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Equal Treatment of Cultures and the Limits of Postmodern Liberalism

I

Classical liberalism, which traces its lineage in the first instance to Locke, uses the medium and concepts of modern law to tame political power and to promote the primary goal of liberal political thought, namely, the protection of the prepolitical freedom of individual members of society. The core of a liberal constitution is the guarantee of equal individual liberties for everyone. This corresponds to Kant's "Universal Principle of Right," according to which, "the freedom of choice of each can coexist with everyone's freedom according to a universal law." Even the "rule of the people" remains an instrument of the "rule of law." The political autonomy of citizens is not an end in itself but serves as a means to safeguard the equal private autonomy of members of society.

The appeal of liberalism resides in part in its elegant reconciliation of two powerful normative intuitions. On the one hand, the idea of equal individual liberties for all satisfies the *moral* standard of egalitarian universalism, which demands equal respect and consideration for everyone. At the same time, it satisfies the *ethical* standard of individualism, according to which each person must be granted the right to conduct her life according to her own preferences and convictions. The equality of all citizens is expressed in the generality of laws, whereas actionable rights, which are derived from laws in particular cases, accord each citizen a carefully circumscribed latitude in pursuing her own way

of life. Hence, ethical individualism constitutes the essential meaning of the egalitarian universalism that modern law borrows from postconventional morality.

The differentiation between ethical life plans and questions of justice responds to the requirements of a postmetaphysical mode of thought. Since philosophy has renounced any ambition to compete with religious worldviews, it no longer presumes to offer ontotheological or cosmological justifications for universally binding models of a successful or not-misspent life. It claims universal validity only for moral claims concerning what is in the "equal interest of all," that is, what is equally good or tolerable for each person. This kind of moral theory refrains from committing itself to substantive conceptions of an exemplary way of life that are supposed to be authoritative *for everyone*. Having become "formal" in this respect, morality is exclusively associated with the idea of equal respect and consideration for each person. This idea of equality also crops up in the positive, compulsory, and individualistic form of modern law in the conceptions of "equal treatment" and "human dignity" (purged of all connotations of social rank).

This liberal idea of equality has been repeatedly subjected to criticism. The civic republicanism that had been pushed aside by liberalism first responded by objecting that the "freedom of the ancients" must not be sacrificed on the altar of the "freedom of the moderns." In fact, classic liberalism threatened to reduce the meaning of equal ethical liberties to a possessive-individualist reading of individual or "subjective" rights misinterpreted in instrumentalist terms. In so doing, it failed to do justice to an important normative intuition that also merits respect under modern social conditions, namely, the requirement of solidarity that unites not only relatives, friends, and neighbors in the private sphere, but also citizens as members of a political community beyond purely legal relations. Individual liberties tailored to the business transactions of private property owners and to the religious conscience and allegiance of private individuals constitute the core of a liberal legal system. This reading pointed to the narrow "egoistic" interpretation of ethical freedom that continued to echo in the polemic of the young Marx against the American and French declarations of rights. The objection is that individual freedom is not exhausted by the right to a utilitarian "pursuit of

happiness" and hence cannot be reduced to the authorization to the private pursuit of temporal and spiritual goods.

To make good this deficit, the modern revival of civic republicanism brought into play a different, intersubjectively expanded conception of freedom associated with the role of the democratic citizen. Within this Rousseauean tradition, the equal communication and participation rights are not merely important for realizing subjective individual rights but rather make possible a joint civic practice understood as an end in itself. From a republican point of view, democratic self-legislation establishes a form of solidarity that – however abstract, because legally mediated – enables one citizen to take responsibility for the other (also with weapons in hand). The political ethos of the community is reproduced and revitalized in the democratic will-formation of a sovereign people. Equal rights in turn guarantee ethical freedom – but in this case not first and foremost the subjective freedom of the individual member of society but the freedom of a nation of citizens united in solidarity conceived in terms of sovereignty. This sovereignty branches internally into a communitarian understanding of the political freedom of the members of a national community and toward the outside into a collectivist understanding of the freedom of a nation that asserts its existence against other nations.

However, ethical republicanism accepts a limitation on egalitarian universalism as the price for this element of civic solidarity. Each citizen enjoys equal rights only within the limits of a particular ethos presumed to be shared by all members of the political community. The fusing of citizenship and national culture leads to a "monochrome" interpretation of civil rights that is insensitive to cultural differences. The political priority accorded an ethically tinged common good over the effective guarantee of equal ethical liberties inevitably leads to discrimination against different ways of life in pluralistic societies and to helplessness in the face of a "clash of civilizations" at the international level.

These problems can be solved in principle only from a universalistic egalitarian perspective that detaches the mobilization of civic solidarity from ethnic nationality and radicalizes it into a solidarity between "others." In binding itself to universalistic constitutional principles and to "human" rights, the sovereign will-formation of democratic citizens simply draws the unavoidable

conclusion from the necessary presuppositions for a legitimate legal institutionalization of its own practice.[1] Historically evolved forms of solidarity are transformed, but not destroyed, by the interconnection between the republican idea of popular sovereignty and the idea of a rule of law spelled out in terms of basic rights. On this third reading, which reconciles liberalism with republicanism, the citizens understand their national political ethos as the intentional product of the democratic will-formation of a populace accustomed to political freedom. The internal relation between the private autonomy of individual members of society and the political autonomy of the citizenry as a whole is something that is *worked out* progressively over time and the historical experience accumulated in this process eventually finds expression in a form of national pride founded on the attainment of an intersubjectively shared consciousness of freedom.

Citizens can make appropriate use of their political rights only if they are able to judge and act independently because they enjoy equal protection of private autonomy in the conduct of their lives. On the other hand, members of society can enjoy equal unrestricted private autonomy only if they make an appropriate use of their political rights as citizens, that is, only if they do not use them exclusively to promote their self-interest but also with an orientation to the common good. The idea that the addressees of the law must be able to understand themselves at the same time as its authors, which Rousseau introduced and to which Kant gave a universalist twist, does not give a united democratic citizenry *carte blanche* to make any decisions it likes. It should enact only those laws that derive their legitimacy from the fact that they can be willed by all. The individual liberty to do as one pleases

[1] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996); "On the Internal Relation between the Rule of Law and Democracy," in Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed. and trans. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: MIT Press, 1998), pp. 253–64; "Constitutional Democracy – A Paradoxical Union of Contradictory Principles?" *Political Theory* 29 (2001): 766–81, repr. in Habermas, *Time of Transitions*, ed. and trans. Ciaran Cronin and Max Pensky (Cambridge: Polity, 2006), pp. 113–28. For the following reflections, I am indebted to the participants in a seminar held at Northwestern University in fall 2002.

within the bounds of the law is the core of private, not civic, autonomy. On the contrary, based on this legally guaranteed freedom of choice, democratic citizens can be reasonably expected to exercise autonomy in the more demanding sense of a will-formation that satisfies requirements of rationality and solidarity – even though this cannot be legally required, but only *urged* upon them [*angesonnen*]. A legal obligation to show solidarity would be a contradiction in terms.

The democratic elaboration of the system of rights necessarily presupposed by a democracy operating within legal institutions rescues classical liberalism from the rigid abstraction of universal laws grounded in natural rights which are supposed to "rule" for the sake of equal individual liberties. On the other hand, the logic according to which the egalitarian universalism of the constitutional state makes possible citizens' ethical individualism remains intact. On the radical-democratic interpretation of political liberalism, however, this logic is no longer objectively imposed by the anonymous rule of law above the heads of the citizens, as it were; rather, this logic is internalized by the citizens themselves and is embodied in the democratic procedures of their political will-formation. The idea of equal liberties is no longer fossilized in natural law but takes on reflexive form in the process of self-legislation. It calls upon the participants in the democratic process to engage in reciprocal perspective-taking and joint generalization of interests with the goal of granting one another the rights called for under existing historical circumstances by the project of a voluntary and self-determining association of free and equal legal consociates.

The egalitarian project of making equal ethical liberties possible assumes the form of a process in the shape of a civic solidarity produced, renewed, and deepened through the democratic process. Under auspicious circumstances, this dynamic can initiate cumulative learning processes and lead to permanent reforms. A democracy with roots in civil society then acquires in the shape of the political public sphere a sounding board for the multiform protests of those who suffer inequality, underprivilege, or disrespect. This protest against social injustice and discrimination can serve as a spur for self-corrections that extend the universalistic content of the principle of civic equality progressively in the form of equal ethical liberties.

However, even this democratic reading of political liberalism does not silence criticism. Here I would like to distinguish three kinds of objections, namely, those which draw on social science, social theory, and the critique of reason, respectively. In the first place, chastening sociological reservations offer salutary corrections to the frank normativism (and concealed idealism) of a political theory that prioritizes conceptual analysis. However, if they are understood in a melioristic sense, then they do not necessarily solidify into the fundamental objection that normative theories are condemned to failure by social complexity. Purely normative considerations retain their relevance as long as we accept that complex societies can still shape themselves in a reflexive manner through law and politics.

