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CULTURAL RIGHTS AGAIN

A Rejoinder to Kymlicka

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IN HIS REPLY TO MY ESSAY, "Are There Any Cultural Rights?" (Vol. 20, no. 1, pp. 105-39), Will Kymlicka (Vol. 20, no. 1, pp. 140-6) responds to two objections I raised against his theory defending group rights and raises some further criticisms of the views I advance. In this rejoinder, I wish to take issue with Kymlicka's arguments once again. A part of my intention is to offer some considerations in defense of my own proposals for addressing the concerns of cultural minorities.

Kymlicka's first reply is to my objection that his theory may be found wanting from the perspective of liberal equality. I had argued against the granting of special cultural rights on the basis of liberal equality on the grounds that Kymlicka was mistaken to assume that all members of cultural minorities faced the same inequality. If rights were to be given to the disadvantaged, I had suggested, they should go to them regardless of group membership. But this, according to Kymlicka, misses the point. We cannot give all the disadvantaged the same rights because they suffer different *kinds* of disadvantage and so require different *kinds* of rights: we "match the rights to the kinds of disadvantage being compensated for" (p. 141). The disabled might get special health care rights to be brought to a level of equality; Aborigines might require, instead, language rights. It is not clear, Kymlicka suggests, exactly what it means to give all Australians "the same rights" as Aborigines or how identical rights are supposed to overcome "vastly different kinds of disadvantages" (p. 141).

I think Kymlicka misses my point. My concern was to argue that group rights could not be defended successfully from the standpoint of liberal equality. The reason is that groups are not made up of equal persons and not all members of a group are unequal (in the relevant respects) to all those outside it. To treat the group as a whole as "less equal" to those outside with respect to, say, resources, would violate liberal equality to the extent that some group members are, in fact, better endowed with resources than some

outsiders. It is because of the nature of "groups" as associations of differently endowed individuals, whose memberships are not constant but in a state of flux, that liberal egalitarianism has, I think, generally upheld individual rather than group equality—and individual rather than group rights. We give individuals rather than groups the rights because we seek to protect the interests of individuals rather than groups; if we are concerned about equality, it is about equality among individuals rather than among groups and we then give all individuals the "same" rights.

I am not persuaded that Kymlicka's suggestion that addressing different kinds of disadvantages requires different kinds of rights meets my point. The problem here stems from the difficulty of talking in terms of *kinds* of rights in the way he does. The discussion of rights here I have assumed to be taking place at the level of what might be called "basic" or "fundamental" rights. Basic rights might include, for example, rights to religious toleration, or rights to welfare, or rights to political participation, or perhaps even rights to bundles of "primary goods." Theorists, of course, disagree over which, if any, of these are in fact basic rights—libertarians seldom think there are welfare rights—but agree that if any are it means that all people have them. From these basic rights one might "derive" specific rights: a right to religious toleration might imply the right of Buddhists to practice Buddhism; a right to welfare might mean, in some institutional contexts, the right to income support if one is a single parent, or the right to a guide dog if one is blind, or the right to a housing subsidy if one's income drops below a specified level. However, it would be misleading to suggest that different groups therefore have different kinds of basic rights: that Buddhists have Buddhist rights, or that the blind have blindness rights, or that single parents have single parenthood rights. They all have the same basic rights, which are granted in different specific forms under different institutional arrangements. Liberal equality, I take it, suggests that all individuals should have the same basic rights and that it is not permissible to set some groups apart as having basic rights not available to the rest. Some people will be able to claim "derivative" rights which others cannot—the sighted may not claim the subsidies set aside for the blind—but all share the same basic rights.

If Kymlicka is suggesting that cultural minorities have different basic rights, I would say this is not defensible from the standpoint of liberal equality. Yet perhaps he is not saying this but, rather, is suggesting that cultural minorities have particular "derivative" rights. Minorities have cultural rights that are derived from a broader right (such as a right to a bundle of primary goods needed to live a good life) possessed by all individuals. They require these particular derived rights if their basic rights are to be upheld. Yet these can be sanctioned by liberal equality only if they are, in

principle, available to all individuals who share the similar circumstances that such rights are supposed to address. If all individuals have a right to a congenial cultural environment, liberal equality cannot sanction some being able to invoke this right while others cannot. If liberal equality should permit Aborigines to claim cultural support, it cannot deny, say, Vietnamese immigrants who also claim the right to cultural support. Kymlicka, however, does want to distinguish between the claims of Aborigines and those of the Vietnamese immigrants. He notes that it is "particularly important to distinguish the case of voluntary immigrants and minority cultures" (p. 146, note 5). But my point is that one cannot do so without violating liberal equality.

This is not to say that there may not be other grounds for distinguishing the claims of, say, Aboriginal peoples as demanding particular attention. One might, for example, argue that injustices suffered by a particular historical community demand rectification. But this may conflict with liberal equality. If one wishes, as does Kymlicka, to place a good deal of weight on liberal equality, the case for group rights must be weakened.

