5

Classifying Cultural Rights

A wide variety of extant and proposed policies seek to accommodate cultural pluralism; these do not lend themselves to being normatively analyzed as a single group. On the other hand, many of them do rise or fall by similar arguments. This chapter seeks to identify those cultural rights-claims which are morally alike and (as importantly) those which are unlike one another. It offers a way of sorting those policies which may facilitate and clarify such arguments.

Normative work on cultural rights is difficult to structure. One can rarely say with any precision what implications a given philosophical turn had for the sets of policies being endorsed or disparaged. Arguing by analogy from one case to another is necessary, but it is also frustrating without a framework for identifying the traits which made policies like or unlike in relevant ways.

Drawing purely philosophical distinctions sometimes provides little guidance in sorting actual institutions or policies. The discussion about individual and collective rights, for example, important as it is on a philosophical level, provides little guidance when confronting concrete policies and rights-claims, some of which seem to fit into neither category, some of which are all-too-easily redescribed as part of either one. Yael Tamir[1] derives the right of a national group to its own (not necessarily independent) government from the individual right to practice one's culture, and argues that this derivation means national self-determination should be understood as an individual right. Darlene Johnston holds that 'the prevalence of collective wrongs such as apartheid and genocide demonstrates the need for collective rights.'[2] This seems to redescribe, for example the right not to be murdered by one's government as a group right. Such redescriptions in one direction or the other are not unique, and the variety of usages of 'collective right'—which can refer to a right to a public good or a social good, a right which could

[1] Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993).

[2] Darlene Johnston, 'Native Rights as Collective Rights: A Question of Self-Preservation,' *Canadian Journal of Law and Jurisprudence* 2 (1989), 19–34.

only be exercised by members of a collective, or a right which could only be exercised by a corporate collectivity itself, among other possibilities—adds to the confusion. An argument that the only morally important rights are individual ones might still lead to support for a variety of cultural rights-claims (suitably redescribed); an argument that groups can have rights does not prove that any *do*, or which groups have which rights.

On the other hand, sorting rights-claims by the kind of group making the claim[3] clarifies some issues but also makes it difficult to distinguish among the various kinds of claims a group can make. It also, in my view, unnecessarily distinguishes between quite similar claims made by a variety of different groups.

What follows, then, is the set of categories useful in sorting cultural rights-claims. There are clusters of claims which lend themselves to similar sorts of arguments (pro and con), clusters within which one policy may be taken as precedent for another but across which such claims are much harder to sustain. I have proceeded inductively, from particular cases and arguments to categories. The classification is therefore not a logically exhaustive typology; I am unsure that any such typology captures the range of policies and rights-claims at issue. Usefulness, not truth, is the goal.

For each category, I provide real or proposed examples from the theoretical and empirical literature, and a sketch of the normative issues at stake in such rights-claims. I also identify important clusters within some categories, clusters which raise additional normative issues or which are clearly recognizable patterns of rights-claims actually made. I also indicate what the multiculturalism of fear suggests about the various kinds of cultural rights-claims. Following the classification, I discuss some alternative methods of sorting cultural rights-claims, and some examples of arguments which I think would be clarified by use of a framework like the one presented here.

I have by and large excluded both obviously illegitimate claims—'We have the right to rule you because ruling is part of our culture'—and claims that are simply demands that one's liberal individual human rights be observed—'We have the right that our government not slaughter us.' This classification attempts to sort through the kinds of claims that are seen to be something different from equal

[3] As in Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflict* (Washington, DC: United States Institute of Peace Press, 1993), and Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995). These approaches are discussed in Part III.

Table 5.1: Types of cultural rights-claims

Category	Examples
Exemptions from laws which penalize or burden cultural practices	Sikhs/motorcycle helmet laws, Indians/peyote, indigenous peoples/hunting laws, Amish/schooling
Assistance to do those things the majority can do unassisted	multilingual ballots, affirmative action, funding ethnic associations
Self-government for ethic, cultural, or 'national' minorities	secession (Slovenia), federal unit (Catalonia), other polity (Puerto Rico)
External rules restricting non-members' liberty to protect members' culture	Quebec/restrictions on English language, Indians/restrictions on local whites voting
Internal rules for members' conduct enforced by ostracism, excommunication	Mennonite shunning, disowning children who marry outside the group
Recognition/enforcement of traditional legal code by the dominant legal system	Aboriginal land rights, traditional or group-specific family law
Representation of minorities in government bodies, guaranteed or facilitated	Maori voting roll for Parliament, U.S. black-majority Congressional districts
Symbolic claims to acknowledge the worth, status, or existence of various groups	name of polity, official name of ethnic groups, national holidays, teaching of history, official apologies

individual rights conventionally understood, but which are still normatively plausible.

Cultural rights-claims and special policies for accommodating ethnic and linguistic pluralism include exemptions, assistance, self-government, external rules, internal rules, recognition/enforcement, representation, and symbolic claims.[4]

[4] It has been suggested to me that this classification might also incorporate rights-claims made by or on behalf of, for example, women, the disabled, or gays and lesbians. It has also been suggested to me that if the classification does not prove able to incorporate such claims, it should be adjusted to do so, because of the links between cultural rights and assistance for other oppressed groups. For discussion of those links, see Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990). If the classification can incorporate such claims, so much the better, but I am not in a position to say whether it can.

EXEMPTIONS

Exemption rights are individually exercised negative liberties granted to members of a religious or cultural group whose practices are such that a generally and ostensibly neutral law would be a distinctive burden on them. Often this is because the law would impair a minority's religious practices, or would compel adherents to do that which they consider religiously prohibited; exemptions are thus often analogous to the status of conscientious objector which exempts, among others, Quakers and the Amish from conscription.

Examples abound. The ceremonial use of wine by Catholics and Jews was exempted from alcohol Prohibition in the United States. The religious use of peyote by American Indians is similarly exempted from many state laws on narcotics and hallucinogens.[5] The Amish in the United States have sought or obtained exemptions from mandatory schooling laws;[6] regulations of private schools like the requirement that schools have certified teachers;[7] participation in Social Security and some states' workers' compensation and unemployment insurance schemes;[8] a requirement that slow-moving vehicles display a standardized reflective symbol;[9] and a variety of health care and

[5] The US Supreme Court in *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (USA 1990) held that the Free Exercise Clause of the First Amendment did not provide constitutional protection for the religious use of peyote. Congress' attempt to provide such protection with *The Religious Freedom Restoration Act* was struck down in *City of Boerne v Flores*, 521 US 507 (USA 1997).

[6] This was granted in *Wisconsin v Yoder*, 406 US 205 (USA 1972); Ontario has informally granted a similar exemption. See Dennis Thompson, 'Canadian Government Relations,' in Donald Kraybill (ed.), *The Amish and the State* (Baltimore: Johns Hopkins University Press, 1993), 239.

[7] See Thompson, 'Canadian Government Relations,' and Thomas Meyers, 'Education and Schooling,' in Donald Kraybill (ed.), *The Amish and the State* (Baltimore: Johns Hopkins University Press, 1993).

[8] The Amish have a religious prohibition on reliance on or participation in organized insurance; Social Security is not an insurance system according to the usual definitions but public rhetoric about it has long referred to it as one. The Social Security exemption was granted to self-employed Amish (a large majority) by legislation in 1965; denied to Amish working for wages by *United States v Lee*, 455 US 252 (USA 1982); extended to Amish employed by other Amish by federal legislation in 1988. Some states have granted analogous statutory exemptions from participation in their unemployment insurance and workers' compensation plans. See Peter Ferrara, 'Social Security and Taxes,' in Donald Kraybill (ed.), *The Amish and the State* (Baltimore: Johns Hopkins University Press, 1993). A similar exemption from the Canadian Pension Plan was granted in 1974 to self-employed Amish, Old Order Mennonites, and Hutterites. See Thompson, 'Canadian Government Relations,' 239–40.

[9] Some Amish objected to the emblem as a worldly symbol as well as to putting bright colors on their carriages. They sought to use reflective tape and a lantern in lieu of the standard red triangle. They were refused federal protection in *Minnesota v Hershberger*, 110 US 1918 (USA 1990), granted protection under the Minnesota constitution in *State v Hershberger (II)*, 462 NW2d 393 (Minn. 1990).

land-use regulations.[10] A century ago American Mormons sought an exemption from laws against polygamy.[11] Jews and Muslims in a number of states have sought or obtained exemptions from sabbatarian laws, especially Sunday-closing laws for businesses.

Not all exemption claims are religiously based. Indigenous peoples in several countries have sought and obtained exemptions to various hunting, fishing, and land-use regulations, arguing that the rules would unfairly burden their traditional way of life or even their ability to gain sustenance. At various times Afrikaner, Quebecois, and Irish citizens of South Africa, Canada, and the UK have sought exemptions from conscription, saying that they should not be forced to fight on behalf of England. Some exemptions are religious only in an inverse sense to those on the conscientious objection model. For instance, some Muslim states ban the use of alcohol, but exempt non-Muslims from the rule. The exemption is not granted because alcohol consumption is a *duty* of all non-Muslims; it differs from the exceptions to American Prohibition noted above. It is granted because the rule itself is there for an openly religious reason. The state is intimately involved with the majority culture and religion, and considers it appropriate to turn the sinful into the criminal; but by the same token holds that those who do not hold alcohol sinful should not be held criminally liable for it either.

A variety of exemption claims revolve around dress codes and restrictions. Sikhs in Canada have sought exemptions from mandatory helmet laws and from police dress codes, to accommodate the turbans required by their religion. American Orthodox Jews requested an exemption from Air Force uniform regulations to accommodate their yarmulkes.[12]

[10] See Gertrude Huntington, 'Health Care,' and Elizabeth Place, 'Land Use,' both in Donald Kraybill (ed.), *The Amish and the State* (Baltimore: Johns Hopkins University Press, 1993). Other religious groups, notably including Jehovah's Witnesses and Christian Scientists, have also sought and sometimes obtained exemptions from health care regulations.

[11] Their claim was denied in *Reynolds v United States*, 98 US 145 (USA 1878). Muslims in some countries are allowed to have marriages involving one husband and up to four wives, the limit imposed by the Koran; but their case differs somewhat from that of the Mormons. In the United States, polygamy is a criminal offense; what was sought in *Reynolds* was immunity from prosecution, an exemption. The right granted to Muslims will be discussed below under 'recognition and enforcement.'

