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The logic of aboriginal rights

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ABSTRACT Are there any aboriginal rights? If there are, then what kind of rights are they? Are they human rights adapted and shaped to the circumstances of indigenous peoples? Or are they specific cultural rights, exclusive to members of aboriginal societies? In recent liberal political theory, aboriginal rights are often conceived of as cultural rights and thus as group rights. As a result, they are vulnerable to at least three kinds of objections: i) that culture is not a primary good relevant to the currency of egalitarian justice; ii) that group rights are inimical to the moral individualism of liberal democratic societies; and iii) that pandering to group interests provides incentives for abuse and undermines the conditions required for promoting liberal egalitarian outcomes. My argument is that a successful defense of aboriginal rights will tie them to the promotion of the equal freedom of aboriginal people, both in the formal and substantive senses, and thus to improvements in their actual wellbeing, both as 'peoples' and individuals. But rights and norms interact in complex ways, and the translation of particular individual and social goods into the language of rights is always fraught with difficulty.

KEYWORDS equality ● freedom ● indigenous peoples ● norms ● rights

Are there any aboriginal rights? If there are, what kind of rights are they? Are they legal rights granted by the state? Are they human rights adapted and shaped according to the circumstances and self-understanding of indigenous peoples? Or are they specific cultural rights, exclusive to members of aboriginal societies? From the perspective of indigenous peoples, at least as I understand it, their rights stem from their own collective lives, self-understandings, political philosophies and practices. And they are justified in light of them. From the outside, however, they refer to a bundle of specific interests that need to be justified to others. In law they refer to a complex amalgam of common law rights, treaty rights (in some, but not all circumstances), basic rights and the collective human right of

self-determination. I shall try to lay out these various lineaments below. But what makes them *aboriginal* rights as opposed to just rights? How do they fit with other kinds of rights, like general citizenship rights? And in what sense are others under a duty to respect them?

In recent liberal political theory, aboriginal rights are often conceived of as cultural rights and thus as group rights. As a result, they are vulnerable to at least three kinds of objections: i) that culture is not a primary good relevant to the currency of egalitarian justice; ii) that group rights are inimical to the moral individualism of liberal democratic societies; and iii) that pandering to group interests provides incentives for abuse and undermines the conditions required for promoting liberal egalitarian outcomes. I shall address these objections below.

I am also concerned with the nature of rights in general. How does the language of rights help or hinder the claims made by indigenous peoples? A crucial feature of the discussion below is the relation between rights and norms. Rights are often opposed to norms in the sense that the former are universal and the latter particular. But norms shape not only our understanding of what rights mean, but when it is appropriate to claim or insist on them. So how do norms insinuate themselves into choices and, conversely, how do rights reshape social and cultural norms?

THE NATURE OF RIGHTS

There is no definitive or categorical account of a right, and yet rights discourse is one of the most powerful discourses in contemporary domestic and global politics. But there is a difference between saying that the nature of rights is conceptually ambiguous and that it is essentially empty. For some, rights have deep conceptual and normative roots in the kinds of people and institutions characteristic of liberal democratic societies – free, dynamic, individualistic and pluralistic. Rights acknowledge the inherent fact of equal human agency (Ignatieff, 2001: 163–4). In this sense, they are foundational to and can be used as a means of evaluating basic political institutions and practices. For others, the connection between rights and human agency is more contingent and functional. Relations of power are constitutive of social and political practices and so too of our practices of rights. Hence rights can serve a strategic function in practices of freedom, but are not foundational to political analysis and thus should enjoy no privileged analytical or normative position within it. Rights are derivative of some more general story about human wellbeing, a theory of justice or power (or all three).

If one's understanding of rights is something like the first of these, then the problem of whether there are any aboriginal rights is potentially acute.

What work does the modifier 'aboriginal' actually do here? There may be conceptual and normative constraints on what you understand a right to be, such that the very idea of an aboriginal right is deeply confused. On the other hand, if your view tends towards the second, as mine does, then you are faced with a similar type of question, but this time from a very different direction: what is *the point* of appealing to the language of rights given the fact that it offers only a contingent and potentially highly contestable source of support for the kinds of claims that indigenous peoples are making? Rights are valuable, I shall argue, to the extent that they protect or promote certain crucial interests that individuals and groups have. These interests have to be important enough to impose duties on others to either perform or forbear from certain kinds of actions, and, to be effective, they will have to be legally enforceable. This is true of both negative and positive rights, since even negative rights of forbearance – for example, those to do with property rights – require active governmental protection and intervention (see Geuss, 2001: 131–52; Holmes and Sunstein, 1999).

Aboriginal and non-Aboriginal theorists, as well as those on the left and the right, are often skeptical about aboriginal rights. The conceptual trimmers fear inflation and worry about linking the notion of rights to culturally-specific claims at all, since this detracts from the values of equality and universality which they argue are central to our understanding of them. Aboriginal theorists, on the other hand, such as Taiaiake Alfred, argue that aboriginal rights are merely the 'benefits accrued by indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state' (1999: 140; see also 57–8; for a contrary view, see Behrendt, 2001a; Borrows, 1997; Williams, 1990). In Australia, Noel Pearson (a prominent Aboriginal activist, community leader and lawyer) has argued that the focus on aboriginal rights and especially the right to self-determination has deflected attention from the deep social and economic problems afflicting indigenous communities. The focus on rights might have even made things worse.¹ These are powerful criticisms and point to how rights exist within various kinds of relations of power, as opposed to standing over or outside of them.