Second, from Hegel through Marx to Foucault, the critique of the "impotence of the ought" has intensified within social theory. From this perspective, normative projects already meet with the glaring denial of an opposed reality because they are themselves an integral part of the overwhelming totality of a form of life that is denounced as "alienated" or "power-ridden." These more far-reaching critical diagnoses, however, attribute the criticized leveling and isolating power of the "abstract universal" to the facticity of social *structures*, and not to the violence exerted by the *concepts* of a normativity turned in upon itself. Thus, conformist standardization and individualization is supposed to be exerted by the oppressive mechanisms of the market and administrative power – i.e. by mechanisms of social integration that exercise a reifying power when they penetrate into the heart of the fragile, communicatively constituted lifeworld. This criticism is not yet directed at inherent conceptual contradictions in the norms themselves as long as the desiccation of the resources of social solidarity is seen as the result of pathological distortions of communicatively constituted private and public domains of the lifeworld caused by the invasion of exchange relations and bureaucratic regulations.[2]

In this respect, Adorno's work marks a transition to a third and deeper level of criticism which represents the exchange of equivalents and organizational power, the two systemic mechanisms of

[2] Habermas, "Conceptions of Modernity," *The Postnational Constellation*, ed. and trans. Max Pensky (Cambridge, Mass.: MIT Press, 2001), pp. 130–56.

social integration, in terms of a critique of reason. For Adorno they are expressions of an instrumental rationality that contradicts the noncoercive form of individuation characteristic of relations of solidarity. In limiting himself to a deconstruction of the basic concepts of critical theory, Derrida dissolves the link between the critique of reason and social theory that marks the tradition of Weberian rationalization theories going back to Lukács.[3] He is primarily concerned with the internal heterogeneity of a concept of law that is inextricably bound up with sovereign power.[4] However, Derrida's deconstruction of justice, like Adorno's critique, is still informed by an indeterminate messianic hope. At any rate, the fervent talk of the hesitantly anticipated "event"[5] supports the interpretation that Derrida "criticizes an existing, exclusionary and oppressive understanding of liberal equality from the perspective of a pending, expanding, and domination-free understanding of liberal equality."[6]

Derrida seems to be still inspired by the memory of the promise of radical democracy. It remains for him a source for the reticent hope in a *universal* solidarity that permeates all relations. Christoph Menke, by contrast, gives the project of the deconstruction of justice an anti-utopian twist. In the process, he develops an interesting and original postmodern reading of liberalism. It shares with the classical version the view that democratic procedures and the political participation of citizens do not play an essential role in determining the basic liberal idea of equal ethical freedoms. The critique of reason then takes the form of an attempt to demonstrate that the conception of equal liberties is self-contradictory. Equal treatment, no matter how reflective, fails to

[3] The "theory of communicative action" also upholds the connection in question. On the associated "reconstructive" approach, see Bernhard Peters, *Integration moderner Gesellschaften* (Frankfurt am Main: Suhrkamp, 1993), pp. 471ff.

[4] Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* 11 (1990): 919–1045, and *Politics of Friendship* (New York: Verso, 1997). On the constitutive relation between law and power, see Habermas, *Between Facts and Norms*, pp. 133–51.

[5] For example, in Derrida, "The University without Condition," *Without Alibi* (Stanford, Calif.: Stanford University Press, 2002).

[6] Christoph Menke, *Spiegelungen der Gleichheit* (Berlin: Akademie, 2000), p. ix.

do justice to the concerns of the individual because "the realization of equality can [always] conflict with the obligations implied by doing justice to the individual case."[7] Revolution, mercy, and irony are "three sovereign ways of dealing" with the irreducibly "paradoxical relation" between equal treatment and doing justice to the individual case.

The quietism involved in persisting in reflecting on the limits of freedom reveals the anti-utopian aspect of this conception. Although acts of equal treatment cannot achieve their declared purpose, this deconstructive insight should induce us to try even harder to achieve individual justice, conscious of the inevitability of failure.[8] On Menke's conception, by making philosophy aware of the hidden paradoxical nature of its own activity, deconstruction heightens awareness of finitude.[9] Conceptual analysis of this unconscious element is supposed to bring out the "performative contradiction . . . between acting and saying."[10] Of course, then we need to know how "philosophy" understands its own activity.

According to Menke, philosophy is concerned from the outset to grasp "what successful action involves," and it understands this transcendental knowledge, in turn, as an "insight into the good." In the process, it also wants to make a practical contribution toward promoting the good.[11] If philosophy did not understand itself in such metaphysical terms, deconstruction would lack the pathos that first lends it its significance on this reading. The demonstration that "the conditions of possibility" of a successful practice are simultaneously "the conditions of impossibility of its success" remains within the conceptual universe of metaphysical thought that seeks to grasp reality as a whole. For the true adversary of the critique of metaphysics is the postmetaphysical

[7] Ibid., p. 41.
[8] Ibid., p. 33.
[9] I am skeptical and set aside the question of whether Menke's interpretation of the method of so-called deconstruction applies to the practice or self-understanding of Jacques Derrida.
[10] See the editors' introduction in Andrea Kern and Christoph Menke (eds), *Philosophie der Dekonstruktion* (Frankfurt am Main: Suhrkamp, 2002), p. 9.
[11] Menke, "Können und Glauben," in Kern and Menke (eds), *Philosophie der Dekonstruktion*, pp. 243ff.

self-understanding of modernity that starts from the supposition of the autonomy of self-conscious subjects and responsible agents: "Deconstruction aims at the philosophical presupposition that the success of our praxis is something in our own power."[12] The goal of deconstruction on this reading is to awaken a disenchanted modernity from the assumption that its intellectual presuppositions are beyond question.

The theories of morality and justice that appeal to Kant's egalitarian universalism and his conception of autonomy represent a particular challenge for such a project. This forms the backdrop to the controversy with John Rawls[13] to which Christoph Menke has returned in an article in the *Deutsche Zeitschrift für Philosophie*.[14] His excellent analysis deserves attention not only for the clarity of its arguments but also for its subject matter. Menke develops his critique of the idea of equality through an examination of political liberalism, that is, a specific interpretation of the legally institutionalized equality of the citizens of a political community. He wants to uncover the harm inflicted by the violent abstraction of universal laws on the claims of the individuals concerned within the dimension of the relations between legal subjects. This concentration on law and politics is important because the argument for a "different" or "caring" justice points to a dimension *beyond* law. Morally binding mutual claims derived from the personal encounters and the communicative interconnections among individual life histories interwoven through relations of solidarity thereby advance to an exacting but inappropriate standard for criticizing law.

Of course, law owes its legitimacy in essence to its moral contents; however, constructed legal orders also complement the moral-practical orientations acquired through socialization with the goal of freeing citizens in unmanageably complex social contexts from the cognitive and motivational burdens of an exacting form of morality. This accounts for the formal differences between

[12] Ibid., p. 247.
[13] Menke, "Liberalismus im Konflikt," in *Spiegelungen der Gleichheit*, pp. 109–31.
[14] Menke, "Grenzen der Gleichheit," *Deutsche Zeitschrift für Philosophie* 50 (2002): 897–906.

morality and law that must be respected when speaking of "justice" in a moral in contrast to a legal sense. The fact that law must not contradict morality does not mean that it is situated on the same level as morality. The differences become especially apparent in the case of the claims based upon our positive duties toward our "fellows." Postmodern ethical ideas in particular turn "not unlike Adorno's unwritten theory of morality, . . . on the idea that it is only in dealing appropriately with the non-identical that the claim to human justice can be redeemed."[15]

In comparing these approaches, Axel Honneth has already drawn attention to the danger of overgeneralization. Lévinas's phenomenologically elaborated "unbounded concern for a singular, unique individual" is read off from face-to-face relations in existentially radicalized situations that shed light on the basic moral impulse and often ground positive duties of virtue, but are not typical for legal obligations. To be sure, the function of the administration of justice is also to apply laws in a way that does justice to the individual case in the light of its "particular circumstances." We must even expect the fair administration of justice to show an extraordinary hermeneutic sensitivity for circumstances whose relevance changes according to the individual biographical perspectives of those involved. Otherwise, it would not be able to discover the single "appropriate" norm or apply it in a sufficiently "flexible" manner.[16] Nevertheless, the individual claims of the *legal* persons are pre-formed, as it were, by the predicates of the legal norm; they are restricted in principle to what legal persons can expect from one another, that is, to an ultimately coercible conduct that falls under the formal determinations of the law. Legal norms regulate interpersonal relations among actors who recognize one another as members of a community that is abstract because it is first created by legal norms.[17]

I am interested in Menke's perceptive attempt to deconstruct the freedom-guaranteeing principle of civic equality as presented

[15] Axel Honneth, *Disrespect: The Normative Foundations of Critical Theory* (Cambridge: Polity, pp. 99–128, here p. 100.

[16] Klaus Günther, *The Sense of Appropriateness*, trans. John Farrell (Albany, N.Y.: SUNY Press, 1993), pp. 247ff.