[12] The claim was denied in *Goldman v Weinberger*, 475 US 503 (USA 1986). Kymlicka discusses these cases at some length. He stresses their integrative capacity; joining the Air Force or the Royal Canadian Mounted Police are acts of belonging rather than of separation. But one could easily find closely analogous examples which lacked the symbolism of belonging; consider dress codes in prisons. Nor are all of Kymlicka's

Muslim women and girls have faced similar situations with regard to the garments they are required to wear, though the most famous of these—the expulsion of Muslim girls from French schools because their headscarves violated rules about the display of religious symbols—is a special case. Exemption disputes involve rules which only accidentally impinge on the minority practice; it's not that the US Air Force bans yarmulkes *per se* but rather that it has a standardized uniform of which yarmulkes would be one sort of violation. But the rule in France was very specifically against anything that would allow one to identify students by religion. The *foulard* is precisely the sort of thing the rule was intended to keep out.[13] One is reminded of the rule that all personal names must be in the state's dominant language, imposed at various times on peoples as disparate as Germanic South Tyrolians in Italy and the non-Han Chinese aboriginal inhabitants of Taiwan. Such rules are intentionally aimed at the minority group, and so it makes little sense to seek an exemption but leave the rule intact. Again, repeal rather than an exemption is what is wanted. These cases obviously have something important in common with those in which an exemption is sought to a rule left otherwise intact; but they differ, too.

Brian Barry argues that for similar reasons exemptions in general make little sense, that either a general law illegitimately violates liberty and should be repealed or it is justified and should be uniformly enforced.[14] But in most cases in which an exemption is demanded or granted, a practice which has a distinctive status and meaning in a minority culture is banned, regulated, or compelled because of the very different meaning it has for the majority culture. The exemption is justified as a recognition of that difference, as an attempt not to unduly burden the minority culture or religion *en route* to the law's legitimate goals.[15] As noted, many are defended as part of the freedom to practice and live according to one's religion, and seek their defense in the broader theory of religious freedom; but all defenses of exemptions

examples of polyethnic exemptions so obviously integrative; exemptions from motorcycle helmet laws or Sunday closing laws do not seem analogous in this respect to the Sikh trying to join the Mounties. Kymlicka, *Multicultural Citizenship*, 114–15.

[13] See Françoise Gaspard and Farhad Khorokhavar, *Le foulard et la République* (Paris: Éditions La Découverte, 1995), 163–212. In fact the situation was worse than that; the rule in effect prohibits worn religious symbols that are not crosses or yarmulkes—that is, it functions *de facto* as a rule against the *foulard*, since public schoolchildren tend not to wear nuns' habits or clerical collars. Leaving the rule intact but granting an exemption for the *foulard* would border on incoherence.

[14] Brian Barry, *An Egalitarian Critique of Multiculturalism* (Cambridge: Polity Press, 2000).

[15] Kymlicka, *Multicultural Citizenship*, 108–15, offers an 'equality argument' which uses reasoning like this.

stress the distinctive meaning which the practice has for the non-dominant group. The fact that exemptions are individually exercised, and that many of the laws in question are so-called 'victimless crime laws,' makes exemptions easy to ground in liberal and libertarian theories emphasizing individual freedom from coercion. But Barry might be correct that the libertarian solution should simply be to abolish the victimless crime laws altogether. Raz thus argues that the exemption for conscientious objectors has been a protection for religious *communities* as much as if not more than a deferral to *individual* conscience, and the argument is easily extended to other exemption rights.[16] Sandel provides a communitarian argument for religious exemptions as exercises of the right to carry out one's communal duties.[17]

If liberty is not all of a piece, however, then even on individualistic grounds what Barry calls the 'rule-plus-exemption' solution might be preferable to either abolishing the rule or refusing the exemption. Some violations of liberty are more serious than others; they intrude closer to the core of a person's dignity, sense of self. Some restrictions are inconveniences, others deep offenses to self. But which is which is not the same for everyone, and cultural and religious understandings help make the difference. Religious rules and understandings make sacred the otherwise profane: a wafer and wine into the blood and body of Christ, or (an example of Michael Walzer's) a butcher block into an altar. The justification of legal restrictions on freedom of action must surely involve the weighing of the importance and legitimacy of the state's goals against the importance of the liberty being restricted. This is reflected in American law in the difference between laws which need only show 'a rational relationship' to 'a legitimate state interest' in order to pass constitutional muster and those which must show 'a necessary relationship' to 'a compelling state interest;' but neither those particular formulations nor the idea of judicial review are necessary for the point at hand. A law might justifiably restrict a minor liberty in the public interest, but at the same time restrict a core religious liberty of a minority. If the state's interest is not one of overriding importance, then the combination of rule-plus-exemption might be the best available solution.

Some state interests, of course, are overriding. Some who sympathize with exemption claims in general maintain that laws that protect the interests of children (e.g. compulsory vaccination or mandatory schooling) are

[16] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 252.

[17] Michael Sandel, unpublished paper cited in Tamir, *Liberal Nationalism*, 38–9.

too important to allow for exceptions.[18] And preventing violence and cruelty are undoubtedly moral ends of the highest importance—compelling state interests, in the American legal terminology. There is thus no contradiction between defending many of the exemptions mentioned above and denying the validity of the so-called 'cultural defense' discussed in Chapter 2. Parents having genital cutting performed on their daughters suggest that such ritual cutting should be exempt from child abuse laws; Hmong men argue that their courtship by 'capture' should be exempt from rape and kidnapping laws. Undoubtedly there are distinctive cultural meanings of ritual genital cutting and courtship by capture; but the moral interest being served by the laws against abuse, rape, and kidnapping far outweigh the claimed liberty to practice one's own culture.[19]

Exemptions are criticized as a class for the distinctions they draw in the law; they grant liberties to some which others lack. This is particularly a problem for republican or liberal theories which place overwhelming importance on *equal* liberty. It is also a problem for the conception of the rule of law that emphasizes the general applicability of laws and the absence, as it were, of proper nouns from legitimate law-making. Exemptions are also subject to criticism because they also require the state to identify individuals as members of various groups; perhaps most problematically, religious exemptions can require judicial inquiry into whether a person is a sincere and faithful member of the religion or whether the exemption is being claimed opportunistically. All exemptions, though, require an official determination of the group membership of individuals, a process some might think problematic. On the other hand, exemption rights are wholly immune to the criticism that 'groups cannot be rights-bearers,' for while they are group-differentiated they are not 'group rights' in any meaningful sense.[20]

[18] Some liberals who endorse exemption rights generally, including Kymlicka, reject *Wisconsin v Yoder* because of the additional issues raised when an exemption is sought from a law which seeks to protect children. On the other hand, Kukathas both endorses *Yoder* and suggests a similar exemption for Roma (gypsies) in Britain. Chandran Kukathas, 'Are There Any Cultural Rights?' *Political Theory* 20 (1992) 105–39, at 126.

[19] Not all cultural defense claims suggest that a whole class of violent actions should be exempt from the criminal law. Many only treat the offender's culture as relevant to establishing *mens rea* or intent.

[20] See Jan Narveson, 'Collective Rights?' *Canadian Journal of Law and Jurisprudence* 4 (1991), 329–45, and Michael Hartney, 'Some Confusions Concerning Collective Rights,' ibid. 293–314, for the claim that groups cannot bear rights.

ASSISTANCE

Where exemption rights seek to allow minorities to engage in practices different from those of the majority culture, assistance rights are claimed for help in overcoming obstacles to engaging in common practices. Special provision is sought because of culturally specific disadvantages or because the desired common activity has been designed in such a way as to keep members of non-dominant groups out.

The most prominent clusters of assistance rights are language rights; funding for ethnocultural art, associations, and so on; and preferential policies (in, for example, hiring and university admission). All impose a direct cost onto at least some members of the majority or dominant culture; all seek to allow the minority or subordinated culture to do those things which the majority culture can allegedly do already.[21]

Language rights present simple examples; speakers of the minority language seek special provision to allow them to interact with the state or receive state protection and benefits. These include ballots printed in multiple languages; interpreters in court and in administrative agencies, or the appointment of bilingual judges and civil servants;[22] the provision of bilingual or minority-language public education; and offering college entrance exams in more than one language. Voting, using the courts and the schools, having access to the bureaucracy—these are

[21] The language of 'minorities' and 'majorities,' always problematic in the cultural rights debate, becomes especially so when dealing with assistance rights. In a given society different groups may feel excluded from different kinds of activities, and numbers may not be the determining factor. Malaysia has practiced various preferential policies for ethnic Malays *vis-à-vis* ethnic Chinese, a minority which is predominant in business and education. South Africa has implemented widespread affirmative action policies for its black majority. For a similar reason, 'dominant' and 'non-dominant' are unsatisfactory. Often a group which is predominant is business is disadvantaged in politics; this has been true of Indian, Chinese, Jewish, and sometimes Arab populations around the world. On the other hand, 'dominant/non-dominant in the relevant sphere' and 'unfairly disadvantaged/unfairly advantaged in the relevant sphere' are unwieldy, and I shall continue to use the imprecise language of majorities and minorities.