On my view, claims about rights are about entitlements of some kind and have basically a quadratic structure (Shapiro, 1986). To say A has a right to X is to commit yourself to providing an account of: i) who or what is the subject of the entitlement; ii) what is the substance of the entitlement; iii) what is the basis of the entitlement; and iv) what the purpose of the entitlement is. Thus, two of the most influential analytic accounts of rights in recent years – the 'choice' and 'interest' accounts of rights – reflect different substantive relationships between these variables. According to the choice account, for example, the concept of a right refers to an uncontested domain of choice for the individual and consists in the 'normative allocation of freedom', as Hillel Steiner puts it (Kramer et al., 1998: 238). To be a rights

bearer is to have control over the duty in question in the sense of being able to demand or waive the performance of an action. For Hart (1984), a 'right to liberty' is fundamental to and presupposed by all other claims about individual rights, and rights claims are therefore incapable of being attributed to things that cannot exercise the powers and waivers central to this account, such as babies, the very old, horses or a forest. This clearly isn't a value-free account of rights, but rather one intended for modern, market-based liberal societies, where there is a concern to protect the formal structure of the law from being encroached by the fickle demands of policy (Kramer et al., 1998: 213). Thus, to protect the 'integrity' of rights, and particularly the pre-emptory value of choice, rights should be seen as a set of protected options – or negative freedoms – that stand independently of other kinds of interests.

According to the interest account, on the other hand, the value of choice may be an important interest, but not pre-emptory, and thus it will have to be balanced against other interests as well. To say A has a right to X is to say that someone else has a duty to perform some act (or omission) that is in A's interest.² The interest has to be such that its protection or advancement can be accepted as a reason sufficient for holding some other person(s) to be under a duty. To appeal to a right is not to have already justified the interest in question, but rather to be asserting it, and thus some further justification has to be forthcoming. This moves us much more directly into the domain of contested moral beliefs than the choice theory does and is all the more plausible for it. It also brings to the fore the mutability and contestability of claims about interests, and thus about rights, and highlights the inherent indeterminacy of the language of rights. As we shall see, this indeterminacy offers room for the flexible adaptation of rights to new circumstances and contexts.

WHAT ARE ABORIGINAL RIGHTS?

I think the interest theory of rights is a good approach for thinking about aboriginal rights in general for two reasons: first, because rights are not self-justifying, and this approach focuses our attention explicitly on the underlying interests involved and the moral arguments required to justify those interests; and, second, because since interests clearly change over time and according to different circumstances, we should expect our understanding of rights to be similarly mutable. Both point to the contestability of rights claims and also to the way that they always stand within politics and relations of power instead of outside of them.

Our challenge then is to answer three questions: i) what are the interests at stake with regard to aboriginal rights?; ii) why are they important enough

to put others under a duty?; and iii) who in particular acquires these duties?³ Before moving directly to a consideration of these questions, let me say something more about the ambiguity inherent to the notion of ‘aboriginal rights’ in the first place.

A challenge facing anyone defending aboriginal rights is in making clear what we mean when we call them *aboriginal* rights. Two general avenues present themselves: first, one can appeal to the historical, cultural and political specificity of the interests to which the claims appeal – in other words, to indigenous difference; and, second, one can appeal to general or human rights and argue that aboriginal rights are a species of these kinds of rights in that they refer to interests that everyone deserves to have protected or promoted (*qua* human).

Note some of the dangers in choosing the first avenue to the exclusion of any other. If indigenous peoples are owed rights on the grounds of their radical ‘otherness’ from Europeans and of their having suffered grievous harm as a result of this otherness, then it is not clear whether, if their circumstances change or they borrow from other cultures and traditions, they thereby undermine the basis of the cultural distinctiveness that is said to give rise to these rights. So the second avenue seems a more promising route to travel, but raises various difficulties of its own.

Let me turn to a more detailed treatment of the kind of justifications we find at this point. Consider first the ‘common law doctrine of aboriginal rights’. In recent Canadian jurisprudence, at least, this refers to the legal rights of aboriginal peoples as they were recognized in the custom generated by relations between aborigines and incoming French and English settlers from the 17th century onwards and especially in the treaty process initiated between them and the Crown (although treaties were not struck with all indigenous nations). According to Brian Slattery, the doctrine of aboriginal rights is a basic principle of Canadian common law which ‘defines the constitutional links between the Crown and aboriginal peoples and regulates the interplay between Canadian systems of law and government and native land rights, customary laws and political institutions’ (Slattery, 1987: 732).

As Slattery and others explain, this doctrine emerged out of three broad sets of circumstances: i) the realities of life in North America in the 17th and 18th centuries and the uneasy interdependency that often existed between colonial and aboriginal societies; ii) the broad rules of equity and convenience; and iii) imperial policy. These emergent principles ‘were part of a special branch of British law that governed the Crown’s relations with its overseas dominions, commonly termed “colonial law” or “imperial constitutional law”’ (1987: 736–7). These rules, Slattery claims, form a body of unwritten law known as ‘the doctrine of aboriginal rights’ (the part dealing specifically with land being the ‘doctrine of aboriginal title’ and the other parts dealing with treaties, customary law, powers of self-government

and the fiduciary role of the Crown). The crucial legal point is that this doctrine applied automatically to a new colony when it was acquired and 'supplied the presumptive legal structure governing the position of native peoples'. In other words, 'the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law ... [and] limits and moulds the application of that law to native peoples' (1987: 737–8). Slattery argues that this provides the legal basis for the survival of 'native customary law' in Canada (as it does, by analogy, in Australia as well, although important historical, constitutional and legal differences remain). This doctrine was recognized by the courts to varying degrees from the 19th century onwards, but only really came into play in Canada with the *Calder* decision in 1971 and arguably in Australia with the *Mabo* decision in 1992 (Iverson, 1997).

On this reading, the doctrine of aboriginal rights is a body of intersocietal law – a 'bridge constructed from both sides', as the Canadian *Report of the Royal Commission on Aboriginal Peoples* (1996) puts it – based on the original rights of aboriginal nations as these were recognized by the various imperial and colonial powers. The rights to which it refers – to land, to fish and hunt, to special linguistic, cultural and religious rights, to the continuity of aboriginal law and to the right of self-government – are 'inherent' in that they originate 'from the collective lives and traditions of these people themselves rather than from the Crown or Parliament' (*R v Sparrow*, 1990) and are to be 'interpreted flexibly so as to permit their evolution over time' (*Report of the Royal Commission on Aboriginal Peoples*, 1996). This is a crucial feature of aboriginal rights that has been frequently emphasized by indigenous activists and leaders. These rights coexist with those of the Crown and do not derive from them (*Report of the Royal Commission on Aboriginal Peoples*, 1996: 675–95; Venne, 1998; Yunupingu, 1997).