[17] On the formal features of law, see Habermas, *Between Facts and Norms*, pp. 111ff.

in Rawls's political liberalism primarily because he restricts his examination to the liberal idea of equality in its classic form. He neglects the prior generalization of interests that should be performed by democratic legislation, that is, through joint deliberation on and agreed justification of the legal determination of equal individual liberties (II). Even on a reading that does justice to this aspect, the criticism is not dispelled if one thinks of the ambivalent consequences of group rights founded on multiculturalism. Such rights are supposed to strengthen the capacity of groups that suffer discrimination to assert themselves; but even assuming an exemplary democratic realization, they appear instead to produce a dialectical inversion of equality into repression (III). Finally, I will examine once again the conceptual coherence of the interconnection between freedom and equality in the equal treatment of cultures from a historical perspective, namely, in the light of the normative reasonableness of the costs that religious communities had to pay for their cognitive adaptation to the requirements of cultural and social modernization (IV).

II

Menke wants to show that, in the course of implementing the liberal program, the idea of equal ethical liberties for all becomes embroiled in a self-contradiction. Although he is not interested in the specific solution proposed by the later Rawls – i.e. the modular idea of an overlapping consensus[18] – the Rawlsian theory is just the right thing for the purpose of such a deconstruction. In view of the "fact of pluralism," it offers an explicitly "political" conception of justice that is neutral among worldviews and is equally acceptable to all citizens. A liberal constitution guarantees all citizens equal freedom to structure their lives according to their own "conceptions of the good." If it could be shown that the equal

[18] Rainer Forst, *Contexts of Justice*, trans. John Farrell (Berkeley: University of California Press, 2002), pp. 94–100; Jürgen Habermas, "'Reasonable' versus 'True,' or the Morality of Worldviews," in *The Inclusion of the Other*, pp. 75–101, here p. 100.

guarantee of ethical liberties were itself merely an expression of a particular, substantive view of the "correct" life, then citizens who did not share that liberal worldview would inevitably feel constrained in the spontaneous conduct of their lives. Let us assume for the sake of argument that the principle of equal ethical liberties is only valid within the context of a humanistic self-understanding, say within the context of belief in eighteenth-century French Enlightenment ideals. Then the pluralism of worldviews institutionalized in the liberal state would marginalize all religious doctrines in the long run.

Rawls must avoid such an *ethical* liberalism, which would *eo ipso* restrict the equal right of adherents of conflicting doctrines in the name of equal rights. Menke agrees with him in the formulation of the problem, though not in its solution. According to Menke, even the most reflective attempt to guarantee all citizens equal ethical liberties on the basis of a conception of justice that is neutral among worldviews will still fail for conceptual reasons. Admittedly, he does not want to discourage us from the continued attempt to *seek* justice on the basis of the equal treatment of all. But we should no longer presume that we can succeed in *establishing* justice *ourselves*.

In the tragic awareness of a supposedly irreconcilable conflict between justice for all and the individual good, the realization of political equality should remain "an object of hope and striving." Evidently, this is not intended in the trivial sense of an ineradicable difference between norm and reality but rather in the deeper metaphysical sense of the recognition of the "impossibility of any guarantee of successful completion." In Rawls's theory, too, the "pending state [*Im-Kommen-Sein*] of justice" can be demonstrated and hence the insight that "*the reign* of justice becomes independent of the subjective *implementation* of justice."[19] In Hegelian terms, the causality of fate retains the upper hand over abstract justice – only now, of course, no longer in the name of a surpassing objective or even absolute *reason*.

A conception of political justice cannot remain neutral in the sense that it lacks any normative content, even if the corresponding constitutional principles take the form of procedures for

[19] Menke, "Können und Glauben," *Philosophie der Dekonstruktion*, p. 250.

legitimately making and applying the law.[20] For the just political order Rawls claims (1) the "neutrality of aim" in relation to the ethical forms of life and worldviews common in civil society, but not (2) the "neutrality of effect or influence" that individual norms and measures have on different cultural groups.[21] Under both of these aspects, Menke believes that he can show that the conditions of possibility for an egalitarian-universalistic constitutional order turn out in an aporetic way to be conditions of the impossibility of its realization.

(1) The neutrality of the aim or goal of a conception of civic equality is measured by the complete and equal inclusion of all citizens. It must be possible to include all of the citizens in the political community without discrimination as to their ways of life or their understandings of themselves and the world. Of course, this aim demands both the *exclusion* of doctrines that are incompatible with the principle of civic equality (such as sexist, racist, or fundamentalist doctrines) and a *restriction* of the rights and duties of persons who are not yet (or are temporarily not) in the position to fulfill the roles of citizen or of competent legal persons (such as underage children or people who are of unsound mind). We shall return in Section III below to the specific problem of exclusion that arises with regard to fundamentalist worldviews and members of so-called illiberal groups.

Menke argues for the claim that neutrality of aim is unattainable, even with regard to groups and doctrines that accept liberal premises, as follows. In European and American constitutional history, we can identify with hindsight dramatic examples of exclusion of women, disadvantaged groups, nonwhites, and so on, that obviously violated the principle of equal treatment: "Each and every liberal conception of equality therefore stands not only in opposition to non-egalitarian ideas of justice and order, but represents the attempt to go beyond previous definitions of the idea of liberal equality and to overcome the

[20] See Rawls's critique of my procedural view in John Rawls, "Reply to Habermas," *Journal of Philosophy* 92 (1995): pp. 132–80, at pp. 170ff., and my reply, "'Reasonable' versus 'True,'" pp. 98ff.

[21] Forst, *Contexts of Justice*, pp. 47f.

oppression still associated with them."[22] From the retrospective understanding of the *inconsistencies* of a painfully selective implementation of basic rights, however, Menke does not draw the obvious conclusion that progress is possible through a self-correcting learning process. Instead, he explains the at best partial success of past attempts to realize the idea of equal inclusion, which thereby contradicted the idea of equality, as a function of an *inconsistency* in the underlying idea of civic equality as such. The liberal idea of equal liberties can never be "specified" in a neutral way, because even future generations cannot know whether they do not err in turn in their attempts to correct the mistakes of the past.

Certainly later generations can at best "strive for" but cannot "guarantee" neutrality of aim. Practical reason is even more fallible than theoretical reason.[23] We must not rule out the possibility that our reforms *could* again turn out, from a future perspective, to be incomplete and in need of correction. But will they necessarily turn out to be false? After all, the fallibilist awareness in which we make an assertion does not mean that we somehow relativize or leave open the truth claim that we raise for the assertion. The understanding acquired from the retrospective view of a third person that *some* of our efforts to acquire knowledge consistently fail does not force us, from the participant perspective, to cease to credit ourselves with any knowledge *at all*.

However, this is the basis of Menke's objection. Since we do not find ourselves here and now in a fundamentally different epistemic position from earlier generations whose attempts to

[22] Christoph Menke, "Grenzen der Gleichheit," *Deutsche Zeitschrift für Philosophie 50* (2002): 901.

[23] Menke nonetheless rejects a fallibilist interpretation of his thesis without offering a plausible justification. The fact that the consequences of practical misjudgments are more serious, in general, than the consequences of theoretical misjudgments does not deprive moral judgments and legal decisions of the epistemic status of statements that can be right or wrong. See Habermas, "Rightness versus Truth: On the Sense of Normative Validity in Moral Judgments and Norms," in *Truth and Justification*, trans. Barbara Fultner (Cambridge, Mass.: MIT Press, 2003).

provide neutral definitions of the idea of equal treatment repeatedly failed, we cannot be sure "that our own proposals and definitions will not themselves appear in retrospect equally non-neutral and be criticized accordingly."[24] But even past generations were not mistaken in every respect. As the more than 200-year-old American constitutional tradition shows, later generations have corrected the errors of the founding fathers and predecessors, for instance, during Reconstruction, the New Deal, or the civil rights movement of the last century. Because the idea of civic equality points beyond its particular institutionalizations, it is possible to overcome exclusions which are recognized as unjustified under different historical conditions. Just as in theoretical areas, here too the relativization of old insights leads to the extension rather than the elimination of past achievements.

I fail to see how one can explain either the notorious blind spots of past interpretations of civic equality that are now obvious to us or the resulting practices of exclusion and discrimination in terms of *conceptual* "conditions of impossibility" supposedly implicit in the idea itself. The selective readings of norms that have the grammatical form of universal statements but at the semantic level are vulnerable to particularistic interpretations of their basic concepts, such as "person" or "human being," call for an *empirical* explanation. Of course, this must extend to the semantics of the background worldview that prejudices the interpretation of the norms of equality to the advantage of the dominant values.