[22] See Sergij Vilfan, 'Introduction,' and Lode Wils, 'Belgium on the Path to Equal Language Rights up to 1939', in Sergij Vilfan *et al.* (eds.), *Comparative Studies on Governments and Non-Dominant Ethnic Groups in Europe, 1850–1940*, iii: *Ethnic Groups and Language Rights* (New York: New York University Press, European Science Foundation, 1993), on the wide variety of ways in which minority language-speakers can seek to be accommodated in courts and administrative procedures. Issues include not only the right to speak one's own language in court but the language of the overall proceedings; not only the right to speak to a civil servant in one's own language but the right to have correspondence from the state in that language; not only the right to be a member of the civil service but the question of the language in which intra-civil service communication is to be conducted.

common activities which speakers of the minority language are effectively prevented from engaging in. Overcoming that obstacle requires special provision which imposes a cost; interpreters are expensive, a requirement that judges or civil servants be bilingual even more so, and there is a direct cost associated with printing ballot papers in more than one language. Supporters of assistance rights maintain that these costs are less important than the injustice which would result if minority-language speakers were denied access to the activities in question. Bruno De Witte summarizes the general argument in favor of such assistance rights, which he refers to as rights of linguistic equality (as opposed to mere linguistic freedom, the right to speak one's own language):

> The freedom to use one's own language in addressing [judicial or administrative] authorities is ineffective if those authorities have no corresponding duty to understand and act upon that language; and with 'negative' rights, no such duty can be imposed upon them. Indeed, in the absence of such a duty, the individual members of the administration or the judiciary could themselves invoke their own linguistic freedom against that of the citizen with whom they deal. In the context of administrative and judicial usage, the primary interest of minorities *is* the recognition of a form of linguistic equality rather than linguistic freedom.[23]

Subsidies to a variety of cultural and linguistic institutions and associations are also common. It is argued that the majority culture, simply by being in the majority, has its cultural integrity and heritage protected for free, as it were, while other cultural groups have to create, maintain, and fund institutions like private schools, fraternal associations, museums, art galleries, theater companies, community newspapers, cultural clubs, and so on in order to preserve their cultural integrity to anything like the same degree. Special state measures to ease that burden are assistance rights. These can include direct subsidies to ethnic associations, special tax deductions for contributions to such associ-ations, the provision of tax credits, vouchers, or direct subsidies to cultural private schools or the parents of children who go there, and so on. Kymlicka also argues for support for 'ethnic associations, magazines, and festivals,' seeing them as a logical extension of state funding for arts and culture generally and possibly as security against discrimination in the allocation of such funds.[24] Carrying the logic of these assistance rights farther, Yael Tamir suggests the provision of cultural vouchers which could be donated to a wide variety of cultural institutions.[25]

[23] Bruno de Witte, 'Conclusion: A Legal Perspective', in Sergij Vilfan *et al.* (eds.), *Ethnic Groups and Language Rights* (New York: New York University Press, European Science Foundation, 1993), 303.

[24] Kymlicka, *Multicultural Citizenship*, 31,123, 223–4 n. 15.

[25] Tamir, *Liberal Nationalism*, 54–5.

With the possible exceptions of the language of public education and subsidies for private education,[26] the most controversial and explosive assistance rights are preferential policies. They are also extremely common worldwide. Affirmative action, preferential hiring and admissions, quotas and set-asides are present in various places in private employment, the civil service, bank loans, the military, universities, the awarding of government contracts, and land allocation.[27] For reasons which are either systematic and permanent or at least in theory contingent and temporary, members of one group are held to be at a disadvantage in competing for the resources or positions in question, a disadvantage which these assistance rights attempt to overcome.[28]

The explosiveness of preferential policies comes in part because the costs of the policy are apparently concentrated on the marginal members of the non-preferred group, those who are better-qualified or more competitive than some of those members of the preferred group are awarded the positions or resources. In this they differ from language rights or funding for ethnic associations; those assistance rights do have costs, but they are dispersed among a society's taxpayers. They are also highly controversial because of their open departure from principles of merit and equal treatment, although Iris Marion Young argues that such principles are themselves biased and unequal.[29]

Language rights and cultural subsidies (though not preferential policies) are immune to fears about identifying individuals on the basis of group membership; such identification is not generally necessary for their exercise. Arguments for the separation of culture and state, or against the legitimacy of claims for cultural support, *do* impact on language rights and cultural subsidies.[30] Many assistance rights are integrationist and so

[26] On the centrality of the question of education to ethnic and nationalist disputes worldwide, see Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983); Janusz Tomiak and Andreas Kazarnias, 'Introduction,' and Knut Eriksen, *et al.*, 'Governments and the Education of Non-Dominant Ethnic Groups in Comparative Perspective,' in Janusz Tomiak *et al.* (eds.), *Comparative Studies on Governments and Non-dominant Ethnic Groups in Europe, 1850–1940*, i: *Schooling, Educational Policy, and Ethnic Identity* (New York: New York University Press, European Science Foundation, 1991).

[27] See Thomas Sowell, *Preferential Policies* (New York: Basic Books, 1991), and Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985), 653–80.

[28] Of course, a crucial part of the defense of such programs is showing that the stipulated disadvantage is real and that the policy is not simply a way for a politically powerful group to extend its influence into other spheres.

[29] Young, *Justice and the Politics of Difference*, 192–225

[30] See e.g. Narveson, 'Collective Rights,' 344–5. Kymlicka, *Multicultural Citizenship*, 108–15, and Tamir, *Liberal Nationalism*, 145–50, arguing for (among other cultural rights) assistance rights, maintain that arguments for a separation of culture and state are untenable.

not subject to charges of separatism; this is the case for multilingual ballots, for example, which allow all to participate in a common political system. On the other hand, funding for minority-language schools, newspapers, radio stations, and so on, while allowing the minority to do the same sorts of things as the majority, do not encourage the two groups to pursue their activities *together* and do not seem integrationist.

As ought to be clear, some differences in justification necessarily surround the clusters of assistance rights; but they are importantly similar as well, in ways which make them dissimilar to other kinds of cultural rights-claims. All assistance rights involve costs to members of the majority culture (though these are not costs in liberty; policies imposing such costs require different justification and are discussed separately under 'external rules'), and those costs must be justified. All involve the aspiration or the desire to do things which members of the majority already or easily do, and are therefore not typically subject to criticism on grounds of leading to or encouraging separatism.[31] Unlike exemptions, which are readily defended in terms of liberty and only indirectly in terms of equality, arguments about assistance rights are almost always arguments about equality. They are opposed on the grounds that they single out members of specific groups for receipt of unequal benefits; they are supported on the grounds that members of the minority culture face an unfair inequality in their chances to do or participate in something.

The *unfairness* of the inequality is an important part of the argument; it is typically stated that the inequality comes from historical injustice, actions of the state or of the majority group, or from the bare status of being a minority, rather than from choices made by individual members of the group.[32] Note that this does not mean assistance rights are all

31 The provision of bilingual education, or state support for minority-cultural schools, are an important exception to this; this may suggest that such policies are better understood as part of another category, though it is unclear which that would be. If the cultural community can tax its own members and provide its own schools, a form of self-government would seem to exist. Perhaps bilingual education provided by the state should be understood as an assistance claim while schools provided or assisted by the state which intend to keep students in the minority culture (for instance, through minority monolingual education) should be understood as part of self-government; but that, too, would seem strange as a description of a policy which provided tax deductions for contributions to private minority-language schools or which provided vouchers to attend them.

32 On the fairness or unfairness of various advantages and disadvantages accruing to cultural and ethnic groups, see Robert Simon, 'Pluralism and Equality: The Status of Minority Values in a Democracy,' and Joseph Carens, 'Difference and Domination: Reflections on the Relations Between Pluralism and Equality,' in J. W. Chapman and Alan Wertheimer (eds.), *NOMOS XXXII: Majorities and Minorities* (New York: New York University Press, 1990).

thought to be *temporary*, although preferential policies are very often temporary in principle (even if not in practice). The argument for language rights, for example, would only yield temporary conclusions if the minority language group were made up of a group that was expected to assimilate entirely (and, if the group is made up of immigrants, not to be replenished by newcomers). Even if members of the minority were all rightly expected to learn the majority language, supporters of language rights could argue that it is unfair to force them to speak, read, listen, or write in a second language when (for example) defending themselves in court. Permanent assistance rights are typically sought when the disadvantage is a result of the simple status of minority, rather than a result of a history of injustice.

SELF-GOVERNMENT

Self-government claims are the most visible of cultural rights-claims and among the most widespread; ethnic, cultural, and national groups around the world seek a political unit in which they dominate, in which they can be ruled by members of their own group. These political units might be joined with others in a confederation, or they might be cantons, states or provinces in a federal system, or they might be fully independent. They might instead occupy a distinctive status not quite like that of other political units; this is true for the semi-sovereign Indian nations of the United States. Examples range from Quebec to KwaZulu, from Eritrea to Tibet; Slovakia, Scotland, Kurdistan, Catalonia, Brittany, Kashmir, the Basque lands, and the Jura canton in Switzerland do not begin to exhaust the list of places where self-government has been demanded or granted. The normative claims are similar in all of these cases: there ought to be a government which members of the group can think of as their own. They should not be ruled by aliens. Borders ought to be drawn, and institutions arranged, to allow the group political freedom from domination by other groups.

Self-government claims are ordinarily treated as distinct from other cultural rights-claims, and the normative issues they raise are well explored elsewhere (including, in part, in Chapters 2 and 4); I shall not rehearse them at length here.[33] None the less, a few points should be

33 Secessionist claims for full independence are dealt with most thoroughly in Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumpter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991), and Margaret Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998), but also in Harry Beran, 'A Liberal Theory of Secession,' *Political Studies* 32 (1984), 21–31;

emphasized. The justification of self-government claims is unique in that it requires addressing questions of territory and borders. These claims are also more about government structure, and less about what private persons may do, than most cultural rights-claims. The incidental effects on minorities within minorities raise distinctive issues—distinctive even from policies *designed* to affect such local minorities, external rules); the question of whether those minorities in turn have a right to self-government is a perennial one.

The link between rights of cultural practice and self-government rights are not easy to draw, though Tamir tries to ground self-government rights in an extension of the individual right to practice one's culture; and even she recognizes the need for a separate argument showing the importance of having a public sphere of one's (culture's) own. The language of individual rights is more commonly thought irrelevant to self-government claims, except to condemn them if the self-governing group is thought likely to be illiberal or undemocratic.

Where a self-government claim or right is neither about full independence (Lithuania) nor about a general system of federalism (Switzerland) but is instead about a distinctive self-governing status within a larger state (Indian tribes, Puerto Rico) the issues raised may differ somewhat from those in the other cases; on some accounts it is thought easier to justify two separate states than it is to justify differentiated citizenship within one state.

In the Introduction and in Chapter 3 I argued that there cannot be a general right to self-government, but that self-government is justified in response to violence and exclusion by the currently ruling state.