Now, as a *common law* doctrine, this means that aboriginal rights are vulnerable to being overridden or modified by legislation, subject to any constitutional barriers and usually to payment of compensation. But even when constitutional or legislative barriers exist, rights are still sensitive to government reasons for action – as indigenous peoples have always known, even with the arrival of the Canadian Charter of Rights and Freedoms in 1982 and in Australia since 1993 with the passage of the Native Title Act. So the 'reconciliation' of aboriginal rights with Crown sovereignty remains controversial.

Thus, one very influential way of understanding aboriginal rights is to think of them as common law rights – as legal rights, in other words, that emerge from a complex cross-cultural practice of treaty-making – and as being already inside and thus enforceable by the law, seen now as a body of intersocietal law.⁴ This is a legal argument, but it has also been invoked as a normative model as well, most notably by James Tully (1995) and also, albeit to a different extent, by Jacob Levy (2000). The idea here is that the

common law approach offers a context-sensitive and complex intersocietal model for thinking about cross-cultural negotiations. For Tully, this means picking out those norms that emerge out of actual negotiations between *peoples*, given the particular historical and political situation between them. Aboriginal rights, according to this reading, form the basis of treaty negotiations between indigenous peoples and the state and are not derivative from it. For Levy, on the other hand, the common law approach presupposes the legitimacy of the extant sovereignty of the Crown and merely offers a hospitable structure for hosting distinctive indigenous property rights, which are ultimately subject to the regulation of (and potential extinction by) the state, given the need to protect the interests of *persons*.

Note two general issues concerning the common law approach here. If it is aboriginal difference that justifies the interests that aboriginal rights are said to protect, then they may be required to stick very closely to those values, practices and institutions associated with aboriginal societies prior to their contact with European ones (Asch, 1999: 436–7), which may restrict their capacity to adapt and develop those interests in light of contemporary realities (for example, should an aboriginal right to fish on certain waters extend only to ‘ceremonial’ purposes or include the right to fish commercially?). Or, if the argument entails granting exclusive rights to peoples, this may threaten the interests of vulnerable or less powerful members of those groups. On the other hand, as we have seen, the common law usually presupposes the legitimacy of the extant sovereignty of the Crown. But how can this be reconciled with the fact that, prior to first contact with Europeans, natives were, as one Canadian judge put it recently, ‘independent nations, occupying and controlling their own territories’ (*R. v van der Peet*, 1996: para. 106)? When did they give up those self-government rights or have them extinguished and on what basis?

Hence the attraction of broadening our understanding of aboriginal rights to include reference to more abstract principles associated with human and political rights. If aboriginal peoples have rights as peoples to self-determination in international law or according to the values of freedom and equality, then the common law incorporation of aboriginal rights can be understood differently. If indigenous peoples were sovereign and self-determining at the time of settlement, then Crown sovereignty could only be reconciled with their sovereignty through some mechanism of consent, or at least through means consistent with their freedom and equality. History tells us that this did not occur, but the ideal serves as a counterfactual for rethinking relations in the present.

So let us return to the three questions posed at the beginning of this section. The interests to which aboriginal rights refer are a bundle of specific rights to do with ownership and control over their lands and the various activities that occur on those lands; with political rights of self-government; and with their rights as citizens of both aboriginal nations and

the wider country in which they reside. The interests will be normatively compelling insofar as they protect and promote the basic interests of indigenous peoples, both individually and collectively. The duty of protecting these rights falls upon the Crown (the state), aboriginal governments, aboriginal and non-aboriginal citizens and, to a lesser extent, the international community (in upholding basic human rights, the state has committed itself to protecting these through various international treaties and covenants).

SOME OBJECTIONS

There are three sets of objections to aboriginal rights: legal, conceptual and normative. I shall deal with the first two relatively quickly here and then turn to the third, to do with the nature of group rights, in the next section.

Legal objections to aboriginal rights take aim at revisionist claims about the intersocietal basis of constitutional law and the validity of aboriginal title and laws after the imposition of British sovereignty (at least in North America and Australasia). Thus, one objection to aboriginal rights is that they are merely those positive rights granted by the Crown and enforceable according to the extant legal system. Any so-called 'inherent' rights, such as they are, were extinguished by the imposition of sovereignty at the time of settlement through the doctrine of discovery. From a strictly legal perspective, however, this argument has been rejected, albeit slowly and unevenly, by US, Canadian, New Zealand and Australian courts in the face of fairly strong historical and legal evidence. The courts have acknowledged that various kinds of aboriginal legal interests, especially concerning property, did in fact survive settlement and continue today. The question of sovereignty remains unclear and intractable, at least as a legal matter, because courts are not in a position to easily question the basic sovereignty of the state (hence the importance placed by indigenous peoples on political negotiations with the state and in international forums such as the United Nations).

Conceptual objections focus on the apparent incoherence of linking the notion of a right to claims that are not clearly tied to interests to do with individual choice and freedom. Thus, according to this argument, 'aboriginal rights' are an example of the grievous inflation of the currency of rights. The defender of aboriginal rights has erred according to some established common usage of the word 'right', but this holds only if there *is* some agreed-upon currency in the first place. Try as the 'will' or 'choice' theorist does to insist that there is, there clearly is not.

Ontological objections to aboriginal rights presume that they are inherently collective in nature. If so, according to this objection, then they violate

the essentially individualistic nature of rights and the moral individualism and ontology of liberalism more generally. Conversely, if liberal rights are inherently individualistic, and aboriginal political theory is not, then, from an aboriginal perspective, they are ill-suited to promoting aboriginal ends (Alfred, 1999; cf. Borrows, 1997). Once again, the problem is not a conceptual one, since there is no intrinsic reason against assigning rights to groups, as it is clear that, among the goods that individuals value, are collective goods and thus it is plausible to think this might entail group rights. From a practical perspective, our legal and political system is full of group rights. The more precise worry is about the kinds of group rights that aboriginal rights might entail and whether these are consistent with liberal norms more generally. Let's look at this question a bit more carefully.