Thomas McCarthy pursues this method in his analysis of the racial prejudices in Kant's anthropology: "Substantive worldviews – religions, cosmologies, metaphysics, natural histories, etc. – function like refractive media for *grammatically* universal norms . . . The meanings of key terms used in formulating universal norms have typically been inflected to mark distinctions of gender, race, ethnicity, class, status, or other forms of group membership and ascriptive identity, such that those who understand the language in question were sensible of the variations in the

[24] Menke, *Spiegelungen der Gleichheit*, p. 902. Note that Menke does not say at this point "could be criticized."

intended scopes of the norms."[25] Selective interpretations of universalistic principles are symptomatic of the incomplete differentiation between the "right" and the "good." But the lucky historical experience that we can *also* learn in this respect is not sufficient to establish the paradoxical nature of the *project* of guaranteeing equal ethical liberties to all as such.

(2) Rawls claims neutrality for his conception of justice as a whole, not for the differential effects of the individual norms that guarantee equality. Impartially justified norms by no means necessarily affect the ethical self-understanding and way of life of each and every addressee in the same way. Menke seems to regard this insight as a concession that already meets deconstruction halfway. But first let us examine the phenomena to which this proviso applies. The conceptual priority of the right over the good means that a norm that is in the equal interests of all may impose not only general restrictions on those affected but also unequal burdens on different groups of addressees. Such burdens may impede one group more than others in shaping its form of life and some individuals more than others in the pursuit of their individual goals. Liberal regulations on abortion place a greater burden on devout Catholics or on any supporter of a pro-life position based on a religious or other worldview than on secular citizens, who, even if they do not share the pro-choice position, can live more easily with the idea that the right to life of the embryo may be trumped by the right to self-determination of the mother under certain circumstances.

Again, Menke wants to restrict his analysis to the harm suffered by forms of life and worldviews that are not essentially anti-egalitarian. Therefore, he may not relate the non-neutrality of effects to identity groups that will "cease to exist in the well-ordered society of political liberalism." With that, Rawls has in mind "illiberal" groups whose continued existence depends,

[25] Thomas McCarthy, "Die politische Philosophie und das Problem der Rasse," in *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, ed. Lutz Wingert and Klaus Günther (Frankfurt am Main: Suhrkamp, 2001), pp. 627–54, at p. 633; trans. as "Political Philosophy and Racial Injustice: From Normative to Critical Theory," in *Pragmatism, Critique, Judgment*, ed. Seyla Benhabib and Nancy Fraser (Cambridge, Mass.: MIT Press, 2004), pp. 147–68.

for instance, on the fact that their membership "controls the machinery of the state and is able to practice effective intolerance."[26] An example would be the Shiite interpretation of the Qur'an by the Mullahs who currently govern Iran; but this could not be described as a "not in principle anti-egalitarian conception of the good." Rather, the question turns on whether an aporia inherent in the idea of equality itself can be developed out of the differential burdens that norms sometimes impose on their addressees, even when they are justified from the point of view of the equal consideration of the relevant interests of all.

Menke takes his orientation from the intuition that each specific determination of the idea of equal treatment is an abstract universal that inevitably does violence to the individual life of particular persons. Here we must avoid getting off on the wrong foot. Cognitively speaking, we always have the alternative between judging the facts of the case from the participant perspective of citizens who are involved in political opinion- and will-formation concerning collective goals and binding norms or from the first-person perspective of someone deliberating on his or her own way of life as a unique individual. The cognitive possibility of adopting either perspective does not imply, however, that they are equivalent for all normative purposes. The perspective of justice and that of evaluating one's own life are not equally valid in the sense that the morally required priority of impartiality can be leveled out and reversed in favor of the ethical priority of one's particular goals in life.

It is certainly open to those affected to subject the effects of intersubjectively justified norms on their lives to a personal evaluation from their subjective perspective. But this option – of which the participants must in any case make use *ex ante* during the process of justification – does not imply a balancing that gives ethical self-understanding the final say for normative purposes. In the process of reflecting and adopting the corresponding perspectives in examining issues of political justice, they do not both have equal weight.

[26] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1992), pp. 196–7.

In the end, the symbiotic fusion of both perspectives is supposed to pave the way for the concept of a supposedly "higher" justice that guarantees the happy coincidence of the right with the individual good.[27] "Then the priority of liberal justice would not only be a priority for institutions – and for us as participants in institutions – but also a priority for us as individuals: not just a politically, but also an ethically valid priority."[28] The paradoxical nature of this surreptitiously introduced standard also explains why any "political justice" that is distributed in the currency of equal ethical liberties appears unworkable by this standard. For there are good reasons why political justice does not enjoy priority over other, more important individual values in the context of most life histories.

The mistake in this thought is not difficult to identify: the two opposing perspectives (of justice and the "good life") do not enter into a symbiosis, but remain for good normative reasons intertwined with each other in an asymmetrical way. Ethical self-understanding, undertaken from the first-person perspective, can succeed in the final analysis only under the proviso that the pursuit of individual aims does not violate moral consideration for others.[29] On the other hand, citizens in their role as democratic co-legislators are bound to procedures of *reciprocal* perspective-taking, so that the perspectives of the affected, who do not want their individual goals to be restricted in existentially unreasonable ways, also find their way into the perspective of justice.

Moreover, a norm can be appropriately applied only on the basis of such a democratic justification. That norm is "appropriate" for an individual case if it enables all relevant features of the conflict and of the participants in the conflict to be considered "exhaustively."[30] Whoever has only the *semantic* features of a

[27] Menke wants to place the idea of equality in a relation "with the obligations of individuality . . . which is not already determined from the beginning in favor of the priority of equality" (*Spiegelungen der Gleichheit*, p. 7).

[28] Ibid., p. 122.

[29] Martin Seel, *Versuch über die Form des Glücks* (Frankfurt am Main: Suhrkamp, 1999), pp. 191ff.

[30] Klaus Günther, "Ein normativer Begriff der Kohärenz," *Rechtstheorie* 20 (1989); "Warum es Anwendungsdiskurse gibt," *Jahrbuch für Recht und Ethik* 1 (1993).

universal norm in view, and then claims that it *cannot* do justice to the particularity of the case and to the context of the individual's life history, overlooks the *pragmatic* meaning of the "universality" of democratically justified norms. Norms of this kind are discovered and adopted in accordance with a procedure of discussion and decision that grounds the presumption of rational, and in this sense universal, acceptability. There can be no question of the constitutional state ignoring "the problem of the possible restriction of the individual good by political equality."[31] The non-neutral effects are the proper focus of the hypothetical scenarios fought out in the public arena and in the political debates of the democratic legislature *ex ante* and thus not only in the subsequent application discourses of the administration of justice.

Because the democratic procedure makes the legitimacy of decisions dependent on the discursive forms of an inclusive process of opinion- and will-formation, the norms that are supposed to guarantee equal rights can only come about in an awareness and assessment of the different burdens they impose. Menke describes the non-neutral effects of norms of equality as "unintended consequences" of "achieving equality."[32] That betrays a fixation on the observer standpoint of the theorist; he refuses to adopt the participant perspective of the citizens who also regard themselves as the authors of the law. Postmodern liberalism follows classical liberalism in excluding the democratic components, together with the lawmaker, from the guiding idea of equal liberties and ignores the dialectical connection between private and civic autonomy.

In this way, the process of "defining" equality takes place entirely in the mind of the philosopher observer. The space in which the participating citizens engage in communication does not feature in the analysis. But only there can the process of determining what calls for equal application as a universal norm be carried out as "self-determination" in the shape of democratic opinion- and will-formation. Those affected must participate in the process of differentiating the right from the good, both from the point of view

[31] Menke, "Grenzen der Gleichheit," p. 905.
[32] Ibid., p. 903.

of their own self-understanding and worldview and under the condition of reciprocal perspective-taking. Then the universal norms, which meet with general agreement after discursive consideration of the anticipated exclusions and restrictions, no longer confront them as an alien force that does violence to their individual lives (and, most importantly, not on account of their equality-guaranteeing generality).

A deconstruction of the idea of equality is not necessary in order to arrive at the result to which the democratic procedure is inherently geared. Political discourse focuses the participants' gaze on what is equally good for all, so it naturally still remains *connected* to the ethical judgments "that individuals reach in view of what is important and good in their lives."[33] As citizens, the participants can nevertheless accept a norm as just – for instance, a liberal abortion regulation whose effects they personally find harder to accept than other citizens – if this burden appears reasonable to them in comparison to the burden of the discrimination that is thereby eliminated. The norm must be legitimated by democratic means in an awareness and assessment of its non-neutral effects by all those who must live with the consequences. Hence, the asymmetric restrictions that are accepted on normative grounds are as much an expression of the principle of civic equality as the norm itself – and not a reflection of its "internal heterogeneity," as Menke claims.

Neither the actual failures in realizing the "neutrality of aim" (1) nor the "non-neutral effects" of formally equal rights (2) support the idea of a "limit to equality" inherent in the idea of civic equality as such. The "unavoidable suffering of individuals that every system of equality produces through its operations of exclusion and the effects of its restrictions"[34] cannot be established through conceptual analysis. Only the egalitarian universalism of equal rights that is sensitive to difference can satisfy the individualistic requirement that the fragile integrity of unique and irreplaceable individuals should be guaranteed equally.

