged-minority status, to determine whether my null-hypothesis fails and, if so, how.

NOTES

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1. Groups of these four types will be loosely referred to as cultural groups. In some societies, other types of cultural groups may exist as well, groups whose members are identified with a particular vocation, world view, ethics, vision of the future, past experience (e.g. veterans), or biological characteristic (e.g., race, gender). I will focus here on the more familiar cases without worrying about exactly how far my main thesis can be extended beyond them.

2. Why cannot groups identified with a particular ethics or world view have as strong and conscientious objections to military service, and as solid reasons to hold meetings to deepen and clarify their commitments, as any religious denomination? And why cannot linguistic, religious, and racial groups have as good reasons as ethnic groups can have to seek limited autonomy in an area in which they constitute a majority?

3. Limits on what can reasonably be granted arise from the morally significant costs involved: Legal group rights restrict the freedom of persons and groups within and/or outside the possessor group and of governments at all levels. Because they impose such restrictions (opportu-