GROUP RIGHTS

Rights are reason-dependent claims, and these reasons draw on both individual and societal interests. To use some familiar examples, a right to free speech can be defended in terms of the value of autonomy, or the marketplace of ideas, or the social conditions necessary for exercising free and uninhibited speech, including the capacity of marginalized groups to participate in public discourse. Some of these arguments refer not only to the interests of the individual beneficiary – the right holder – but also to society more generally. A right to property can be justified in terms of the value of autonomy, but also in terms of promoting economic prosperity. And so on.

To be sure, the rights mentioned above also immunize the choices and decisions of individuals from state interference and from the smothering conformity of what Locke calls 'the law of opinion'. It may be that certain so-called 'core rights' are best justified on the basis of individual interests alone,⁵ but it is difficult to detach the value of individual rights entirely, even the classic liberal rights, from collective interests or public goods (see Raz, 1994). Freedom of speech, assembly and religion all contribute to the good of democratic legitimacy and the creation of (potentially) liberal and tolerant cultures.⁶ These basic rights often do promote cultural or societal heterogeneity, but their presence is not necessarily a sufficient condition for it. For example, individual behavior that falls too far outside the bounds of the norms and values of the dominant culture is unlikely to be protected by individual rights. In fact, individual rights can often serve to *align* individual behavior with collective norms and values as much as immunize it from them (Post, 2000). A right to sue for defamation or invasion of privacy aligns behavior with cultural beliefs about decency or civility. Certain kinds of speech (for example, 'fighting words') may fall outside the moral, but also partly cultural bounds of individual rights to freedom of speech. And

a right to be immunized from certain kinds of interference might embody various cultural norms or assumptions about the proper scope of law or government or the line between public and private, as feminist critics point out. Thus, where a dominant culture exerts a strong or even hegemonic influence, individual rights may do little to promote or protect diversity. Dominant languages drive out minority ones when the cost of protecting or promoting the latter becomes too high. Communal ownership of land can be made increasingly difficult in a legal and political system that promotes individual ownership above all else.

These kinds of concerns characterize the recent surge of work in political philosophy on group rights. The relation between group and individual rights is complex.⁷ Sometimes group interests are best protected by assigning legal rights to individuals, such as when we protect the collective right of a group by assigning legal rights to individual members to engage in group-specific activities. At other times, a group right protects group interests by being assigned to the group and not its individual members, as, for example, when we say that 'aboriginal title' (or 'native title') lies with the tribe rather than its members.⁸ This empowers groups and puts incentives in place for them to organize themselves in order to be recognized by the state as possessing the appropriate legal and moral standing. Thus, group rights, like individual rights, may or may not promote cultural and societal heterogeneity. Group rights are compatible with the loose moral individualism of liberalism as long as those rights can be connected to promoting or protecting the legitimate interests of individuals in some way – interests they have qua individuals, but also those they might share jointly with others (and which are not simply those private interests that happen to be shared by everyone).

One way to think of the differences here is to distinguish between 'collective' and 'corporate' conceptions of group rights.⁹ On the collective conception, a group right serves to protect or promote those interests that individuals have jointly with others and that are sufficient to impose duties upon others. The right is held by the group, but the interests that make the case for the right are the separate (although identical) interests of the group's members. The moral standing required for the rights claim is provided by the moral standing of the several individuals that make up the group. According to the corporate conception, on the other hand, the moral standing is ascribed to the group as such. The right is not held jointly by the individual members, but by the group as a unitary entity.

When we think of a group right in this corporate sense, the interests or values it serves are independent of the legitimate interests of the individuals who identify or associate with it. This can amount to saying that a culture or group is intrinsically good and worth preserving regardless of the desires, beliefs or interests of the individuals who identify with it. Sometimes the value of a nation or a people is defended in these terms. If so, then these

kinds of group rights appear to be in conflict with basic liberal norms. So where does this leave the defender of aboriginal rights? Are they necessarily committed to the corporate conception of group rights? One example might be the right to self-determination. On the corporate conception, this right is owed to the group independently of the claims of individual members. The right is universal insofar as it is held by all tokens of the corporate type (Jones, 1999a: 89). On the collective conception, the right is held jointly by the individuals who make up each nation or people and will be grounded in the interests they share in living in a self-determining political community because of the connections between self-determination and individual wellbeing, or at least the right not to be oppressed or discriminated against in various ways. The right is universal insofar as the interests it serves are universal to all human beings. Thus, if aboriginal rights include group rights in the collective as opposed to the corporate sense, then they are compatible with a family of liberal arguments about human rights (although there may still be deep disagreements over the kinds of interests at stake). The limits to any local 'hybridization' of rights are established with reference to these collective interests.

However, it is also clear that indigenous peoples' rights are often spoken of in the corporate sense. One reason for this is to do with imputing identity across time. A cultural group may claim a group right in order to ensure its survival into the future, as opposed to its mere security in the present. Aboriginal property rights, which reside in the group as opposed to the individual members per se, seem to require a corporate identity stretching back into the past and forward into the future. Group rights premised on reparating a people or tribe for historical wrongs seem to require this too, since it refers to a possessor not entirely reducible to the current members of the group (see Ivison, 2002: Ch. 5; Jones, 1999b: 367). The self-understanding of a group often takes on this corporate cast. So as much as a conceptual distinction can be drawn between collective and corporate group rights, in practice they can become entwined and difficult to separate.

One prominent example of the corporate conception at work can be found in John Rawls's *The Law of Peoples* (1999) insofar as he treats 'peoples' as the fundamental moral unit of international society. For Rawls, there is an analogy between the restriction on appealing to comprehensive doctrines at the domestic level to justify the coercive institutions of the state and, at the international level, with regard to justifying international law. He does not think that this means that human rights are impossible, just that they will have to form a narrower subset of rights common to all 'decent' societies as opposed to fully liberal ones – 'decent' in the sense of falling short of satisfying liberal principles of justice, but not too far short.¹⁰ So Rawls is willing to take the corporate identity of groups seriously and then try to balance it against other kinds of interests that liberals seek to protect.