[33] Ibid., p. 898.
[34] Ibid., p. 906.

III

Of course, this claim concerns only the conceptual relations on which deconstruction focuses, not the actual relations that are deformed by violence. Liberal "systems of equality" have, of course, hitherto covered up the flagrant injustices of social inequality. The impoverished districts of our cities and other desolate areas are populated by outcasts and "superfluous" persons for whom equal rights do not have "equal value." Under the pretense of equality, they suffer the misery of insecurity and unemployment, the humiliation of poverty and inadequate social provision, the isolation of a life on the margins of society, the wounding feeling of not being needed, the despair over the loss of (and denial of access to) all the means required to change their oppressive condition through their own initiative. However, these facts do not reflect a paradox in the normativity of the idea of equality itself. Rather, the contradiction between the normative claim that these conditions prompt and the morally obscene sight that they actually present gives rise to cognitive dissonances.

From the early socialists to present-day opponents of globalization, political protest has been spurred by facts that flout the normative claim to substantive equality of rights. This led to the promise of the welfare state that the guarantee of equal ethical liberties must also include the opportunity to make effective use of equal rights. Underprivileged citizens have a right to compensation when they lack the opportunities and resources to make use of their rights in accordance with their own preferences and values.

Of course, such contradictions between facticity and validity can become the political driving force for the self-transformation of society only as long as the cognitive dissonances are not robbed of their sting by being ontologized – through a form of deconstruction that projects the contradiction into normativity as such. However, we must examine whether the implementation of cultural rights for members of groups that suffer discrimination, as well as the introduction of social rights, follows a development in law governed by the principle of civic equality (1). The justification of cultural rights can explain a disturbing competition between group rights and individual rights (2) that gives rise to the paradoxical appearance of a dialectical inversion of equal rights into oppression (3).

(1) Recent court decisions in Western countries contain numerous examples of correctives to unreasonable asymmetrical effects of general laws: Sikhs are permitted to wear their turbans on motorcycles and to carry their ritual daggers in public; Muslim women and girls may wear their "headscarves" in the workplace and in school; Jewish butchers are permitted to slaughter livestock and poultry according to kosher methods; and so forth. Although these rulings seem to involve exceptions to general laws (concerning traffic safety, animal protection, and so on), interpreting them as exceptions to rules misleadingly suggests a dialectic in the idea of equality. In fact, these decisions are simply the logical consequences of the fact that Sikhs, Muslims, and Jews enjoy the same religious freedom as the Christian majority. They are not a matter of a mysterious "inversion of the universal into the particular," only trivial instances of basic rights taking priority over ordinary laws or public safety regulations. As in the decision handed down by the Federal Constitutional Court of Germany concerning the equal status of the Jehovah's Witnesses (who acquired the same privileges as the Churches in being recognized as an entity in public law), here it is also a matter of implementing the equal treatment of cultures through the normal process of applying the law to particular cases.

Both the regulations in the organizational section of the constitution (such as those conferring self-administration rights on regional authorities or special representation rights on cultural minorities) and multicultural policies designed to protect and promote groups that suffer discrimination (such as quotas in education, employment, and politics, subsidies for language programs and school curriculums, and regulations governing official languages, official holidays, and national symbols) constitute precautionary measures against the exclusion of groups with strong identities of their own. Such tendencies continue to operate below the threshold of formal recognition of equal treatment – as shown, among others, by the impressive study of Charles W. Mills.[35] More inconspicuous mechanisms of exclusion in the modes and communicative patterns of everyday interaction permeate the

[35] Charles W. Mills, *The Racial Contract* (Ithaca, N.Y.: Cornell University Press, 1997).

very semantics of body language. To be sure, the "politics of recognition" runs up against the structural limits of the legal medium, which can, at best, bring about conformity in behavior but has little impact on mentalities. But factual restrictions on the effects of a steering medium such as law must not be confused with the conceptual barriers of the allegedly self-contradictory idea of legal equality.

We describe a political culture as "liberal" insofar as it is characterized by symmetrical relations of reciprocal recognition, including those between the members of different identity groups. These relations of recognition, extending across subcultural divides, can only be promoted indirectly, but cannot be directly produced, by means of politics and law. Cultural rights and policies of recognition can strengthen the capacity for self-assertion among minorities that suffer discrimination and their visibility in the public sphere; but the values of society as a whole cannot be changed through the threat of sanctions. The aim of multiculturalism – the mutual recognition of all members as equals – calls for a transformation of interpersonal relations via communicative action and discourse that can ultimately be achieved only through debates over identity politics within the democratic public arena.[36] However, these processes also occur in a space constituted by citizens' rights to political participation and communication. Thus, the "self-reflection" oriented toward the "recognition of difference" that Menke rightly calls for does not depend on an *entirely different* politics – built on the ruins of deconstructed equality – that would free itself from the chains of law and enter the sphere of virtue.[37]

The discussion of "multiculturalism" calls for a more careful differentiation within the concept of civic equality. Discrimination

[36] Nancy Fraser, "Struggle over Needs," *Unruly Practices* (Minneapolis: University of Minnesota Press, 1989); Seyla Benhabib, *The Claims of Culture* (Princeton, N.J.: Princeton University Press, 2002), pp. 114–22.

[37] It is not clear to me what is meant by the thesis "that a politics of equality must develop *in itself* the attitude or the virtue of doing justice to the suffering and complaints of the individual," if this politics is supposed to be allowed "[to go] to the extreme that equality limits itself in view of these limitations" (Menke, "Grenzen der Gleichheit," p. 905).

or disrespect, nonpresence in the public arenas of society, or a collective lack of self-respect point to an incomplete and unequal inclusion of citizens who are denied full status as members of the political community. The principle of civic equality is violated in the dimension of membership, not in the dimension of social justice. The degree of inclusion concerns the horizontal relations among members of the political community, whereas the scope of the system of statuses concerns the vertical relations among citizens of a stratified society.

Social strata are conditioned by patterns of distribution of social wealth. Depending on their rank, citizens have at their disposal greater or lesser resources and a greater or lesser variety of opportunities for shaping their lives according to their own preferences and values. Among equal citizens, every system of statuses raises questions concerning the legitimacy of the permitted degree of inequality. Whatever counts as economic exploitation and social underprivilege (as measured by the socially accepted principles of distributive justice)[38] and whatever counts as deprivation (of the necessary means for an autonomous life), it violates the principle of civic equality in a different way from incomplete inclusion. The inequality lies in the dimension of distributive justice, not in the dimension of the inclusion of members.

Nancy Fraser recognizes the importance of making an analytic distinction between these two dimensions of civic inequality (even though they are almost always empirically intertwined) and has made a corresponding distinction between the politics of distribution and the politics of recognition.[39] This distinction makes clear why one misses the point of cultural rights by incorporating them into an extended model of the

[38] Herlinde Pauer-Studer, *Autonom leben* (Frankfurt am Main: Suhrkamp, 2000).

[39] Nancy Fraser, "From Redistribution to Recognition?" in Cynthia Willett, ed., *Theorizing Multiculturalism* (Oxford: Oxford University Press, 1998), pp. 19–49. Her subsequent revisions do not seem to me to represent improvements over the original formulation. See Fraser, "Rethinking Recognition," *New Left Review* 3 (May/June 2000): 107–20; also Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange*, trans. Joel Golb and Christiane Wilke (London: Verso, 2003).

welfare state.[40] Unlike social rights, cultural rights must be justified in terms of their role in facilitating the equal inclusion of all citizens. Although this consideration demands an extension of the classic concept of the legal person, which was tailored to the dual role of economic citizen and member of a religious community, this revision seems at the same time to grant us ambivalent group rights that could conflict with individual rights under certain circumstances.

(2) The standard justification for cultural rights starts from the guarantee of equal ethical liberties for all.[41] These take the form of subjective rights that open up a well-defined range of options for decisions guided by preferences. The rights-bearer can enjoy this freedom of decision to lead an ethical life only if she has a sufficiently wide range of value orientations at her disposal that allow her to choose the ends of her actions and set goals. She only really enjoys equal ethical liberties if, in selecting her preferences, she can rely upon the orienting power of internalized cultural values. Therefore, the use value of equal ethical liberties depends upon guaranteed access to cultural resources from which the necessary values can be tapped (i.e. acquired, reproduced, and renewed).

This instrumental justification misses the real point of cultural rights. The concept of a person acting instrumentally who selects from fixed options according to culturally shaped preferences fails to clarify the intrinsic meaning of culture for an individual's way of life. Newborn children come into the world organically

[40] See Brian Barry, who reduces the claim to recognition of groups that suffer discrimination to a lack of "means and options" because he measures civic equality in terms of distributive justice, hence according to the necessary "opportunities and resources" for each citizen to enjoy equal opportunities to make actual use of equal rights. This assimilation of the lack of recognition to underprivilege that calls for material redress leads, for example, to the counterintuitive assimilation of religious convictions to preferences: "The position regarding preferences and beliefs is similar" (Barry, *Culture and Equality* [Cambridge, Mass.: Harvard University Press, 2002], p. 36). On this approach, the Sikhs would be permitted to wear turbans when riding motorbikes because otherwise their leeway in choosing a religious community would be unjustly restricted.