EXTERNAL RULES

In some cases, it is claimed that protecting a particular culture requires restrictions on the liberty of nearby nonmembers. One of the most

Anthony Birch, 'Another Liberal Theory of Secession,' ibid. 596–602; Avishai Margalit and Joseph Raz, 'National Self-Determination,' *Journal of Philosophy* 87 (1990), 439–61; Cass Sunstein, 'Constitutionalism and Secession,' *University of Chicago Law Review* 58 (1991), 633–70; and Kai Nielsen, 'Liberal Nationalism, Liberal Democracies, and Secession,' *University of Toronto Law Journal* 48 (1998), 253–95. See also Crawford Young, *The Politics of Cultural Pluralism* (Madison: University of Wisconsin Press, 1976), 460–504. Federalism, confederalism, and regional autonomy as specific responses to ethnic pluralism are less well explored in the normative literature, but see Wayne Norman, 'Toward a Philosophy of Federalism,' in Judith Baker (ed.), *Group Rights* (Toronto: University of Toronto Press, 1994). The comparative literature on self-government short of secession is much larger; see Horowitz, *Ethnic Groups in Conflict*, 601–28 for an overview.

prominent of such external rules has been Quebec's Bill 101, which originally banned commercial signs in English and now mandates that they carry French translations if they are not in French. The province has other language laws including one requiring that businesses with more than fifty employees be run in French.[34] Kymlicka argues that preserving American Indian culture requires creating areas 'in which non-Indian Americans have restricted mobility, property, and voting rights.'[35] The restrictions on mobility and property rights take the form of 'denying non-Indians the right to purchase or reside on Indian lands;'[36] the proposed restriction on voting rights would (where the property and mobility restrictions are not in effect) require a three-to-ten year residency requirement before non-Indians gained the right to vote for or hold office in regional government.[37] On many US tribal reservations, residents who are not members of the tribe can never gain voting rights.

There are similar examples of external rules in other contexts. Quebecois as well as Indians have sought the power to limit the settlement of immigrants in their area. Where ownership or sovereignty do not already grant such control, an aboriginal veto over mining or development on tribal land would serve as an example of an external rule,[38]

[34] See Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1993), 52–5. The overruled Toubon law in France might have provided a similar example, and would have illustrated that in a global society it is not only minorities within a state which can feel culturally endangered. On the other hand, unlike in Quebec, the English threat (if that's what it is) in France comes not primarily from anglophones but from francophones adopting Anglicisms, and the Toubon law was seen as focused on members rather than nonmembers, so it is probably not analagous to the Quebec case and better understood outside the framework of external rules.

[35] Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989), 136.

[36] Ibid. 146. The inalienability of native land (or, more precisely, its alienability only to the Crown or its successor) has been a recurrent rule in the Anglo-settler colonies. As Kymlicka notes, it is both a restriction on nonmembers and a restriction on members. The degree to which it is one or the other depends in part on whether the rule is that native lands cannot be bought and sold *at all* or that they cannot be sold to or bought by *non-indigenes*. There is also variation in whether the rule simply prevents individual sales or whether even the tribe as a whole is incapable of selling even part of its land.

[37] Ibid. 147.

[38] This is the state of the law in Australia. Aborigines there do not have self-government or sovereignty; and ordinary landowners in Australia do not have either ownership of subsurface minerals or the right to refuse access to mining interests. Legislation recognizing Aboriginal land rights (in the Northern Territory in 1976, nationwide in 1993) granted special rights and powers to native title-holders to control or veto mining; this is an external rule, a limitation on the rights miners would have elsewhere in Australia. If all landowners had such rights, no special provision for Aborigines would be needed; that is, the ordinary common-law rule governing relations between landowner and miner need not be thought of as a cultural right. I argue against the Australian situation, in favor of the common-law rule granting all landowners mineral ownership and veto

as would extraordinary powers to control mining or development on nearby but non-tribal land. Allen Buchanan seems to suggest that the Amish and Mennonites be given the power to keep pornography and other 'cultural influences that threaten to undermine the community's values' out of the areas near their settlements.[39] In a slightly different vein, hate-speech laws come under this heading.

External rules are often argued to be an extension of the cultural community's right of self-government; the power to limit outsiders is compared with the comparable power held by states (such as the power to pick and choose among would-be immigrants). Some critics of Kymlicka suggest that external rules can *only* be justified in such a way, that is, with reference to the specific, partially independent status of the communities in question.[40] Similarly, Buchanan seeks to promote external rules as a viable alternative to secession, letting cultural minorities have state-like powers to protect their societies without the need to become independent states.

One thus might say of the right to impose external rules that it is derivative of the right to self-government, and that only a group with the latter right has the former. (This by itself, on Kymlicka's more recent account, would take the Amish out of the running.) The question of which external rules are legitimate might then be reduced to the question of what rules states themselves can legitimately impose on nonmembers. Even on this theory, some account is required of what those rules are, and whether the rules a small, culturally endangered state may impose on nonmembers are different from those which may be laid down by a large state which is not so endangered. If no such difference is stipulated, then the justification for external rules simply reduces to the justification of self-government (and of the claimed right

rights. Jacob Levy, 'Reconciliation and Resources: Mineral Rights and Aboriginal Land Rights as Property Rights,' *Policy* 10:1 (1994), 11–15; and 'The Value of Property Rights: Rejoinder to Brennan and Ewing,' *Policy* 10:2 (1994), 44–6.

39 Buchanan, *Secession*, 59. The Amish themselves have never sought such a power; to do so would violate their own norms. They believe that Christians should have nothing to do with the violence and the power of the state, which is 'worldly'. Indeed, they ordinarily refuse to act as plaintiffs in court; seeking to control and direct the power of the criminal law would be unthinkable. Buchanan refers to the 'government of a territorially concentrated religious community such as the Amish or Mennonites' as analogous to Indian tribal governments, which is mistaken; the relevant religious authorities would be extremely resistant to seeing themselves as force-wielding governments.

40 John Tomasi, 'Kymlicka, Liberalism, and Respect for Aboriginal Cultures,' *Ethics*, 105:3 (1995), 580–603; John Danley, 'Liberalism, Aboriginal Rights and Cultural Minorities,' *Philosophy and Public Affairs* 20 (1991), 168–85. Kymlicka himself seems to have come around to this view; he now argues for external rules only on behalf of national minorities (all of which, on his view, have a right to self-government) and using the analogy between the powers of such groups and the powers of states.

of all states to control, for example, immigration). If there is such a difference—if an Indian tribal government may restrict non-Indians in a way that the United States could not morally restrict, say, resident aliens, or if strenuous requirements for voting are thought legitimate near Indian lands but not in Estonia—then the appeal to self-government cannot do all of the justificatory work, and one of the arguments described below will be needed.

If external rules are not simply derivative from self-government, if some groups without valid self-government claims can none the less impose external rules legitimately, the supporter of an external restriction must argue for the priority of a culturally related end *over the liberty of nonmembers*, which is what makes external rules distinct in the kind of justification they require. What this entails obviously depends on the status of liberty in the general political philosophy of which the cultural-rights theory forms a part. This might be done by arguing that the liberty lost is of no very high value; this is part of the approach in defending hate-speech laws. Or it might be done by stressing the importance of cultural membership to the exercise of liberty at all, and then limiting the external rules to those necessary to protect the good of cultural membership.[41] An argument about the externalities of nonmembers' actions is also likely to play an important role; this is most evident in the case of an indigenous veto on mining or development, but forms a necessary part of any argument for an external rule: your exercise of your freedom has the side-effect of damaging my culture. External rules can be argued against by reversing any of these steps; liberty (or the particular liberty at stake) might be argued to have a greater importance, the cultural good might be argued to have a lesser (moral) importance, or the existence or magnitude of the externalities might be disputed (thus denying the necessity of the external rule for the protection of the culture).[42]

In Chapter 3 I argued that a supposed generalized good of cultural

41 This, or something close to it, was Kymlicka's original approach, and seems still to carry that part of the justification for external rules which cannot be borne by the appeal to self-government.

42 Narveson, 'Collective Rights?' clearly embraces both of the first two arguments: liberty is extremely important, and the preservation of a culture, while perhaps valuable, is not morally important enough to give rise to a right. Kukathas, 'Are There Any Cultural Rights?' seems to use both as well. Tamir, *Liberal Nationalism*, 38–42, stresses that, since cultural membership is partially chosen, it should not be 'entirely isolated from "the market of preferences." ' For Rawlsian liberals, identifying culture as chosen deprives it of the sort of moral status which could trump liberty claims, which is why Kymlicka, *Liberalism, Community, and Culture*, takes pains to identify a culture as a 'context of choice' rather than the result of choices.

preservation could not justify external restrictions. I also suggested that the letter in fact often restrict members at least as much as they restrict non-members, since they characteristically restrict forms of interaction between the two, weighing relatively more heavily on the members of the smaller group.

RECOGNITION/ENFORCEMENT

It is fairly common for cultural communities to seek to give their traditional law a status in the law of the land, to seek to have their members bound by the traditional law of the community rather than the general law of the wider state. Very often, these claims seek to have the general law recognize a culturally specific way of establishing certain rights which are established otherwise by the general law. A simple, and fairly innocuous, example, is the authority granted to religious officials in some states to perform legally binding marriages.[43]

An extremely wide range of issues are caught up in the question of recognition for traditional law, but among the most common are land rights, family law, and criminal law. James Crawford notes that the doctrine that Australian Aborigines (whether aware of it or not) were subject to British rather than tribal law 'involved the denial of land rights and the non-recognition of traditional marriages as much as the refusal to recognize Aboriginal tribal laws as a defense to crimes defined by British law.'[44]

Indigenous groups in Australia and in the United States have sought legal recognition for their criminal punishment systems, which recognition would imply both that the offender should not be punished again by the state and that the tribal punisher should not be criminally liable (for example, when the tribal punishment includes a spearing).[45] Some Muslims in India have sought (and won) legal standing for Muslim family law, and have generally argued that Muslims should be bound by the *sharia* rather than by general Indian

[43] In other states—France and Germany, for example—the religious ceremony lacks legal standing, and must be supplemented with a civil ceremony before a secular civil official.

[44] James Crawford, 'Legal Pluralism and the Indigenous Peoples of Australia,' in Oliver Mendelsohn and Upendra Baxi (eds.), *The Rights of Subordinated Peoples* (Oxford: Oxford University Press, 1994), 181–2, footnotes omitted.