Rawls's theory has been subject to extensive criticism. One general problem is that, as a theory of international justice, it seems to tolerate far too much, including discrimination against minorities, wide disparities in political power and undemocratic political arrangements. More specifically, the analogy between the domestic case and the international one breaks down. First, according to Rawls, the kind of pluralism that is relevant to a theory of justice at the domestic level is *reasonable* pluralism, which is a product of the free exercise of reason under free institutions (Rawls, 1993: 144; see also Caney, 2002: 106). But decent societies do not necessarily have free institutions, especially those relevant to the 'free exercise of reason'. This undermines the basis for toleration at the international level. Second, Rawls sometimes suggests that, given the fact that decent societies are open to internal non-violent change, we create the conditions in which the evolution of their institutions in a liberal direction becomes more likely by treating them as equal members of international society (Beitz, 2001: 276–7). Again, this seems to be analogous with the domestic case in which the (state-enforced) right of exit and the liberalizing effects of liberal public policies on non-liberal ways of life mitigate the toleration of non-liberal groups by putting in place indirect incentives towards liberalization.¹¹ But again the analogy breaks down, since the right of exit and the indirect liberalizing effects of liberal public policies are absent in the international sphere or at least severely constrained (Tan, 1998: 292–4).

Suppose, however, that we apply the general spirit of Rawls's argument to the situation concerning indigenous peoples in liberal states. These are quasi-international relations since, as we have seen, although these groups lack external sovereignty, they claim jurisdictional rights or political authority independent of the state. The general claim would be that there are no grounds for interfering in indigenous societies as long as they remain 'decent' ones. Moreover – and here is a critical difference – since indigenous people also possess basic citizenship rights in addition to any special rights they have qua membership of an indigenous community, the consequences of tolerating non-liberal practices are less severe than in the pure international case. First, internal dissenters would have a guaranteed right of exit, backed up by the state, but also the indirect effects of liberal practices in the wider community would be greater in this context, since indigenous groups would not be able to completely insulate themselves from them.¹² So here is an example in which a corporate conception of group rights is balanced against the concern for protecting individual liberal rights.¹³ Still, it's a difficult balancing act.

Consider an example for a moment. Suppose a young aboriginal girl is brought up with the expectation that at an appropriate age (say, at 13) she will be 'promised' to another man as his wife and with whom she will be expected to live and have sexual relations.¹⁴ Assume, for argument's sake, that the laws and rules governing this relationship are widely known and

accepted in the remote community in which she lives, including by her parents and her extended family. But even in being brought up to know 'what is expected of her', she might, in fact, be unhappy or uncertain about the arrangement and want to get out of it. Maybe she *is* unhappy about the arrangement, but doesn't say anything and goes along with it for the sake of her family. Maybe she *isn't* unhappy about the arrangement and doesn't even question it. Even if the relationship is morally correct relative to aboriginal customs – assuming that it is and that there are not conflicting judgements about what is entailed in these circumstances (which is usually not the case, as I shall return to in a moment) – whose interests should prevail? Looking at it from the outside, in being 'promised' to someone in the first place, various of the girl's crucial interests to do with her freedom and autonomy (her capacity to decide whom to marry, where to live, and so on) have been grievously violated. We might think that the problem runs even deeper, just insofar as the various informal conventions and norms within that community lead her to think it is reasonable that she should have very little control over whom she can marry or have sex with (see Okin, 1999). What are her options? Go ahead with it despite her misgivings? Ask the police to prosecute the 'husband'? (According to criminal law, if her 'husband' has sex with her, he is probably committing rape.) Leave her community? Try to change these customs and laws from within? All require tremendous courage and strength on her part and all have significant costs, most of which she will have to bear for herself. What kind of considerations should guide liberal judgements in these particular cases?

I take it that the best solution would be to enable or empower her to promote cultural change or accommodation of her interests from within, such that she is not forced to choose between staying and losing her freedom or leaving in order to gain a different and perhaps more difficult freedom elsewhere. And this becomes more plausible when we realize that, more often than not, the moral grounds for these practices within the culture are much less clear and more contested than assumed. There are a range of possibilities between coercive intervention and simple tolerance that could be considered. Any solution should include the broadest possible deliberation and consultation among all the parties involved, especially the young women themselves. Coordinate jurisdiction, for example, might create incentives that force community leaders to take into account the interests of more vulnerable members of the group, but that also provide 'escape clauses' or 'reversal points' that individual members can invoke to protect their basic interests (Iverson, 2002; Shachar, 2001; cf. Okin, 1998). Of course, if these shared arrangements are impossible and the situation serious enough, coercive intervention or exit may remain the only option.

Still, it might be that the kinds of 'localized' rights that would emerge under such a regime would be objectionable for other kinds of reasons. First, if aboriginal rights can be held only by aboriginal people, whether

flowing exclusively from their distinctive customs and laws or as a collective right to self-determination, does this not mean that rights are being assigned according to descent (i.e. race), which violates basic notions of fairness and equality before and under the law? And does this not entail a form of biological or cultural essentialism that locks people into presumed 'customary' practices or communities and being treated as a member of a group whether they want to be considered thus or not (Barry, 2001)? The short answer is 'no', although there are always risks when institutionalizing group rights – collective or corporate. First, indigenous peoples should not be seen as fundamentally racial entities, but rather as political or, perhaps more precisely, as *constitutional* ones. Historically, for example, the membership rules of indigenous societies were not usually racist and included various means of incorporating new members from different ancestries and cultural backgrounds.¹⁵ Thus, the grounds for treating indigenous people differently when it comes to the distribution of resources, including land and sovereignty, are not based on race, but on historical and normative considerations. They share a collective right to self-determination on the basis of the interests that ground the right; namely, the value – in terms of its contribution to individual wellbeing – of living in a self-determining community. The fact that interests are the test here is important. They remain sensitive to the views of the members who make up the group in question and they have to be weighed against other considerations, including the consequences of self-determination for those who don't identify with the group, but are affected by its claims.