[41] Joseph Raz, "Multiculturalism: A Liberal Perspective," in *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994).

immature and remain for a long period briefly dependent on the care of others. Only as social members of cultural communities can they develop into persons. Only by growing into an intersubjectively shared universe of meanings and practices through socialization can persons develop into irreplaceable individuals. This cultural constitution of the human mind explains the enduring dependence of the individual on interpersonal relations and communication, on networks of reciprocal recognition, and on traditions. It explains why individuals can develop, revise, and maintain their self-understanding, their identity, and their individual life plans only in thick contexts of this kind.

But if we relate the guarantee of equal ethical liberties to such an intersubjectively understood process for forming, reproducing, and developing personal identity, we must expand the concept of the legal person as the bearer of subjective rights accordingly.[42] Against this background, it makes sense to derive cultural rights directly from the principle of the inviolability of human dignity (Article 1 of the German Basic Law): the equal protection of the integrity of the person, to which all citizens have a claim, includes the guarantee of equal access to the patterns of communication, social relations, traditions, and relations of recognition that are required[43] or desired[44] for developing, reproducing, and renewing their personal identities.

This role for cultural rights explains how such rights can counteract the incomplete inclusion of the members of disrespected

[42] For an overview of the more recent discussion, see Stephan Kirste, "Dezentrierung, Überforderung, und dialektische Konstruktion der Rechtsperson," in *Verfassung – Philosophie – Kirche* (Berlin: Duncker & Humblot, 2001).

[43] Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture," *Social Research* 61 (1994): 491–510. Chaim Cans speaks of an "identity based argument" in *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), pp. 43ff.

[44] This qualification is intended to pre-empt the restriction of cultural rights to access to *cultures of origin*. We must not reify cultural heritages – which are always hybrids resulting from the intermingling of different traditions – into closed totalities. Nor should we assume that people's identities remain dependent throughout their lives on a particular culture or even on rootedness in their culture of origin. See Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," *University of Michigan Journal for Law Reform* 25 (1992): 751–93.

religious, linguistic, ethnic, or racial minorities (as well as oppressed and marginalized women, children, elderly people, etc.). The aim of guaranteeing free access to the cultural background, social network, and communicative web of identity groups also accounts for the introduction of collective rights. Such rights strengthen the organizations responsible for the self-assertion of endangered cultures. Collective rights empower cultural groups to preserve and make available the resources on which their members draw in forming and stabilizing their personal identities.

Self-assertion rights grant the representatives of identity groups enhanced authority to organize and administer themselves. These rights are particularly interesting in the present context because they give rise to a type of conflict that is alien to systems of equality organized along individualistic lines. Typical conflicts of rights arise either between individual legal persons (one of whom violates the rights of the other) or between the individual citizen and the state (when the latter oversteps the legal boundaries of interference). The introduction of collective rights gives rise to conflicts of a different type, (a) when different identity groups dispute each other's rights or privileges, or (b) when, as is typically the case with multicultural claims, one group demands equal treatment with other groups, or (c) when, as in the complementary case, nonmembers see themselves as disadvantaged in relation to members of privileged groups (white people, for example, by quotas for nonwhites).

In the present context, a fourth case – (d) oppression within groups – is of primary interest. In these cases, elites use their expanded organizational rights and competences to stabilize the collective identity of the groups, even if it entails violating the individual rights of dissenting members of the group. When the communal life of religious groups is determined by a "law" that is guarded and interpreted literally by guardians of orthodoxy (as it is in Islamic countries and in Israel, for example), and when religious law supplements or even replaces civil law, especially within the sphere of the family, women and children in particular are exposed to repression by their own authorities.[45] Given the

[45] Ayelet Schachar, "On Citizenship and Multicultural Vulnerability," *Political Theory* 28 (2000): 64–89.

"special power relations" within the family, even the secular rights enjoyed by parents in Western countries can lead to similar conflicts (for example, when Turkish fathers keep their daughters out of coeducational physical education in public schools).

The point is not that rights are suspect *per se*. For example, the rights that a democratic constitution accords local authorities, provincial governments, or semi-public institutions are generally unproblematic because such transfers of authority can be justified on the basis of, and hence cannot conflict with, citizens' basic rights. But not all cultural groups whose position is strengthened by collective rights have an internal organization that satisfies liberal standards. Cultural groups are also not required to abide by liberal organizational principles (as are political parties). Thus, for example, the Catholic Church has the right to exclude women from the priesthood, even though the equality of men and women has constitutional standing and is implemented in other sectors of society. The Church explains this employment policy by appealing to an essential element of the doctrine to which its pastoral mission is devoted.[46] From the perspective of the liberal state, the principle of equality is not violated as long as members are not barred from expressing their dissent by leaving the group or by mobilizing counterforces within the organization itself. Yet, how should we view the religiously based racial discrimination of Bob Jones University, an American institution of fundamentalist Christians that, although it changed its restrictive admissions policy and accepted black students when it was threatened with losing its tax-exempt status, nevertheless prohibited interracial dating and marriage?[47] How do the two cases differ?

When the liberal state fulfills the conditions required to enable the reproduction of a cultural minority whose very existence would otherwise be threatened, and when it as a consequence accepts in return the violation of the basic rights of individual members, it seems that the dialectic of equality and oppression affirmed by Menke comes into play. Thus, the US Supreme Court in a notorious decision upheld the objection of an Amish community against

[46] See the discussion of the relevant legal cases in Barry, *Culture and Equality*, pp. 169ff.
[47] Ibid., pp. 165f.

the Department of Education of the state of Wisconsin and granted the plaintiff a collective exemption from the universal requirement of ten years of schooling. Amish parents were accordingly allowed to withdraw their children from the ninth and tenth grades because they would otherwise be familiarized with subjects judged to be incompatible with the survival of the worldview and way of life of the religious community. It seems that the right to protect the religious form of life and practice, which according to the principle of equality must be equally valid for the (otherwise law-abiding) Amish community as for other religious communities, can only be honored if the state accepts a violation of the civil rights of juveniles to the basic education that would enable them to make their way in complex societies.

Countless cases exhibit this classic pattern, which Brian Barry deals with in his study on "culture and equality." Barry draws on these examples in conducting a polemical debate with authors such as William Galston, Charles Taylor, and Iris Young. Assuming they exist, the paradoxical inversions of freedom into repression that are supposed to reveal a contradiction in the idea of civic equality as such would have to be demonstrated by the potential threat to individual basic liberties posed by collective rights guaranteeing the equal treatment of cultural groups.

(3) In order to dispel the air of paradox, Will Kymlicka has made a distinction between two types of group rights: legitimate rights through which an organization protects itself against external pressures from its social environment; and problematic rights through which it can impose its will internally on dissenting members of the group who threaten to destabilize the settled life of the community.[48] But this distinction ceases to be useful when the same collective rights simultaneously serve both functions, as in the Amish case. To be sure, empowering collective rights do not *necessarily* conflict with individual rights;[49] but the alleged paradox can only be resolved if it can be shown that group rights that are legitimate from the perspective of civic equality *cannot*

[48] Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), pp. 34–48.
[49] Ibid., p. 38.

conflict with the basic rights of individual group members. For, according to the liberal intuition, group rights are legitimate only if they can be understood as *derivative* rights – derived, that is, from the cultural rights of the individual group members.

The advocates of a "strong" multiculturalism dismiss this requirement and pursue a justification strategy that does not exclude collective rights that potentially restrict basic rights. They argue that if the equal right to ethical freedom obliges the state to guarantee equal access to cultural resources for any citizen who needs them to develop and maintain her personal identity, then the state must also see to it that such cultural resources are available – and remain available. The latter qualification marks the inconspicuous but decisive logical step from the availability of such resources in the present to *ensuring* their availability in the future. Only this step enables "strong" multiculturalism to justify a "politics of survival."

Thus Charles Taylor, for example, defends the thesis that the undisputed right of the French-speaking citizens of Quebec to continue their ancestral traditions implies the controversial obligation on the part of the provincial government to take whatever measures are required to ensure the *survival* of the French language:

> You could consider the French language, for instance, as a collective resource that individuals might want to make use of, and act for its preservation just as you do for clean air or green spaces. But this can't capture the full thrust of policies designed for cultural survival. It is not just a matter of having the French language available for those who might choose it . . . But it also involves making sure that there is a community of people in the future that will want to avail itself of the opportunity to use the French language. Policies aimed at survival actively seek to *create* members of the community, for instance, in their assuring that future generations continue to identify as French speakers.[50]

This argument justifies, among other things, the intrusion by the government of Quebec into the parental rights of its

[50] Charles Taylor, "The Politics of Recognition," *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995), p. 246.