[45] See K. E. Mulqueeny, 'Folk-law or Folklore: When a Law is Not a Law. Or is it?' in M. A. Stephenson and Suri Ratnapala (eds.), *Mabo: A Judicial Revolution* (Brisbane: University of Queensland Press, 1993).

law in civil matters—though they accept the need for a general criminal law.[46] A British court refused such recognition to traditional Indian rules about arranged marriages.[47] In some states polygamous marriages in accordance with Muslim law are recognized and given full legal status as marriages. This differs from a simple exemption from criminal laws against bigamy, and one could easily support the exemption claim while opposing the recognition claim. Granting the recognition claim has implications for the whole array of legal privileges that adhere to marriage in most states. Those privileges, including preferential tax treatment, extension of health insurance, default rules about power of attorney, child custody, and property allocation after a divorce or a death *in testate*, are often shaped and supported on grounds of public policy rather than justice. Those public policy arguments, formulated in the context of two-person marriages, might or might not make any sense in the context of plural marriages. Of course, a claim in justice might then be made saying that unequal treatment of different family arrangements was unjustified; but this is a different kind of argument from that saying that one ought to be free to have religiously but not legally binding plural marriages without facing criminal penalties.

At the base of indigenous land-rights claims is the notion that the legal system of the settlers ought to recognize the property systems established according to native law, and that if a particular group owned a particular piece of land under traditional law they ought to have a valid title under settlers' law as well. The Australian High Court case *Mabo v Queensland (no. 2)*[48] puts this problem in stark form: Could Australian law recognize and incorporate the property law of the Mer people of the Torres Strait Islands, or must it be bound by the doctrine of *terra nullius* which held Australia to be legally unowned? Many land-rights cases in Canada and the United States are one step removed from this question, and seek to undo seizures of land which were either illegal even according to settler law or which violated treaties which recognized native title. The root issue is the same, however, although the British in North America recognized native ownership much earlier than they did in Australia. Still, many Indian nations in North America did not sign treaties with the settler

[46] See Veena Das, 'Cultural Rights and the Definition of Community,' in Oliver Mendelsohn and Upendra Baxi (eds.), *The Rights of Subordinated Peoples* (Oxford: Oxford University Press, 1994).

[47] Kukathas, 'Are There Any Cultural Rights?', 133.

[48] *Mabo v Queensland (no. 2)*, 175 CLR 1 (Australia 1992).

governments, and their land-rights-claims are straightforward recognition claims.[49]

A recognition of a property-law system need not be only or even primarily about landownership; other issues include hunting and passage usufruct rights over land, and fishing and other marine rights. A related question is that of intellectual property. Some Australian Aborigines have sought to have the copyright law extended to protect folklore and art which Aboriginal customary law holds may only be told or reproduced by certain persons or groups.[50]

In general, legal standing might be given to a tradition's method of performing marriages; its rules about conduct within marriages; its method of obtaining a divorce; its rules about relations between ex-husband and ex-wife; its way of defining a will, or its laws about post-mortem allocation of property; its expectations about the support of the indigent; its arbitration of civil disputes or its judgments in criminal matters; its methods of establishing property rights and its rules about use of property; its hunting and fishing rules; its evidentiary rules or procedures;[51] and so on. Arguments for doing so often refer to the

[49] Tully explicitly argues for indigenous land rights as part of an argument for the recognition of indigenous legal systems. James Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground,' *Social Philosophy and Policy* 11 (1994), 153–80. Shepherd provides an interesting discussion of the Han Chinese settlement of Taiwan and conflicts over the recognition of the land tenure system of the island's indigenous inhabitants; *modulo* the difference between English and Chinese law, the history and issues are remarkably like those in North America, Australia, and New Zealand. John Shepherd, *Statecraft and Political Economy on the Taiwan Frontier 1600–1800* (Stanford: Stanford University Press, 1993), 241–56. Where land rights-claims are based on the illegality of the seizures under instruments of the dominant legal system (the Proclamation of 1763, Indian treaties) it seems to me that no special issues related to culture or ethnicity are raised. Any problems raised are problems in the theory of restitution. This is also the case in the current return of seized property to dispossessed blacks in South Africa and dispossessed Asians in Uganda.

[50] See Kamal Puri, 'Copyright Protection for Australian Aborigines in the Light of *Mabo*,' in M. A. Stephenson and Suri Ratnapala (eds.), *Mabo: A Judicial Revolution* (Brisbane: University of Queensland Press, 1993). Standard copyright law is poorly suited to accommodate any intellectual property in such works because of, *inter alia*, its restriction to work with one or a small and identifiable group of authors and its exclusion of purely oral works. These rules have good reasons, and are thought important to preserving freedom of speech and intellectual and artistic freedom; but, Puri argues, those reasons and those categories reflect parochially western understandings about what it means to create a work of art.

[51] As, for example, when testimony which takes the form 'I know this is my land because my father told me so, and he told me that his father told him, and . . .' is accepted from members of a group which relies on oral tradition rather than written evidence, instead of being rejected as hearsay. This is true in Canada, Australia, New Zealand, Papua New Guinea, and several of the formerly British states in Africa; I do not know the state of the law on this matter in the United States. See B. A. Keon-Cohen, 'Some Problems of Proof: The Admissibility of Traditional Evidence,' in M. A.

cultural non-neutrality of the state's general laws; to the importance of not upsetting settled expectations and plans (involving property, inheritance, norms about marriage, and so on); and to the unfairness of holding people accountable to an unfamiliar law or, worse, leaving them accountable both to the state's law and to the traditional one (which can carry sanctions like ostracism even if it is not given legal status). Too great a disjunction between the law on one hand and real practices, expectations, or shared understandings on the other is argued to be unfair; if correct, this provides strong support for recognition/enforcement claims.[52] Additionally, the more formal and less substantive the issue is from the wider society's perspective (which may not correspond with the minority's!), the easier it seems to justify recognition. On few philosophical accounts would the words spoken at a wedding ceremony be of great significance; that is not true for the question of what rights women have in the subsequent marriage.

Crawford, citing a report of the Australian Law Reform Commission, notes a variety of drawbacks to recognition and enforcement (though he ultimately endorses many such rights-claims).

> The recognition of . . . customary law has often meant its limitation or confinement. It has also been used, on occasions, as a smokescreen to avoid consideration of issues such as autonomy, including the autonomy to change or even to abandon customary ways. The spectre is that of the exhibited Aborigine, recognized as long as recognizably 'traditional.'[53]

Crawford also notes fears about morally unacceptable punishments (e.g. spearing); women's rights; loss of Aboriginal control over laws and traditions; and divisive and discriminatory legal pluralism. Most arguments against recognition/enforcement claims build on one or more of these fears. It is thought the very essence of discrimination to have entirely different legal codes applying to members of different cultures. The law whose recognition is sought is often religious, typically customary and traditional in some strong sense, so women's rights—or basic human rights more generally—are thought to be endangered.

Stephenson and Suri Ratnapala (eds.), *Mabo: A Judicial Revolution* (Brisbone: University of Queensland Press, 1993). See also *Baker Lake v Minister of Indian Affairs* (1979 Canada) 107 DLR (3rd) 513; *Simon v R* (1985 Canada) 24 DLR (4th) 390; *Milirrpum v Nabalco* (1971 Australia) 17 FLR 141.

[52] This argument is obviously compatible with certain communitarian visions (for example, Walzer's theories about the importance shared understandings). The argument is not limited to communitarian philosophies, though. In another context, Tamir warns that a government and a legal code disconnected from the culture of the ruled creates the risk of 'alienation and irrelevance,' 'the enfeeblement of formal law and the marginalisation of government activities.' Tamir, *Liberal Nationalism*, 149.

[53] Crawford, 'Legal Pluralism,' 179.

Concerns about protection of basic rights are perhaps relevant to recognition of family and criminal law in a way which they are not to the recognition of claims for land rights. Land-rights claims are more often argued against on grounds of distributive justice, that is, that it would be unjust to if thus-and-such a small percentage of the population owned so many thousands of square miles of land.[54] Of course, such an argument might be made opportunistically, and many who make it about land would be unwilling to look too deeply into what percentage of a country's population held what portion of its liquid assets. Yet the argument can also be made sincerely.[55]

Different justificatory problems are involved if the traditional law is to have *exclusive* jurisdiction over members, or whether they can choose which legal system to use. In the former case—epitomized by the millet system in Ottoman Turkey—concerns about the basic rights of members are highlighted; if the customary law is reactionary, repressive, or discriminatory, members have no opportunity to escape or work around it.[56] Where members can choose—as in the case of the Aborigine or Indian who must consent to face tribal rather than general criminal sanctions—an inequality of treatment is created which may require justification. A member of the dominant group who commits a crime must face the dominant system's legal judgment; members of the non-dominant group might make an opportunistic decision, choosing the legal system expected to be more lenient. There is the further complication that not all parties to a dispute will necessarily choose the same legal system; if Muslims can choose between Muslim family law and the general family law, one spouse might seek a divorce under the *sharia* with the other seeking divorce under the general law, creating disputes as to who will be

[54] They are also sometimes argued against on the grounds that recognition raises the question of what other aspects of the minority legal system must be incorporated into the dominant legal system; as Crawford notes in the passage quoted above, the legal rationale for excluding Aboriginal criminal law from Australian law was the same doctrine as that used to exclude recognition of Aboriginal land rights. Tully's argument would also seem to suggest that once land rights are conceded there is a live question about the legal status of other parts of minority customary law.

[55] As it is at as in Kymlicka, *Multicultural Citizenship*, 219–21 and Tamir, *Liberal Nationalism*, 40–1. Kymlicka, I think, understates how much a distributive egalitarianism argues against land-rights-claims and how much real land-rights-claims are based on recognition rather than distribution.

[56] The concern for the protection of the basic rights of members animates Kukathas's rejection of exclusive recognition/enforcement of customary family or civil codes as well as Kymlicka's. Kukathas, 'Are There Any Cultural Rights?' 128–9 and 133; Kymlicka, *Multicultural Citizenship*, 39–42. On neither account, I think, is it clear whether recognition without exclusive jurisdiction is being condemned as well.

bound by which obligations.[57] Again, the more purely formal the right claimed is, the less weight these concerns hold. If a customary marriage is recognized but considered legally identical to a civil-law marriage, if native title confers rights no different from freehold title despite its different origins, then the ability to move between legal systems is unlikely to create problems (though these situations of partial recognition may face other difficulties, political and/or theoretical).