But if indigenous peoples have political rights to self-determination, then how can they also have equal rights to participate in Australian or Canadian forms of government and citizenship? And don't group rights, whether corporate or collective, by providing protection for distinctive political and cultural identities, fly in the face of the kind of civic commitment required to realize liberal egalitarian ends? Barry, for example, argues that, in the case of the Pueblo, 'to be a Pueblo Indian is to have a legal status that is equivalent to citizenship in a state' (albeit a 'sub-state with delegated powers') (2001: 189). The Pueblo cannot enjoy all of the constitutional guarantees of US citizenship except by giving up 'their special rights that flow from their Pueblo Indian citizenship'. Since aspects of Pueblo citizenship, such as a religious test determining the receipt of membership benefits, violate liberal principles of justice, in order to retain their 'special political status', the Pueblo 'should be required to observe the constraints on the use of political power that are imposed by liberal justice' (2001: 189). For Barry, the Pueblo are perfectly free to form themselves into a religiously exclusive community given liberal rights of freedom of association and religion, but they cannot combine religious exclusivity with the exercise of political power. In short, aboriginal rights undermine the equality and freedom of individuals at the heart of liberal

conceptions of citizenship. They also threaten the civic unity required for effective and broadly-based social and economic programs aimed at providing equal opportunity for all.

Barry therefore presents a sharp normative challenge to defenders of aboriginal rights. What is the nature of the *fit* between aboriginal rights and more general citizenship rights? Again, the problem is not exclusively one of a clash between collective and individual goods. Both aboriginal rights and citizenship rights are collective rights of a kind, since both define a particular reference group within which a specific distribution of powers, liberties and immunities should occur. Both are also culturally mediated in various ways. Citizenship rights are not simply 'applied liberalism, pure and simple', as Joseph Carens puts it, but rather are interpreted and applied through distinctive legal and political institutions 'with their own norms, practices, interpretations and modes of reasoning' (Carens, 2000: 192). The problem lies in the differing content and scope of the interests to which they refer.

Relying exclusively on the difference argument to explain the nature of the fit between aboriginal rights and citizenship rights does not work, as we have seen, since it either simply ignores the problem or ties the interests related to those rights to a very narrow set of supposedly 'customary' practices. On the other hand, simply asserting that indigenous peoples have already consented to being incorporated into the state (as Barry does, since for him any political powers that aboriginal peoples hold are 'delegated' powers) begs the question as well. So a better justification has to be found.

Aboriginal rights relate to those particular interests to do with territory, culture and self-government that distinguish indigenous peoples from other kinds of groups in states like Australia, Canada or the US. These interests are distinctive because they relate to the fact of aboriginal prior occupancy of and jurisdiction over these territories and to the difficulties they face in maintaining their distinctive cultural practices and ways of life. The argument justifying the protection of these interests through legally enforceable rights appeals to equality, but not only to the equal provision of the means to preserve culture. Other interests are also at stake.

First, aboriginal rights promote the formal equality of peoples who were previously considered in both international and domestic law as politically (and culturally) inferior and thus undeserving of equal consideration. Second, they promote equality in the substantive sense, as providing the means of enabling indigenous groups to address the social and economic disadvantages they suffer from, taking into account their unique historical circumstances (this is partly an empirical claim; see Ivison, 2002: 151–4). This aspect of the argument also has considerable political advantages. People are more likely to support political arrangements that encourage self-government if they feel it will improve the actual lives of ordinary indigenous peoples as opposed to a narrow group of elites. So the

combination of remedial and substantive aspects of equality-based justifications is an attractive feature of this argument. The aim is to help secure the 'real freedoms' of indigenous peoples – the basic capabilities they require for living decent lives.¹⁶

To return to Barry's charge directly, what about the fit between aboriginal rights, citizenship rights and human rights? There are two issues here. First, the fit may be awkward to the extent that aboriginal rights allow departures from liberal norms of citizenship. Should we tolerate such departures? It all depends on the specific claim in each case. And it also depends, as I argued above, on the extent to which those subject to the norm have had a chance to have their say about it. The more asymmetric the relation of power and the less scope for broad deliberation about the consequences of the norms in question, the more we should be concerned. But this means negotiation and compromise on all sides. Given their history of being subject to coercive assimilation by the state – often through the very language of 'equal citizenship rights' – it is unreasonable to expect indigenous peoples to see citizenship rights as providing, *in themselves*, an unproblematic framework for a 'common emancipatory project' (as Barry claims they do), especially if it involves foregoing their collective interests in property and self-government. The state has not acted impartially towards indigenous peoples in the past, and thus they have often turned to other sources – including international law – to support their claims.¹⁷ But it is striking that, in appealing to international law, indigenous representatives and negotiators have been willing to commit themselves to the broad spectrum of human rights and not just the right to self-determination.¹⁸ Moreover, appeals to aboriginal rights in domestic law are frequently made on the basis of claims about equality (Borrows, 1997; Macklem, 2000; *Report of the Royal Commission on Aboriginal Peoples*, 1996). Having said that, accommodation will probably mean tolerating various departures from liberal norms. Thus, the fit between aboriginal rights and liberal rights will be an uneasy one at times and closer to a *modus vivendi* as opposed to an overlapping consensus – but this is truer to the nature of the relation between indigenous peoples and the state anyway (see Ivison, 2002: 84–8, 138).

The other issue concerning the fit between aboriginal rights and citizenship rights is a version of the 'West Lothian' question. Why should aboriginal people have relatively exclusive jurisdiction over their own affairs, but also expect to participate in broader political institutions? A quick answer to this question is that aboriginal rights are usually conceived as *coexisting* with those of the Crown, as opposed to being mutually exclusive, and thus the problem is one of developing shared and coordinate forms of jurisdiction. Still, fairness might be an issue. Aboriginal citizens, if they were to enjoy extensive self-government rights and title to their lands, might enjoy rights that other non-indigenous citizens would not, which has certainly been an explosive political issue in Australia (and elsewhere) in recent years.