Kymlicka's second reply is to my argument that it is a mistake to tie minority rights to the ideal of autonomy. In his view, a liberal theory must uphold some stronger principle than one that simply refuses to sanction the forcible induction into or imprisoning of any individual in a cultural community. And "any theory which does not accord substantial civil rights to the members of minority cultures is seriously deficient from a liberal point of view" (p. 144). My view, which grants to these members only the right of exit, is deficient in this way because it does not give the individuals within communities much substantial freedom; it gives communities more power over the individual than liberals can accept. Indeed, he suggests that I have a "bizarre" view of what gives individuals a substantial right to leave their communities because I think they have this substantial freedom "even if they have been deprived of literacy, education, or the freedom to learn about the outside world, *so long as they have an open market society to enter into*" (p. 143, Kymlicka's emphasis).

At the heart of our disagreement are two different views of liberalism. But before turning directly to this question, I would like to correct the misimpression that I argued that the availability of a market society to enter is enough to insure that community members have a substantial freedom to exit. I did not say this. First, I argued that the availability of a community to enter was a *necessary* condition for the freedom of exit to be substantial, but I did not say that it was a *sufficient* condition. (I said it was the "*most important condition* which makes possible a substantive freedom to exit" (p. 134) but not that it was the *only* condition.) Second, I did not say that the wider society had to be a market society; what I said was that it was necessary that the wider

society not be one that was essentially a network of closed communities (like a network of kinship-based tribes, for example). In this regard, I suggested, the wider society would have to be "*much more like a market society*" (p. 134); I left open the question of whether it would have to *be* a market society, for I was concerned only to point out that the necessary condition for a freedom of exit to have value was the absence of social closure.

Something also needs to be said in response to Kymlicka's point that an individual who is, say, denied education and denied the right to associate with outsiders does not have a substantial freedom to leave her community "because she lacks the preconditions for making a meaningful choice" (p. 143). First, I would like to make clear that if the individual is forcibly prevented from associating with outsiders this would count as a violation of the right of exit and is not sanctioned by the theory I have advanced. If, however, the individual is prevented from associating with others because the cost would be rejection by the community, this is another matter altogether, although the effective power exerted by the group to deny the opportunity to associate may be just as great. The Amish practice of "shunning" or, in extreme cases, "banishing" those members who have violated community norms is an example of the latter kind of "prevention." It is only this latter kind of "denial" of the right to associate that is sanctioned by the theory I advance.

Nonetheless, there is still the objection that the person who has been kept in ignorance — say, by being deprived of some types of education — is unfree to make a meaningful choice to exit the community. There are two ways in which ignorance might constrain choice. In the first instance, an individual without education might be ignorant in the sense that he or she does not know enough to be able to take up an option. For example, a person who is brought up speaking only Pitjantjajara may be unable to take up the option of leaving the Aboriginal community to enter English-speaking Australian society. It would not be impossible to do so, but the costs and the risks would be high. In the second instance, an individual without education might be ignorant in the sense that he or she simply does not know that there is another feasible option — an option of exit into another society.¹

In the first instance, it would not be right to say that the person is unable to make a meaningful choice. The problem is that one option is very costly or risky. One *can* make a meaningful choice to take a risk — even a risk that places one in a situation of extreme uncertainty.

In the second instance, however, it might be possible to say that the person with the right of exit is unable to make a meaningful choice of staying or leaving. But if so, the significance of this is uncertain. If an individual is so completely settled in the way of life of a community that the idea of leaving is inconceivable, this person is in a sense "unable" to leave. Many Muslims

and Christians, for example, are so completely committed to their respective faiths, and ignorant of alternatives, that the idea of changing faiths or questioning their own fundamental beliefs is beyond contemplation. Yet it is not clear that this is objectionable if one's concern is the freedom of the individual to live as he or she prefers.

Nonetheless, Kymlicka is right to suggest that some individuals will not enjoy as substantial a freedom of exit because the costs to them will be too great. But he is wrong to think I deny it. I do *not* think that the threat of exit will always give individuals the de facto ability to question communal authority. In many communities, I note quite clearly in my original essay, there may be injustices if one judges them by the liberal conceptions that value particular freedoms and equalities (p. 133). Rights of exit, I say, will only "temper" the probability and extent of such "injustice" (p. 134).

My contention here is that we are faced with a fundamental conflict between two irreconcilable aspirations: on one hand, to leave cultural communities alone to manage their own affairs, whatever we may think of their values; and, on the other hand, to champion the claims or the interests of individuals who, we think, are disadvantaged by their communities' lack of regard for certain values. Unfortunately, one cannot have it both ways. Kymlicka, I think, has not recognized this because he sees no conflict between his desire to uphold the rights of minority cultural *communities* struggling for survival and his desire to accord "substantial civil rights" (p. 144) to their *individual* members. I argue that to accord individuals these "civil rights" (as, for example, in the case of the Pueblo Indians) is to interfere in the community. I also accept that to refuse to interfere is to go along with possible injustices or with illiberal practices.