Arguments for recognition and enforcement claims are sometimes closely linked with arguments for self-government, and it is true enough that at least some recognition/enforcement rights are likely to go along with any move to self-government; the legal system of the new unit will probably be based in part on the traditional rules and expectations of the newly self-governing group. But it is important to note the separability of the issues. Recognition/enforcement rights-claims, for one thing, involve no necessary claim to territory, and no request to govern non-members. They can be made even when cultural groups are thoroughly intermixed. Furthermore, granting recognition/enforcement claims does not necessarily give members of the group any special standing in the determination of their laws; often, it is up to courts of the general society to decide when customary law has or has not been followed. Indeed, since these rights-claims are precisely about gaining recognition from the general legal system (for the group's marriages, property laws, and so on) outsiders may be given more power over the group in a very real sense, hardly what one expects from self-government. Even enforcement of traditional criminal law, which might be seen as a clear case of self-government rights, seems a great deal less like self-government if the general courts must authorize it, monitor it, and decide on its limits. On the other hand, where a group seeking self-government is not very traditional, or is highly differentiated internally and has no one set of rules regarded as authoritative, or does not differ in its traditional rules from the dominant group, self-government may include very little by way of recognition/enforcement; it may be a simple matter of seeking to control the language of government operations and public schooling, and bringing the capital closer to home.[58] Self-government and autonomy claims are about the structure of government and the identity of the governors; recognition/enforcement claims are about

[57] On the other hand, these disputes might not be any more complicated than those arising because of competing jurisdictions in a federal system.

[58] The secession of the Czech Republic and Slovakia from each other would seem a polar case. No claim was made that the Czechs were disrupting traditional Slovak law, or that independence would allow Slovaks to live according to their own traditional rules.

the content of the law. One faces concerns about borders, territory, and the status of non-members; the other faces concerns about the justice of the treatment of members. A general system of recognition/enforcement of minority cultural law might resemble federalism in that it creates multiple legal orders within the state; but accepting recognition claims does not force one down a logical or moral road to federalism, and vice versa. The *reductio* of recognition rights might be the millet system but it is not secession.[59] The next two chapters are primarily about recognition and enforcement claims, and devote further attention to how they differ from self-government claims.

INTERNAL RULES

Many rules and norms governing a community's members are not elevated into law. There are expectations about how a member will behave; one who does not behave that way is subject to the sanction of no longer being viewed as a member by other members. This sanction may take the form of shunning, excommunication, being disowned by one's family, being expelled from an association, and so on; ostracism of one sort or another usually stands as the ultimate punishment for violating an internal rule. The content of the rules varies enormously; one might be excommunicated for blasphemy or disowned for marrying outside one's own cultural group. Many are at least in part religious, but as the (common) rule against intermarriage shows, they need not be.[60]

On most liberal or democratic accounts, these rules would be clearly unjust if they were imposed by the state. Controversy arises over how

[59] Special treatment may be required for non-territorial, non-customary self-government, sometimes called non-territorial federalism or 'the personality principle.' Bauer and Renner proposed such a system for Austria-Hungary. See Tom Bottomore and Patrick Goode (eds.) *Austro-Marxism* (Oxford: Oxford University Press, 1978). While this work is often referred to as offering possible solutions to difficult problems, there has been little development of the basic ideas into concrete policies, and so I do not try to fit them into this framework.

[60] The old American taboo against 'miscegenation' between blacks and whites differs dramatically from more common forms of the rule against intermarriage, in that it was motivated entirely by racism, a vision of superior and inferior groups, and a fear of 'pollution.' On the other hand, many cultural groups in plural societies are concerned about the continuation and strength of their culture across generations; intermarriage is frowned upon not so much because outsiders are dirty or inferior as because of a responsibility to make sure that the next generation grows up in the culture and a fear that mixed marriages do not provide such cultural integrity. Even if the outsiders are thought well of, they are thought unlikely parents of future group members.

to view them when they are enforced by informal or formal but non-coercive sanctions. A state may not reserve decision-making offices for men; may the Catholic Church? The state may not punish someone for his or her choice of spouse; does the same injunction apply to parents? The state may not deprive someone of citizenship for changing religions; but should a religious group, or a religiously-centered cultural group, be allowed to deprive someone of membership for such a conversion? More generally: is ostracism or expulsion to be taken as normatively different from punishment? Are associations, families, and churches subject to the same moral constraints on their actions that states are? Obviously, one's general theoretical stance about family arrangements, freedom of association and disassociation, and religious freedom will largely determine one's response to internal rules. A theory which argues that only internally democratic associations have any claim to respect from a democratic state will likely have little patience for internal rules, as will one which sees the family as a political institution and a site of unjust oppression under majority and minority culture alike.

Liberal accounts may be more sympathetic than (for example) strong democratic or feminist ones. Kymlicka, who condemns 'internal restrictions'—'where the basic civil and political liberties of group members are being restricted'[61]—goes on to say that

> Obviously, groups are free to require such actions [as church attendance or adherence to traditional gender roles] as terms of membership in private, voluntary associations. A Catholic organization can insist that its members attend church. The problem arises when a group seeks to use governmental power to restrict the liberty of members. Liberals insist that whoever exercises political power within a community respect the civil and political rights of its members, and any attempt to impose internal restrictions which violate this condition is illegitimate.[62]

The strength of this qualification is unclear, though. Kymlicka later criticizes 'minority cultures [that] discriminate against girls in the provision of education, and deny women the right to vote or hold office . . . [or that] limit the freedom of individual members within the group to revise traditional practices,' and says that '[t]hese sorts of internal restrictions cannot be justified or defended within a liberal conception of minority rights.'[63] Does this mean that the right of Catholicism or Orthodox Judaism to keep women out of [some] religious offices cannot be justified or defended? That when the Amish and Mennonites limit the freedom of members to revise traditional practices (and still remain

[61] Kymlicka, *Multicultural Citizenship*, 36.

[62] Ibid. 202 n. 1

[63] Ibid. 153.

members) that they are committing rights-violations? Such would seem to be the case, based on Kymlicka's discussion of the Hutterites, a communal religious group which expelled members for apostasy and refused to divide up their communal assets in order to give a share to the ex-members. This, Kymlicka thinks, is a denial of religious freedom for it imposes a high cost on abandoning one's religion at will.[64] This high cost is characteristic of internal rules; the child disowned for intermarriage or for abandoning the faith is in a similar position to the ex-Hutterites. Similarly, we are told that liberalism 'precludes a religious minority from prohibiting apostasy and proselytization.'[65] If such rules constitute abridgments of the freedom to marry or freedom of conscience, then internal rules stand condemned as a class.[66]

Kukathas, on the other hand, clearly makes full use of the idea of freedom of association.[67] Indeed, he carries it beyond the range of internal rules as described here, defending the right of the Pueblo *state* to ostracize those who abandon their tribal religion. My suggestion here is that, on their own terms, both Kymlicka and Kukathas have made a category mistake. Kymlicka sees internal rules as rights-violations where, based on his argument, he ought to see only associational freedom. Kukathas sees what is really a state as merely a voluntary association entitled to enact internal rules. I will return to this point in Part III.

In Chapter 1, under 'Internal Cruelty,' I argued that internal rules which are violent or cruel ought to be proscribed, but that there is otherwise good reason for leaving internal rules unhampered.

REPRESENTATION

In order to secure protection of their interests or rights, in order to prevent discrimination or ensure certain privileges, in order to have a

64 Kymlicka, *Multicultural Citizenship*, 161. 65 Ibid. 161.

66 As should be clear, I find Kymlicka's arguments here puzzling, not because they condemn internal rules but because of the way in which that condemnation occurs. I'm not sure what it *means* to tell a religious group that it cannot prohibit apostasy. Must the person who openly rejects the faith continue to be welcomed as a member of it? It is simple enough to say that the *state* cannot prohibit apostasy, that the millet system was unjust; but Kymlicka says more than that. The rule may be that a religion cannot be so central or dominant a part of a person's life that abandoning it is very costly. That is clearly a rule for which one could articulate a defense, though it would require a standard for measuring the size of the costs. But it would hardly be a *liberal* standard.

67 Chandran Kukathas, 'Are There Any Cultural Rights?' and 'Cultural Rights Again: A Rejoinder to Kymlicka,' *Political Theory* 20 (1992), 674–80.

say in the actions of the state, ethnic minorities often seek some form of guaranteed representation in the state's decision-making bodies, especially but not only legislatures. The mechanisms for this vary. Sometimes it takes the form of a straightforward quota; in Zimbabwe's first decade of black rule, 20 per cent of parliamentary seats were reserved for whites, and three out of the nine seats on Quebec's Supreme Court are reserved for judges from Quebec. Sometimes the number of seats reserved varies with the number of people choosing to vote on the reserved electoral roll rather than the general one; Maori representation in the New Zealand parliament has some of this flexibility. An effort might be made to create 'majority-minority' single-member legislative districts; this has long been the approach used in the United States to increase black representation in Congress (though its days seem to be numbered). In party-list systems, parties might have formal or informal commitments to have a certain portion of their candidates come from particular groups. Proportional representation, perhaps with a formula weighted toward smaller parties, might be adopted with the intention of letting the various parts of a plural society be represented; cumulative voting might be adopted to allow minorities to concentrate their votes.

Levine observes that 'the issue central to proposals for according blacks (and perhaps other disempowered groups) special electoral rights is not quite the same as in affirmative action or 'reverse discrimination' debates. There the crucial consideration is justice. In evaluating claims for group rights to electoral power, the principal concern is democracy.'[68] To put it another way: the justice and effectiveness of majoritarian democracy are called into question when its assumption of shifting and alternating majorities is violated. Each group, it is argued, should *sometimes* be in the winning coalition; and ethnic minorities often find themselves permanently locked out from decision-making.[69] This is thought unfair according to democratic theory's own terms, and likely to produce either ethnic conflict or oppression.

Other arguments for representation are possible. Kukathas argues that

> there may sometimes be good reason to design political institutions to take into account the ethnic or cultural composition of the society. Yet there is no reason

68 Andrew Levine, 'Electoral Power, Group Power, and Democracy,' in J. W. Chapman and Alan Wertheimer (eds.), *NOMOS XXXII: Majorities and Minorities* (New York: New York University Press, 1990), 215–52.