There are a number of ways to respond to these concerns. First, in federal systems like Australia and Canada, political arrangements positively encourage the simultaneous integration and separation of different communities; that is, complex forms of interdependence between different jurisdictions and modes of identification. Australian citizens have both their local/regional interests represented at the state level and their national ones at the federal level. Aboriginal rights can be seen as simply adding another layer to such complex interdependence and identity, allowing aboriginal people to benefit equally from federalism in a way that non-indigenous Australian and Canadian citizens have (see Borrows, 2000: 338–9). Second, as already mentioned, aboriginal communities or nations are not racial entities, but political ones, and thus it is false to say that rights or privileges are being distributed exclusively along racial or ethnic lines. But membership is a deeply contested and controversial issue for both indigenous and non-indigenous citizens. Some aboriginal groups have argued that racialist criteria for membership are justified given the extremely limited resources they possess and the need to control for the growth and integrity of their communities (Alfred, 1995). Others have argued that non-racialist criteria can achieve those ends just as well and are thus morally and politically preferable (Borrows, 2000: 339–40; see also Macklem, 2000: 231).

Aboriginal rights turn out to refer to a complex bundle of interests, the protection and promotion of which have to be justified to others. But why still refer to them as *aboriginal* rights? Some have suggested that the phrase should be abandoned because the fact that someone is aboriginal is not really salient to the justification of the interests at stake, which are, in principle, also valuable for other individuals and groups (Brock, 2002: 292, 296).

First, it is up to indigenous peoples themselves to decide how to talk about their claims, but I think that there are strong historical and practical reasons for thinking that aboriginal (or indigenous) rights are a valid way of doing so. As we have seen, they refer to a distinctive set of claims that distinguish indigenous peoples from other kinds of groups. In Canada, for example, 'aboriginal rights' refer to a specific set of legal and constitutional claims that emerged through interactions and negotiations between indigenous peoples and the state over the last 500 years. Thus they form part of the constitutional relationship between First Nations and the Crown and have become embedded in the Canadian constitution and the ongoing treaty process.¹⁹ In this context, therefore, it does not make sense to 'lose' reference to aboriginal rights, since they are doing real work in the evolving cross-cultural set of norms and practices governing Crown-First Nation relations. In other contexts (such as Australia, where there is little history or practice of treaty-making), more generic language to do with self-determination or citizenship rights might be expected to be more prevalent. But even here, given, first, the shared common law background and mutual influence between Canadian and Australian jurisprudence; second,

developments in the international law of indigenous peoples; and, third, the political working out of the consequences of the *Mabo* decision, the idea of indigenous rights still retains plenty of critical purchase (see Behrendt, 2001b).

So the term 'aboriginal rights' reinforces the claim that the rights in question refer specifically to the historical situation of indigenous peoples and especially to claims over their traditional lands and to their rights to self-government as peoples or nations. But these rights still have to be justified to others, and that means appealing to general norms and interests that are valuable for others too. I think the best arguments are those that appeal to substantive conceptions of equality and wellbeing, as argued above. However, it does not follow that the 'aboriginal' in 'aboriginal rights' is redundant. Constitutions – written and unwritten – distribute power in the form of rights and jurisdiction between different kinds of legal actors, including individuals, groups, institutions and governments (Macklem, 2000: 21). Aboriginal rights refer to those powers and capacities that are a necessary (although hardly sufficient) condition of aboriginal peoples being treated equally, given the legacy of colonialism and the challenges they face today in living decent lives according to their own lights.

CONCLUSION

Is the notion of aboriginal rights morally coherent? Does rights talk, in this instance, entrench ethnic or cultural divisions and make accommodation and dialogue more difficult?

I have tried to argue that there are not only legal grounds for thinking that aboriginal rights exist, but also good moral ones. Rights claims are not self-justifying; rights are only effective to the extent that they are morally and institutionally enforceable. But the willingness of others to bear the burdens of their enforcement depends on an acceptance of the ends or purposes for which they are said to exist. My argument has been that a successful defense of aboriginal rights will tie them to the promotion of the equal freedom and wellbeing of aboriginal peoples, taken individually and collectively, and understood in both the formal and substantive sense.

Of course, rights are not the be all and end all of politics. We have duties that are not reducible to claims about rights and we can be free or constrained in ways that do not depend on the possession or violation of our rights. Moreover, if aboriginal rights are unenforceable or make no positive difference to the actual lives of aboriginal peoples, then we have good reason to doubt their usefulness (as Alfred, 1999 powerfully points out). But there is nothing inherent to the language of rights itself that is incompatible with the kinds of ends that aboriginal peoples pursue. The

indeterminacy and yet wide acceptance of the language of rights mean that they can be (re)translated and put to work in new contexts and circumstances (see Borrows, 1997: 171).

Finally, what do we learn about rights claims in cross-cultural contexts? One thing that emerges is that rights are intimately related to norms. This is true of both group rights and individual rights. Group rights can immunize particular cultural norms from external interference (to a degree) and thus align and shape individual behavior in culturally-specific ways. But so too can individual rights, either directly by aligning individual behavior with the dominant cultural norms of a liberal society, or indirectly by promoting certain collective values. So the question is not whether or not cultural norms shape rights, but rather what kind of norms act as preconditions for freedom and which do not. Norms insinuate themselves into choices. Determining which norms are enabling or constraining draws us into arguments over the nature of human wellbeing which can sometimes conflict with the ideas of toleration and 'recognition' that underlie many of the arguments of liberal multiculturalists. However, this tension is unavoidable and is constitutive of democratic politics in multinational and multicultural societies today.