Francophone population. These citizens are obliged to send their children to French schools, even if they prefer to educate them in English-speaking institutions. The argument is based on the unspoken premise that cultural resources have a kind of priority over other rights of the individuals who enjoy them, or at least have an intrinsic value that justifies an independent claim to protection. This conception presupposes a metaphysically grounded ethics of the good, which I will not address further here.[51] The idea that rights can refer *directly* to cultural resources is not trivial. For then the claim to protection of these collective goods must be justifiable independently of citizens' interests in maintaining their personal identity.

Collective rights that strengthen a group, not in order to protect the cultural rights of its individual members, but to support the continued existence of the cultural background of the collectivity directly, even above the heads of its members, have the potential to promote internal repression: "Cultures are simply not the kind of entity to which rights can properly be ascribed. Communities defined by some shared cultural characteristic (for example, a language) may under some circumstances have valid claims, but the claims then arise from the legitimate interests of the members of the group."[52] Barry's objection, however, is based on a no less dogmatic inversion of his opponents' dogmatic assertion of the priority of cultural resources over their beneficiaries. What reasons support the claim that collective rights, which guarantee the availability of cultural resources, are justified solely by the individual member's cultural rights to access to such resources?

Barry's passing remark that cultures are "not the kind of entity" to function as rights-bearers offers a clue. Even if we do not already presuppose the individualistic character of modern legal orders on moral grounds,[53] the ontological constitution of

[51] On the theory of hyper-goods, see Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989), pt. I; see also Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics*, trans. Ciaran Cronin (Cambridge, Mass.: MIT Press, 1993), pp. 69ff.

[52] Barry, *Culture and Equality*, p. 67.

[53] See my debate with Karl-Otto Apel in Jürgen Habermas, "On the Architectonics of Discursive Differentiation," above, ch. 3.

symbolic objects speaks against the idea that cultures qualify as bearers of rights. A culture as such is not a suitable candidate for the status of a legal subject because it cannot meet the conditions for its reproduction from its own resources but depends upon constructive appropriation by autonomous interpreters who say "yes" or "no." Therefore, for empirical reasons the survival of identity groups and the continued existence of their cultural background *cannot* be guaranteed by collective rights at all. A tradition must be able to develop its cognitive potential in such a way that the addressees are convinced that this tradition is really worth pursuing; and the hermeneutic conditions for the continuation of traditions can only be guaranteed by individual rights.

A culture can be conceived as an ensemble of enabling conditions for problem-solving activities. It furnishes those who grow up in it not only with elementary linguistic, practical, and cognitive capacities, but also with grammatically prestructured worldviews and semantically accumulated stores of knowledge. However, a culture cannot be maintained through conditioning or crass indoctrination; neither can it be maintained solely through the implicit habituation of the young to corresponding language games and practices. Rather, traditions preserve their vitality by insinuating themselves into the ramified and interlinked channels of individual life histories and, in the process, passing the critical threshold of the autonomous endorsement of every single potential participant. The intrinsic value of a tradition can manifest itself during adolescence at the earliest. Young people must be convinced that they can lead a worthwhile and meaningful life within the horizon of the assimilated tradition. The test of the viability of a cultural tradition ultimately lies in the fact that challenges can be transformed into solvable problems for those who grow up within the tradition.

Although this test also functions within closed societies, its relevance increases with the number of alternatives that are open to the individual. In pluralistic societies, cultural groups can pass on their heritage from one generation to the next only via the hermeneutic filter of the affirmations of individual members who are in a position to say "no" to a range of genuine alternatives. For this empirical reason, collective rights can strengthen the cultural self-assertion of a group only if they also accord the individual members the latitude to use them

realistically in deciding on reflection between critical appropriation, revision, or rejection.[54] Freedom of association certainly already safeguards the voluntary nature of group membership. But it is only the seal on a realistic right to exit. The guarantee of the internal latitude necessary to assimilate a tradition under conditions of dissent is decisive for the survival of cultural groups. A dogmatically protected culture will not be able to reproduce itself, especially not in a social environment replete with alternatives.

IV

The critique of "strong" multiculturalism boils down to the fact that the principle of civic equality confronts all cultural groups with the universal normative expectation that their members should not just become unconsciously accustomed to traditional convictions and practices, but should be taught to appropriate a tradition in a reflexive way. Of course, the more demanding the formulation of the exit conditions, the more they confirm the suspicion that "equal treatment of cultures" remains wedded to the anthropocentric and secularist ideas of the Enlightenment and humanism, and hence that its implementation must deny the "neutrality of aim" vis-à-vis other forms of life and worldviews. This brings us back to the issue of the fairness of the adaptive achievements that the liberal state demands from the traditional

[54] William Galston cites the following as "realistic" conditions for exit: "knowledge conditions – the awareness of alternatives to the life one is in fact living; capacity conditions – the ability to assess these alternatives if it comes to seem desirable to do so; psychological conditions – in particular, freedom from the kinds of brainwashing that give rise to heart-rending deprogramming efforts of parents on behalf of their children, and more broadly, forms of coercion other than the purely physical that may give rise to warranted state interferences on behalf of affected individuals; and finally, fitness conditions – the ability of exit-desiring individuals to participate effectively in at least some ways of life other than the ones they wish to leave." See Galston, "Two Concepts of Liberalism," *Ethics* 105 (1995): 516–34, here p. 533; for a feminist perspective, see Susan Moller Okin, "'Mistresses of their own Destiny': Group Rights, Gender, and Realistic Rights to Exit," *Ethics* 112 (2002): 205–30.

communities and doctrines whose origins long predate modern social conditions.

Let us begin with two distinctions. First, we must not confuse the normative demands of a liberal order with the functional imperatives of social modernization, which, among other things, also necessitate the secularization of state authority. Second, the structural adaptation of identity groups or religious communities to the requirements of modern life in general, and to the expectations of civic autonomy and demands for toleration of a liberal republic in particular, does not entail exposure to reflexive pressure that would inevitably undermine theocentric or cosmocentric doctrines and life-orientations in the long run.

Of course, there are tribal societies and forms of life and ritual practices that are not compatible with the political framework of an egalitarian and individualist legal order. This is shown by the commendable attempts of the United States, Canada, and Australia to rectify the historical injustice to indigenous peoples who were subjugated, forcibly integrated, and subjected to centuries of discrimination. These tribal groups use the concession of a broad autonomy to maintain or to restore specific forms of traditional authority and collective property, even though in individual cases these conflict with the egalitarian principle and individualistic character of "equal rights for all." According to the modern understanding of law, a "state within the state" should not exist. If an "illiberal" social group is nevertheless permitted to operate a legal system of its own within the liberal state, this leads to irresolvable contradictions.

When tribal communities, whose ancestors were forcibly integrated into the state of the conquerors are compensated with extensive self-administration rights on moral grounds, the obligations of individual *members of the tribe* may conflict with the rights they are entitled to as *citizens* of the larger political community. The self-administration rights possessed by Indian territories in the United States and Canada have such implications, especially for legal claims regarding property and family relations. Again, it is primarily women who are affected: "If a member of an Indian tribe feels her rights have been violated by her tribal council, she can seek redress in a tribal court, but she cannot (except under exceptional circumstances) seek redress from the Supreme

Court . . . These limits on the application of constitutional bills of rights create the possibility that individuals or subgroups within Indian communities could be oppressed in the name of group solidarity or cultural purity."[55]

In the special case of reparations for past injustices by the state, law and morality can become embroiled in contradictions, even if both are governed by the principle of equal respect for all. This is because law is a recursively closed medium that can respond in a reflexive manner only to *its own* past decisions, but is insensitive to episodes that predate the legal system.[56] Hence, this conflict is reflected *in* law but does not emerge *from* it. The way of life of illiberal groups constitutes an alien element within the liberal legal order. Therefore, the contradictory consequences that result from a morally justified legal toleration of alien structures remain external to egalitarian law itself. It is quite different with religious groups who adapt their doctrines and forms of life, notwithstanding their premodern origins, to the secularization of state and society in order to be able to assert themselves within the differentiated structures of modernity.

Judaism and Christianity, which not only shaped Western culture but also played an important role in the genealogy of the idea of equality, no longer have any fundamental difficulties with the egalitarian structure and the individualistic character of a liberal order. Like all world religions, however, at one time they raised exclusive claims to validity and authority that were by no means inherently compatible with the claims to legitimacy of a secular legal and political system. In the context of modern societies and secular power structures, religious consciousness has itself been induced to "modernize," if you will. The cognitive switch from the "transmission of tradition" to expectations to adopt a reflexive stance and realistic exit conditions is an example of this.

The question is whether such adaptation processes reflect the submission of the religious ethos to conditions of a *hypocritical*

[55] Kymlicka, *Multicultural Citizenship*, pp. 38f.