69 See Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (New York: Free Press and Macmillan, 1994), 3–6, 41–156; Arend Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1979), 25–41; Kymlicka, *Multicultural Citizenship*, 131–51.

to see this as inconsistent with liberal theory, which, at least since Montesquieu, has recognized the importance of the(*sic*) institutions conforming to the nature of the social order.[70]

But these are, on Kukathas's view, questions of institutional design, that is, how to design those institutions which will most effectively protect individual rights; 'group rights play no part in the justification of the mechanisms that uphold the modus vivendi.'[71]

Three sets of issues are involved in most arguments for representation, issues easily blurred but important to separate. One is the presence of members of the minority group; one is the chance for members of the minority group to choose representatives; and one is protection of minority group interests. These need to be argued for (or against) separately, and they imply different kinds of arrangements.

When parties in a party-list system set aside a certain number of their seats for members of a group, or the group will have *members* in the legislature but not necessarily chosen *representatives*. Here the focus is on the identity of the legislators rather than the identity of the electors. The same is true if a number of seats are set aside for minority group members, but everyone votes to decide who will occupy those seats. This is a kind of affirmative action for legislators, and might even be best understood as an assistance right rather than a representation right.[72] To the extent that such a system builds on the arguments for representation, it does so by assuming that *any* members of the minority group will represent the interests of that group.[73] To a large degree, though, such a system must be understood as overcoming the burdens faced by would-be legislators (e.g. a tradition of drawing candidates from professions or regions dominated by the majority). It is subject to the normal arguments (pro and con) of the affirmative action debate.

In other cases, the concern is less the disadvantage faced by members of the minority who wish to hold legislative seats than on the disadvantage faced by the minority in electing its own representatives. That is, the focus is on the identity of the electors rather than on the identity of the officials; examples include the Maori voting roll; the pre-coup Fijian constitution with voting rolls for Fijians, Indians, and others (mainly

[70] Kukathas, 'Are There Any Cultural Rights?' 131. [71] Ibid. 132.
[72] Kymlicka makes related points; *Multicultural Citizenship*, 141–42, 148–9.
[73] If the argument for guaranteeing seats in the legislature rested on the idea that deliberation is improved and more ideas heard when there is greater diversity among the deliberators, then this would be a democracy-based representation claim rather than one about affirmative action. Of course, often both arguments are made simultaneously. The strength of the deliberation argument depends in part on the structure of the legislature; if it is based on strict party discipline, with decisions made by party leaders rather than by caucus, the argument would be difficult to sustain.

British);[74] and racially gerrymandered districts. Iris Marion Young argues that 'a democratic public should provide mechanisms for the effective recognition and representation of the distinct voices and perspectives of those of its *constituent groups* that are oppressed or disadvantaged.'[75]

Finally, one might worry that even with representatives of a minority group in place—even if they occupy a disproportionate number of seats—they could simply be outvoted time after time. Mechanisms to offset this danger are analyzed by the consociational school and include formal or informal requirements to have grand coalition governments; Switzerland's seven-person executive council and rotating presidency; pre-civil-war Lebanon's reservation of the most important government positions according to cultural/religious status; Belgium's requirement that linguistic legislation be approved by a majority of parliamentarians from each linguistic group, and similar proposals for minority vetoes; and so on. Lani Guinier's recent work is focused on ways to solve this problem. Donald Horowitz suggests that this goal might be at odds with the two discussed above.

> [G]roup rights—or really, special group privileges [referring to guaranteed representation] . . . provide illusory security, easily pierced. Even if they continue to function, they consign minorities to minority status. Unless they offer a minority veto—in which case the urge to abolish them will grow—they ratify the exclusion of the minority from power. So, in the first respect, group rights provide too much—benefits that are disproportionate and are, on that account, unlikely to survive. And, in the second respect, group rights provide too little, for they do not aim at minority participation at the seat of power.[76]

Horowitz maintains that such representation undercuts the need to form multiethnic coalitions and thus increases the likelihood that the winning coalition will simply take no account of a minority group's interests. If this is so, then it becomes all the more important to separate out the various arguments involved in representation claims, for it may be that one must choose among them.[77]

[74] See Vernon Van Dyke, 'The Individual, the State, and Ethnic Communities in Political Theory,' *World Politics* 29 (1979), 353.
[75] Young, *Justice and the Politics of Difference*, 185; emphasis added.
[76] Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991), 136.
[77] Horowitz thus suggests e.g. single transferable vote systems, which he thinks encourage alliances across ethnic boundaries at voting time. Consociationalists disagree, and argue for proportionality at election time and trans-ethnic alliances at the elite level. If their argument is correct, then allowing direct minority-group representation is compatible with, indeed is a crucial part of, ensuring protection for minority group interests.

Two complementary arguments are commonly deployed against representation rights-claims. One is that such claims falsely impute a unity of viewpoint based on ethnicity; that is, they assume that all members of the minority group share the same political ideas and interests. It is also argued that claims for representation assume clear *differences* of interest and viewpoint *among* groups. (It is sometimes further argued that this assumption is self-fulfilling, that is, that granting representation will encourage political cleavages along ethnic lines.)

Some representation schemes are also open to the charge that they require officially identifying voters on the basis of race, in the way that South Africa did under its 1983 (ostensibly) triracial constitution. Many plans for representation, though, have no such requirement. Changing an electoral system in order to protect minorities—for example, adopting cumulative voting or proportional representation—might be done *in order* to protect ethnic minorities, but yield protection for any politically cohesive minority, acting through their parties and votes rather than through a separate voting roll.

SYMBOLIC CLAIMS

Many ethnocultural disputes are over issues which do not directly affect anyone's ability to enjoy or live according to their culture, or the distribution of political power among groups. They concern such matters as the name of a polity, its flag, its coat of arms, its national anthem, its public holidays, the name by which a cultural group will be known, or the way a group's history is presented in schools and textbooks.[78] These symbolic disputes are about claims to recognition—recognition as a (or 'the') founding people of the polity, recognition as a group which has made important contributions, recognition as a group which exists with a distinct and worthwhile identity.

While language-rights-claims in courts, in schools, on ballot papers, and so on are typically claims of assistance rights, the demand to have a minority language be made one of a state's 'official' languages (or the demand to eliminate or prevent the category of 'official languages' altogether) is a symbolic one, albeit one that might have an important impact on the whole range of assistance language-claims. The one kind of claim is about the ability of persons to interact with the organs of the

[78] See Horowitz, *Ethnic Groups in Conflict*, 127 for examples in addition to those discussed below.

state; the other is about the very *identity* of the state. It is worth noting again that the more symbolic claim is not necessarily considered less important than the apparently more substantive one. From the majority culture's perspective, the cost associated with hiring interpreters or bilingual employees, or with printing documents in multiple languages, might be borne much more easily than a challenge to the official status of the *Staatvolk*. From the minority culture's perspective, the absence of interpreters at a particular government office might be viewed as an inconvenience, whereas the elevation of the majority tongue to official status, or the denial of that status to the minority language, might be viewed as an open declaration that some are not wanted as members of the state.

The symbolic nature of these claims is seen in pure form by the successful (in 1938) drive to have Rhaeto-Romanic declared a national language of Switzerland. Rhaeto-Romansh was *not* made a language of state business; German, French, and Italian remained the only languages with that role ('official' languages). Laws did not have to be translated; courts, legislative assemblies, and the army had no new requirement to operate even in part in Rhaeto-Romansh. Native speakers had the right to address courts and authorities in their own language, but they had had that right long before, as well. The constitutional amendment yielded almost no *practical* changes, but it meant that Rhaeto-Romansh speakers were recognized as one of the constituent peoples of Switzerland. This symbolic outcome was what was most desired by petitioners, who were indeed at pains to point out that they were *not* requesting that theirs be made a language of state business.[79]

The variety of symbolic claims and disputes is vast. Australia's Aborigines have argued for a clause in that country's constitution recognizing their prior presence; Quebec has demanded official recognition as a 'distinct society.' Both of these changes are sought in part because it is thought they would pave the way for other, more concrete cultural rights; but the recognition is sought for its own sake as well. Many symbolic claims lack even that role as a possible first step to more concrete policies. Aboriginal and American Indian groups have argued against the symbolism of Australia Day and Columbus Day celebrations. In 1994 the Australian government began referring to Macedonians as 'Slav Macedonians' in order to placate Greek–Australians upset over the recognition of Macedonia; this in turn

[79] Bernard Cathamos, 'Rhaeto-Romansh in Switzerland up to 1940,' in Sergij Vilfan *et al.* (eds.), *Ethnic Groups and Language Rights* (New York: New York University Press, European Science Foundation, 1993), 98–105.

outraged Macedonian–Australians and led them to claim that they had a right not to be renamed by the state.

Symbolic claims are impossible to commend or condemn as a class, since they may well be contradictory; one group's request for recognition as a founding people runs into another group's desire for recognition as unique. Both sides in a dispute about a polity's symbols make claims for recognition. Sometimes these disputes can be compromised, as described by Claus Offe:

> On March 29, 1990, Slovak deputies of the Czechoslovak Federal Parliament entered a motion that the name of the state should from now on be hyphenated as 'Czecho-Slovakia' (as it was written in the inter-war period) rather than Czechoslovakia. The Czech majority voted in favor of the compromise that the spelling proposed by the Slovaks should be used in Slovakia, but the unhyphenated version should be used in the Czech Lands and abroad. This decision was perceived by the Slovak public as deeply insulting, and the elimination of the hyphen was protested the next day at a mass rally in Bratislava by a crowd of 80,000 people. In this case, a compromise could be actually be found. On April 12 the parliament changed the official state name to Czech *and* Slovak Federal Republic.[80]

I discuss symbolic claims much more fully in Chapter 8.

DISCUSSION

Gurr sorts cultural rights-claims into demands for exit, autonomy, access, and control, with various further subdivisions.[81] Exit is full secession, that is, the attempt to gain a fully independent state. There are obvious reasons to treat such secessions separately from internal self-government or federalist arrangements. I have lumped secession and internal self-government together under 'self-government,' because they have much in common with each other which they do not have with other cultural rights-claims, but I do not deny that they must be considered separately for a variety of purposes. This does *not* mean that internal self-government ought to be lumped in with other rights-claims, and this is what Gurr does. His category of 'autonomy' includes rights from every category in my classification.[82] What seems to mark autonomy off as a separate category is that it includes the demands which might be

[80] Claus Offe, *Ethnic Politics in European Transitions* (Bremen: Center for European Law and Policy, Papers on East European Constitution Building No. 1, 1993), 7 n. 5

[81] Gurr, *Minorities at Risk*, 294–312.