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Notes

1

[W]hy has a social breakdown accompanied [the] advancement of the formal rights of our people, not the least the recognition and restoration of our lands . . . why during the period of indigenous policy enlightenment and recognition and despite billions of dollars and much improved housing and infrastructure and government services, there has been a corresponding social deterioration. What is the explanation for this paradoxical result? (Pearson, 2001)

2 More specifically, 'X has a right if and only if X can have rights, and other things

- being equal, an aspect of X's well-being is a sufficient reason for holding some other person(s) to be under a duty' (Raz, 1986: 166).
- 3 I am grateful to an anonymous reader for pushing me to be clearer about my claims in this section.
 - 4 Other kinds of rights can be created by statute, as in Canada by the Indian Act. This created specific entitlements for 'registered' or 'status' Indians who live, for the most part, on reservations. However, the Act has been bitterly criticized by First Nations in Canada as an instrument of colonial rule and thus is not considered a legitimate source of those rights.
 - 5 Jeremy Waldron has argued that, although collective goods *can* be used to justify individual rights, ultimately the best justification appeals to individual interests, not communal ones. This is because the whole point of rights claims is to tie them directly to the interests of individuals as opposed to communal or societal ones. It does not make sense to say, 'X has a right to peace', for example, as much as it would be a good thing if peace prevailed, since one cannot enjoy peace individually, but rather only in conjunction with others (see Waldron, 1993: 360–1).
 - 6 There are limits, of course, to using societal interests to justify basic rights. The right not to be tortured, for example, seems to be tied directly to our individual interest in not being harmed and only very indirectly, if at all, to societal interests or communal goods. Then again, part of the argument against 'torture warrants' to extract information from terrorists is surely not simply the harm done to the individuals in question, but also to the collective good of the rule of law, something we certainly benefit from individually, but can only enjoy in conjunction with others in the context of a general legal system.
 - 7 I am indebted in this paragraph to Kymlicka (1995) and Post (2000).
 - 8 Note that, although aboriginal title is a form of collective title, individuals may – depending on the particular laws and customs – acquire individual property rights within that communal title.
 - 9 I am indebted here to the excellent discussion in Jones (1999a).
 - 10 See Rawls (1999: 65ff.) for the list of basic rights that Rawls thinks a society must respect in order to be considered decent, but not liberal. They include basic rights to life (subsistence and security), liberty (freedom from slavery, serfdom, liberty of conscience), property and formal equality. These fall short of the kinds of rights listed in the Universal Declaration of Human Rights and other international human rights documents. Note especially that the list does not include a right to democratic institutions, voting rights or clearly delineated freedoms of speech and expression.
 - 11 On the right of (internal) exit, see Rawls (1993: 221); on the impossibility of neutrality of effect, see Rawls (1993: 192–4, 199–200). I leave aside the issue of whether or not these are adequate for protecting the kind of interests that liberals value or, conversely, whether they violate the spirit of political liberalism itself. For further discussion, see Okin (1994).
 - 12 This is particularly true with regard to the language of rights. Needless to say, this might not be considered necessarily a good thing by members of the indigenous communities themselves. For an interesting discussion of the impact of the Canadian Charter of Rights and Freedoms on First Nation politics, see Borrows (1997).

- 13 Note that, in the US, the Indian Civil Rights Act (1968) imposed certain human rights obligations on American Indian tribal courts and governments, among which are: a right to the free exercise of religion (although it does not prevent a tribe from establishing a religion); freedom of speech; freedom from unreasonable search and seizures; a right to trial by jury (in criminal but not civil cases) and to a speedy and public trial. Violations of these rights can be pursued through the tribal courts themselves. The only federal court remedy available is that a person may seek a writ of habeas corpus to test the legality of his or her detention when being held in jail or detained by his or her tribe (once all tribal remedies have been exhausted or if serious injury would result from any delay). In Canada, the Canadian Charter of Rights and Freedoms (1982) is intended to apply (precisely how is still unclear) to the 'inherent' rights of the aboriginal First Nations, which are protected, although not defined, in Part II, Section 35 of the Constitution. For a nuanced discussion, see Macklem (2000: 194–233).
- 14 The example is taken from an actual case, 'Victim of Dual Cultures', *The Australian* (9 October 2002: 1). For similar pressures in a different cultural context, see 'Young Brides Stir: New Outcry on Utah Polygamy', *New York Times* (24 February 2002: A1, A23).
- 15 The issues here are complex. For example, more than half of indigenous people in Canada live off reserve, and the rates of intermarriage are increasing both there and in Australia. Interestingly, self-identification as 'aboriginal' or 'indigenous' has also increased markedly, along with indigenous birth rates (especially relative to the non-indigenous population). Not surprisingly, at the same time, resources earmarked for indigenous peoples have become increasingly stretched. This has resulted in bitter disputes over who is or is not 'really' indigenous and thus eligible for these benefits and, in Australia at least, calls for the introduction of DNA testing, and so on. Note that the blood quantum rules that characterize some aboriginal nations today in Canada (and the US) are in fact the result of rules imposed by the 19th-century Indian Act and not the nations themselves, although some have embraced them subsequently. I take it that blood quantum rules are indefensible on liberal grounds. The *Report of the Royal Commission on Aboriginal Peoples* (1996) calls for an elimination of blood quantum rules and the adoption of more 'inclusive and non-racialist bases' for membership, which they claim are more in keeping with indigenous traditions anyway.
- 16 The language here is borrowed from the work of Sen (1999) and Nussbaum (2000). For a more detailed defense of aboriginal rights along these lines, see Ivison (2002: Ch. 6).
- 17 Basic citizenship rights were initially denied and then often imposed without any attempt to acknowledge claims about indigenous peoples' political or treaty rights. A notorious example was the Canadian government's 1969 White Paper. For a discussion, see Boldt and Long (1985). For a discussion of the Australian context, see Chesterman and Galligan (1997). For discussions of indigenous people and international law, see Anaya (1996), Pritchard (1998) and Venne (1998).
- 18 See, for example, the Draft Declaration on the Rights of Indigenous Peoples (Articles 33, 43, 45) as well as discussions about the applicability of the

Canadian Charter of Rights and Freedoms to aboriginal self-government in Borrows (1997) and Macklem (2000: 194–233).

- 19 For two important judicial interpretations of aboriginal rights, see *R. v Sparrow* (1990) and *R. v van der Peet* (1996). For a critical analysis of judicial trends in defining aboriginal rights in Canada, see Asch (1999).

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