[56] Law and morality conflict in a different way in cases of claims for reparations for the descendants of the victims of the criminal policies of past governments for which their legal successors are made responsible.

neutrality that is merely a disguise for domination by a different conception of the good (namely, the secular ethos of equality). Is a religious community that renounces indoctrination and grants latitude for a self-conscious appropriation of religious truths merely falling in line with norms imposed by the state or is it acting on its own initiative? In Europe, long before the emergence of the neutral state, the Church had to brace itself against the anthropocentric ideas of humanism and the secular ideas of the new physics, not to mention the pressure to secularize exerted by the capitalist economy and a bureaucratized administration, while having to cope with the deep crisis of an internal schism. The neutralization of state power vis-à-vis worldviews was only the political response to the irreconcilable wars of religion. This not only served the state's interest in maintaining law and order but also responded to the need of the religious communities themselves to subject their traditional self-understandings to revision in an environment marked by a heightened critical consciousness.

The freedom of religion in the liberal state, generalized into a civil right, not only defused the political threat of the pluralistic polity being torn apart by conflicting worldviews but also provided religious communities seeking a place within the differentiated structure of modernity with an institutional framework for solving their own problems. The political solution ensuring the equal coexistence of the feuding religious powers consisted in a conception of tolerance that took into consideration the absolute – hence, non-negotiable – character of the validity claims raised by religious convictions. For tolerance must not be confused with indifference.

An attitude of indifference toward alien beliefs and practices or esteem for the other in her otherness would render something like tolerance superfluous. Tolerance is expected of those who reject the convictions and practices of others for good subjective reasons, in the awareness that it is a matter of a cognitive, though in the long run irresolvable, disagreement. However, prejudices do not count as legitimate grounds for rejection; tolerance is only required and is only possible if those involved base their rejection on a *reasonable* persisting disagreement. We do not respond to racists or chauvinists with calls for more tolerance, but with the

demand that they overcome their prejudice.[57] These specific requirements are clearly accommodating toward the dogmatic stance of religious communities. But what price must the latter pay for this? What is demanded of those who benefit from the tolerance of others?

With the basic right of free exercise of religion, the liberal state seeks to decouple from the social level a cognitively irreconcilable disagreement among believers, members of different confessions, and unbelievers so that it does not affect social interactions among the citizens of the political community. For the state, the point is to defuse the social destructiveness of a conflict of worldviews by largely neutralizing their impact on actions and interactions. For religious communities, by contrast, the fact that the state recognizes the legitimacy of the persisting disagreement is important. This guarantees them the leeway to adopt – from the internal perspective of their own doctrines whose substance remains unaffected – a cognitively intelligible stance toward the beliefs of other religious communities and toward the modes of thought and interaction in their secular environment. In this way, the functions that legally guaranteed tolerance fulfills for the one side complement those it fulfills for the other. It promotes the self-assertion of the religious communities in a progressively modernizing society as much as it does the political survival of the liberal state. But, once again, what price do the religious communities pay for this leeway for self-transformation? Are the conditions of possibility not at the same time unreasonable restrictions?

Every religion is originally a "*world*view" or "comprehensive doctrine" in the sense that it claims authority to structure a form of life *in its entirety*. A religion must relinquish this claim within a secularized society marked by a pluralism of worldviews. With the functional differentiation of social subsystems, the life of the religious community also becomes detached from its social surroundings. The role of "member of the community" becomes

[57] See Rainer Forst, "Toleration, Justice and Reason," in Catriona McKinnon and Dario Castiglione (eds), *The Culture of Toleration in Diverse Societies* (Manchester: Manchester University Press, 2003).

differentiated from the role of "member of society." And since the liberal state depends on a political integration of citizens that goes beyond a mere *modus vivendi*, this differentiation of memberships must not be confined to a cognitively undemanding conformity of the religious ethos to the *imposed* laws of the secular society. The formation of religious communities harmonizes with the secular process of socialization only when – also from the internal perspective – corresponding statements of norms and values are not only differentiated *from one another*, but when one statement follows consistently *from the other*. John Rawls chose the image of a module to describe this "embedding" of the egalitarian universalism of the legal order in the ethos of the various religious worldviews: the module of secular justice should fit into each orthodox context of justification even though it was constructed with the help of reasons that are neutral toward different worldviews.[58]

However, such a cognitive differentiation of the egalitarian social morality from the communal ethos is not just a normative expectation with which the state confronts the religious communities. Rather, it coheres with their own interest in asserting themselves within modern society and in gaining the opportunity to exercise independent influence on the society as a whole via the political public arena. By participating in national debates over moral and ethical questions, religious communities can foster a postsecular self-understanding of society as a whole in which the enduring vitality of religion in a progressively secularizing environment must be reckoned with.

Nevertheless, the question of whether the religious community must pay an unfair price for this from the perspective of civic equality is not yet answered. The imposition implied by the demand for tolerance has two aspects. Everyone is permitted to realize her own ethos only within the limits required by equal ethical liberties for all. Consequently, everyone must also respect the ethos of others within these limits. One is not required to accept the rejected views of others, since one's own truth claims and certainties remain untouched. The imposition results not from relativizing one's own convictions, but from restricting their

[58] Rawls, *Political Liberalism*, pp. 58ff.

practical effects; it is an implication of being allowed to realize one's own ethos only within limits and having to accept the practical consequences of the ethos of the other. But these burdens of tolerance do not fall equally on believers and unbelievers.

For the consciousness of the secularized citizen traveling with light metaphysical baggage who can accept a morally "free-standing" justification of democracy and human rights, the "right" can without difficulty be accorded priority over the "good." Under these conditions, the pluralism of *ways of life* in which each different worldview is reflected does not give rise to any cognitive dissonance with one's own ethical convictions. For from this perspective, different forms of life only embody different *value orientations*. And different values are not mutually exclusive like different *truths*. So secular consciousness has no difficulty in recognizing that an alien ethos has the same authenticity and the same priority for the other that one's own ethos has for oneself.

The situation is different for the believer who draws her ethical self-understanding from religious truths that claim universal validity. As soon as the idea of the correct life takes its orientation from religious paths to salvation or metaphysical conceptions of the good, a divine perspective (or a "view from nowhere") comes into play from which (or from where) other ways of life appear not just different but *mistaken*. When the alien ethos is not merely a question of relative value but of truth or falsity, the requirement to show each citizen equal respect regardless of her ethical self-understanding or her lifestyle becomes a heavier burden.

That the expectation of tolerance does not have a neutral effect on believers and unbelievers is not surprising but as yet does not reflect an injustice *per se*. For the burden is not one-sided. A price is also demanded from religiously tone-deaf citizens. The understanding of tolerance in liberal pluralistic societies requires not only believers to recognize that they must *reasonably* reckon with the persistence of disagreement in their dealings with adherents of other faiths. The same recognition is also required of unbelievers in dealing with believers. For the secular consciousness, this implies the nontrivial requirement to determine the relation between faith and knowledge *self-critically* from the perspective

of secular knowledge [*Weltwissen*]. For the expectation that the disagreement between secular knowledge and religious tradition will persist merits the title "reasonable" only if religious convictions are accorded an epistemic status as not simply "irrational" from the perspective of secular knowledge.

The guarantee of equal ethical liberties calls for the secularization of state power, but it forbids the political overgeneralization of the secularized worldview. Insofar as they act in their role as citizens, secularized citizens may neither fundamentally deny that religious worldviews may be true nor reject the right of devout fellow-citizens to couch their contributions to public discussions in religious language. A liberal political culture can even expect its secularized citizens to participate in efforts to translate relevant contributions from the religious language into a publicly accessible language.[59] Even if these two expectations did not fully counterbalance the non-neutrality in the effects of the principle of tolerance, a residual imbalance does not place the justification of the principle itself in question. For in the light of the glaring injustice that is overcome by abolishing religious discrimination, it would be disproportionate of believers to reject the demand for tolerance because its burdens are not shared equally.

This observation paves the way for a dialectical understanding of cultural secularization. If we conceive of the modernization of public consciousness in Europe as a learning process that affects and changes religious and secular mentalities alike by forcing the tradition of the Enlightenment, as well as religious doctrines, to reflect on their respective limits, then the international tensions between major cultures and world religions also appear in a different light. The globalization of markets, the media, and other networks no longer leaves nations any realistic prospect of opting out of capitalist modernization. Neither can non-Western cultures evade the challenges of secularization and a pluralism of worldviews generated by an inadequately regulated process of modernization that they also actively pursue. They will only be able to assert their cultural distinctiveness against a capitalist world

[59] See Habermas, "Faith and Knowledge," in *The Future of Human Nature*, trans. Hella Beister and William Rehg (Cambridge: Polity, 2003).

culture shaped by the West by finding paths to "alternative modernities." But this means that they will be able to use their own cultural resources to resist the leveling violence *from the outside* only if the religious consciousness in these countries also opens itself up to modernization *from within*.[60] The challenge for these cultures is to find functional equivalents for the European innovation of the separation of church and state in responding to similar challenges. To the extent that they are successful, their constructive adaptation to imperatives of social modernization will not represent a submission to alien cultural norms any more than the change in mentality and detraditionalizing of religious communities in the West was merely a submission to liberal norms of equality.

[60] Charles Taylor, "Two Theories of Modernity," *Public Culture* 1 (1999): 153–74.