[82] Ibid. 299.

made by a group which might otherwise secede, or by indigenous groups. All the demands which Gurr considers autonomy claims are anti-assimilationist; but that is the extent of what they have in common. Something of the same is true for access, 'recognition and protection of [certain kinds of cultural groups'] interests within the political framework of a plural society.'[83] Assistance, representation, and exemptions are all clearly included, and they lack even a common orientation toward integration or separation. What they do have in common is that they are claimed by those groups which are not candidates for secession, are not indigenous, and do not seek to gain control over other groups.[84]

Kymlicka sorts cultural rights-claims into self-government, polyethnic rights, and representation, with a crosscutting distinction between external protections and internal restrictions.

The self/government/polyethnic distinction, I think, largely matches Gurr's autonomy/access distinction. Both focus on the kind of group making the claim. Kymlicka's category of national groups includes Gurr's ethnonational and indigenous groups; Kymlicka's ethnic groups would seem to include at least Gurr's disadvantaged contenders and ethnoclasses. Both distinctions stress the separatist nature of one kind of claim and the integrationist or cooperative nature of the other.

Kymlicka wishes to emphasize that the legitimate claims of immigrant ethnic groups do not create a slippery slope to self-government while defending self-government for groups like the Quebecois and Indian tribes. Similarly, Gurr wants to identify the clusters of claims which seem to march together in the world. This approach has its uses but also has limits, especially as a framework for normative work. It divides like rights-claims, and it lumps together claims which might be *made* together but which must be *justified* separately. Is the Native American Church's peyote exemption really more like tribal self-government than it is like the right of Jews and Catholics to ceremonial wine during Prohibition? In one sense, yes; the peyote and self-government claims are both made by Indians. This chapter has tried to show that this is not the kind of similarity which is most important for normative political work, and that the affinity between the peyote and alcohol cases make it much more plausible to argue for or against them together

[83] Ibid. 306.

[84] Gurr's 'control' lies, I think, outside the framework of this chapter; it is defined as the aim to establish or maintain hegemony. Groups seeking control seek to preserve or obtain power over other groups, unequal economic privilege, a state which imposes a particular religious view, and so on; the category is constructed so as to only include claims which are clearly illegitimate on almost any general normative account. Gurr seeks to describe the possible aims of real groups in the world, not just those aims which raise interesting moral issues; hence the difference.

than to separate them and argue peyote along with self-government. Similarly, recognition claims are scattered through several of Kymlicka's categories, depending on who makes them and on whether the law being recognized restricts group members. There may be good reason to grant legal recognition to the customary laws of indigenous peoples but not to the customary laws of immigrants; but I submit there is also good reason to treat that outcome as the answer to a single question, 'What should be the legal status of cultural customary law?' If not, there is at least something useful in being able to identify the kinds of rights to which national minorities are entitled but ethnic groups are not without referring to categories defined as 'the rights of national minorities' and 'the rights of ethnic groups.' In empirical work, too, clarity may be gained by being able to specify (for example) the kinds of rights-claims immigrant ethnic groups tend make without reference to a category defined as the claims made by non-national, non-indigenous ethnic groups. Common terms for the kinds of policies at stake would allow us to *then* identify the kinds of claims which will be made (or should be recognized) for this or that kind of group.

Kymlicka's internal/external distinction seems to me insufficiently precise, as the (often-argued) case of the Pueblo exclusion of Protestants from communal resources and functions makes clear.[85] Here what I have identified as self-government, recognition, and internal rights stack on top of one another. The Pueblo are a self-governing semi-sovereign nation. They are also a cultural community bound together by custom, including religious customs which allocate common duties and benefits. Someone who converts out of the traditional religion and withdraws from religious obligations is ostracized and denied access to collective resources; this is a common form of internal rule. Abandoning religious beliefs and customs may well lead to an American Jew being excluded from functions of her former community, and might even lead to ostracism on an informal basis.

American Jews, however, do not form a state. On a theory like Kymlicka's in which exclusion from one's cultural membership is a serious harm, Pueblo converts are in danger in a way that Jewish ones are not. Non-believing Jews have long since adapted Jewish tradition into a different but still distinctively Jewish cultural tradition, and the Jewish apostate still has access to that cultural community. Given current institutions,

[85] See, among others, Frances Svensson, 'Liberal Democracy and Group Rights: The Legacy of Individualism and its Impact on American Indian Tribes,' *Political Studies* 27 (1979), 421–39; Kymlicka, *Liberalism, Community, and Culture*, 195–9 and *Multicultural Citizenship*, 152–170; Kukathas, 'Are There Any Cultural Rights?' 121–3 and 'Cultural Rights Again.'

though, Pueblo identity means to be a member of a tribe (a citizen of a particular kind of self-governing polity), to keep a set of customs (abide by a set of internal rules), *and* to follow customary law (recognized as the law of the polity). It is this stacking of cultural rights, this vesting of different kinds of powers in the same body, which complicates the matter. One could argue in favor of internal rules, self-government, and recognition separately and still condemn this stacking of them; but a simple differentiation into 'internal' and 'external' does not allow for that.

Kymlicka and Kukathas take the Pueblo as a clear example of their disagreement; but I am not sure that their arguments (as opposed to their stated opinions on this case) bear them out. Kymlicka has, it seems to me, provided an argument against internal rules *linked with* either recognition/enforcement rights or self-government; the stricter the cultural rules, the more space there must be between them and state enforcement. He has also (briefly) argued for the legitimacy of internal rules *simpliciter*.[86] Kukathas has argued for the legitimacy of internal rules, and briefly argued against internal rules linked with recognition/enforcement.[87] If I am right, then their arguments on this point have failed to meet each other; what one condemns, the other has not actually defended.[88] But this cannot be made clear without disaggregating the idea of cultural autonomy or self-government in something like the way done here.

A classification such as this one is subject to criticism from two directions: that it has multiplied categories unnecessarily, and that it has created categories which are too broad to be useful. Existing sorting devices—Gurr's, Kymlicka's, the individual/collective distinction—mostly seem to me to commit the second error, which I suppose means that I am most likely to have committed the first. In fact, I fear that some of my categories may be too broad as they stand, that perhaps exemptions must be disaggregated into religious and non-religious, or that preferential policies need to be separated from other assistance claims. I have tried to note such distinctions without increasing the number of basic categories so much as to make the classification unwieldy, but such a balancing act is likely to be imperfect.

[86] Kymlicka, *Multicultural Citizenship*, 202 n.1

[87] On the second point see Kukathas, 'Are There Any Cultural Rights?' 133. As was noted above under 'Internal Rules,' this means I think Kukathas got the particular case of the Pueblo wrong on his own terms; he has argued for the legitimacy of internal rules but has not met the additional hurdle of linking internal rules with self-government to allow for a state-imposed religion. That is, he has seen an association where there is really a state.

[88] The same is not true of their disagreement about external rules and assistance claims.

To the charge that this classification is already unwieldy or inelegant, I reply that we confront policies which are different in kind. We have little reason to think that, for example, representation, exemptions, and symbolic claims can be argued for or against as a group; their common ethnic or cultural referent is not enough to warrant treating them together. Even if one wishes to endorse every rights-claim discussed in this chapter, it is not enough to argue for the importance of ethnocultural groups and the injustice or oppression faced by some such groups; that is only the first step. Subsequent steps require different kinds of arguments for different kinds of policies. The same holds true if one wants to condemn all of these claims; no single argument will do the job. Some policies require identifying individual citizens by ethnic group, but many do not. Some may be precedent for secession or Balkanization, but others are not. Some infringe on members of other groups, but others need not. Some might be described as collective rights and thus shown to be incoherent on an individualist morality; but others cannot.

This chapter has tried to provide a common language in which the cultural rights debate might be conducted. It has also tried to show the need for *some* such language, for some general differentiation of cultural rights-claims which might be used by theorists of different orientations, even if *this* classification cannot do the necessary work.

6

Incorporating Indigenous Law

INTRODUCTION

If a history of cruelty, a legacy of violence and injustice, is important to our evaluation of cultural rights-claims, there can be few better claimants to special consideration than indigenous peoples. Until the horrors of the twentieth century, there was probably nothing with which to compare the vast scale and scope of the mistreatment inflicted on the original inhabitants of the Americas and other colonized lands. While sometimes there is anachronism involved in the moral judgement of long-ago actions, this is not the case here. The cruelty and injustice were recognized as such by its contemporaries, ranging from Bartolomé de Las Casas and Francisco de Vitoria in the sixteenth century to Kant and Montesquieu in the eighteenth, and beyond.[1]

Not all indigenous peoples have been treated with the same savagery; whatever the complaints of Scandinavia's Sami peoples, they do not include the enslavement and genocide practiced in the Spanish conquest of the Americas. Violent expropriation of lands has been all too common around the world, however, almost whenever indigenous peoples have come into contact with expanding modern states and empires. In the Americas, Australia and New Zealand, and South Africa, but also in Siberia, northeastern India and western Myanmar (Burma), Scandinavia, and Taiwan, the refusal to recognize the legitimacy of indigenous land claims has been central to the violent histories of contact between indigenous and other cultures. And the refusal to recognize land claims was often part and parcel of a refusal to recognize indigenous law in general.

[1] See Bartolomé de Las Casas, *The Devastation of the Indies*, trans. Bill Donovan (Baltimore: Johns Hopkins University Press, 1992 [1552]); Francisco de Vitoria, 'On the American Indians,' in Anthony Pagden and Jeremy Lawrance (eds.), *Political Writings* (Cambridge: Cambridge University Press, 1991 [1539]); Immanuel Kant, *The Metaphysics of Morals*, in Hans Reiss (ed.), *Kant's Political Writings* (Cambridge: Cambridge University Press, 1970 [1797]); Montesquieu, *Les Lettres Persanes*, ed. Laurent Versini (Paris: Garnier-Flammarion, 1995 [1721]) and *De L'Esprit des Lois* (Paris: Garnier-Flammarion, 1979 [1758]).