Kymlicka denies that he is drawn down the path of interference, arguing that I have conflated two distinct questions: the first is a question about the content of liberal principles with respect to minority rights; the second one about whether they should be imposed on those minorities. His own concern, he says, is with the articulation of "liberals' fundamental principles" rather than with the resolution of differences of principle between cultures or countries. It is no part of his intention to enforce his liberal principles; if minority cultures reject liberalism, the majority will have to "sit down with the members of the minority culture and find a way of living together" (p. 145).

I do not think I have conflated two questions; rather, it seems to me that Kymlicka has identified two different questions that might be asked, and, by maintaining that his was asking only the first, made his actual position less clear. To begin with, it seems strange, if not downright implausible, to claim that one is articulating fundamental principles but cannot be held to account for the practical implications of those principles because putting them into

practice involves another question. Robert Nozick's political theory denies that individuals have rights to welfare, and this has led critics to draw the implication that under a Nozickian regime the poor would have no legally enforceable moral claim to resources other than their (meager) earnings and charity. It would not do for Nozick to suggest that his theory cannot be criticized by drawing this implication because he was not dealing with the question of whether his principles should be upheld. If he is unprepared to accept the practical implications of his theory, he should abandon it. The same goes for Kymlicka. If he thinks liberalism requires that all individuals be accorded substantial civil rights, then he should accept that a cost of upholding those rights may be that communities that violate them will be overridden.

Kymlicka is reluctant to accept this cost and, at times, appears to abandon his own theory. For example, while he thinks that religious dissenters in the Pueblo Indian community have the right to be tolerated by their society, he would deny the Supreme Court the power to "determine or enforce the religious rights of the Pueblo," preferring to leave matters in the hands of, say, tribal courts — if that is the consensus among the Pueblo.² This, it should be noted, can only be effected by denying the Pueblo dissenters the right to appeal to the Supreme Court to uphold these "rights." Yet I cannot see how it is consistent with Kymlicka's concern to accord substantial civil rights to members of minority cultures.

At times, Kymlicka appears to recognize that there is a deep conflict here between the concern to respect cultural differences and the concern to uphold certain individual rights. He notes that in Canada, while some aboriginal groups have argued against external review of aboriginal self-government, others (for example, some aboriginal women's groups) have sought it. It is precisely at this point, when there is no consensus among such groups and interests conflict, that a theory or set of principles has a role to play. But it is at this point that Kymlicka appears to opt out, saying that he does not "see any obvious formula for dealing with this"³ and that "our intuitions are pulled in different directions."⁴ Yet it is perfectly possible to take a stand here. One option would be to say, as he is wont to generally, that liberalism requires that certain civil rights be given priority. The individuals who possess them have *enforceable moral claims* or "trumps" that override any other consideration. Another option (which I favor) is to regard only the right of association (and dissociation) as paramount and to leave the terms of association to be determined by the community in question. In the world of practice, no doubt, the issues are "cloudy" because there is no solution that does not harm some interest. But this is no reason for not drawing clear lines of philosophical principle.

There is a clear distinction between Kymlicka's views and my own. The differences stem, ultimately from two views of liberalism. In Kymlicka's view, I think, a liberal society is one in which certain ideals of equality and individual autonomy associated with Kant, Mill, and Rawls are generally upheld. Another view is that a liberal society is one in which different ways of life can coexist, even if some of those ways of life do not value equality and autonomy. The distinction might be expressed more sharply by saying that the second view does not hold that a liberal society must be composed of (more or less) "liberal" communities. I hold to the second view, for I see liberalism as offering a solution to the *political* problem of pluralism and social conflict rather than a comprehensive moral ideal.⁵ This is not to say that this liberalism has no moral basis, only that this basis is not the ideal of individual autonomy. I hope to provide a fuller account of this basis on another occasion.

NOTES

1. This situation is not as hypothetical or implausible as it may seem. In the early 1950s, social scientists began a comprehensive poll of Indian villages to determine how many were aware that British rule had ended in 1947. The survey was abandoned when it was discovered that most villagers did not know the British had arrived. See William Manchester, *The Last Lion: Winston Spencer Churchill. Visions of Glory 1874-1932* (London: Sphere Books, 1990). 699.

2. *Liberalism, Community and Culture* (Oxford: Clarendon, 1989), 197.

3. *Ibid.*, 197.

4. *Ibid.*, 199.

5. Here my sympathies lie with Charles Larmore's views, as expressed in *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987) rather than with Stephen Macedo's in *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Oxford: Oxford University Press, 1990).

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