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JAMES W. NICKEL

## FREEDOM OF EXPRESSION IN A PLURALISTIC SOCIETY

Controversies about freedom of expression often occur along religious and ethnic boundaries. The most familiar cases are ones where an intolerant majority group attempts to silence the expressions or protests of a minority.<sup>1</sup> Less familiar, but also important, are cases where an intolerant minority group seeks to squelch expressions or protests of which it disapproves — e.g., the violent response of some members of the Miami Cuban community in 1987 against a group protesting U.S. aid to the Nicaraguan contras.

This paper connects issues about freedom of expression with more general issues about tolerance of distinctive religious and cultural groups. I argue that tolerance of expressions of distinctive religious and cultural perspectives follows from, or is part of, the only policies for dealing with cultural and religious diversity that are morally and politically attractive in the United States today. I am concerned with freedom of expression both as a constitutional right and as a more general social policy.

This is a somewhat unusual way of treating the scope and justification of freedom of expression. Perhaps it will seem less peculiar if we recall that liberalism, with its tolerant attitudes towards the expression of different religious perspectives, is often thought to have evolved as a practical response to the religious wars of early modern Europe. This explanation of the origins of liberalism presupposes what I want to emphasize, namely that tolerance is an attractive option in dealing with the problems of accommodating diverse groups within a single society.

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<sup>1</sup> In 1965 Harry Kalven wrote that “it would not be a bad summary of the last three decades of First Amendment issues in the [Supreme] Court to say simply: Jehovah’s Witnesses, Communists, Negroes”. *The Negro and the First Amendment* (Columbus: Ohio State University Press, 1965), pp. 135–6.

This approach to the justification of freedom of expression is not meant to disparage others. I think of my approach as a buttress to other justifications of freedom of expression such as the need for a free flow of information if democracy is to work,<sup>2</sup> the value of promoting rational discussion of issues as a means to better founded beliefs and policies,<sup>3</sup> and the requirements of a moral principle of autonomy.<sup>4</sup> Perhaps the justification offered here can expand the scope of freedom of expression into areas where it might otherwise not reach, prevent exceptions that might otherwise be justifiable, and give weight in areas where freedom of expression might, without this reinforcement, be overridden by other considerations. The account I offer also helps explain why the right to freedom of expression must be applied in a nondiscriminatory manner.

Since I'll be emphasizing the problems posed by cultural diversity, I should say in advance that I don't think that the United States is hopelessly diverse. It is pluralistic without being plural. It doesn't have the severe problems of ethnic conflict found in countries such as India, the Soviet Union, or Yugoslavia. Perhaps we can explain the degree of unity in spite of diversity that exists in the U.S. by noting the following. First, the United States is an immigrant society in which most people have substantially assimilated to a dominant culture. It is unlike Canada or Sri Lanka, for example, where assimilation of immigrants to a common national identity was impeded by previously existing cultural boundaries. Second, the United States has long required universal education in English. This instills the national language in all children and opens them to influences from the dominant culture. Third, the media and entertainment industries are very influential in promoting English and the mainstream culture. And fourth, knowing English and having at least a veneer of mainstream culture is very useful economically.

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<sup>2</sup> See Alexander Meiklejohn, 'Free Speech and its Relation to Self-Government', in *Political Freedom* (New York: Oxford University Press, 1965).

<sup>3</sup> See Frederick Schauer, *Free Speech* (London: Cambridge University Press, 1965).

<sup>4</sup> See Thomas Scanlon, 'A Theory of Freedom of Expression', *Philosophy and Public Affairs* 1 (1972), 204–226.

## I. WAYS OF DEALING WITH DIVERSITY

There are three broad options for dealing with relations between different religious or cultural groups within a single political unit.<sup>5</sup> To reduce complexity here, I'll use a simple majority-minority model. Suppose that we have a majority group and a minority group that are sometimes in conflict, and that the majority group holds sufficient political power to decide the fate of the minority. What are the main options?<sup>6</sup>

A. *Get Rid of the Minority*

This option is very unattractive morally, but it has been important historically. Its worst form is simple genocide — killing the group the majority wishes to be rid of. Another possible form is killing some members of the minority in hopes of frightening the others into exile. A third form is using threats of death and exile to force conversion or rapid assimilation.

B. *Partition: Put a Political Boundary Between the Two Groups*

This option has two forms. The first is *external partition*, which involves creating a separate country for the minority. The partition of India into Pakistan, India, and eventually Bangladesh illustrates this possibility.<sup>7</sup> In

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<sup>5</sup> These strategies may be accompanied by restrictions on immigration to prevent diversity from increasing or re-emerging. But my focus here is on diversity that already exists.

<sup>6</sup> This matter can also be viewed from the perspective of a minority group. Its first goal will be to avoid genocide and involuntary expulsion. Second, it will need to decide whether external or internal partition is a viable and desirable option. Minorities often meet considerable resistance when they seek to secede. (Individuals may decide this unilaterally by voluntary emigration, thus putting a boundary between themselves and an oppressive group.) If no form of partition is an option, the goal will be to find a form of co-existence that is more accommodating than the Triple S system.

<sup>7</sup> Partition seems to be permissible in many cases and sometimes a good thing. Consider the following view:

In retrospect, unbiased observers are likely to agree that the partition of India, although not the manner in which it came about, has been a good thing. Even though

some cases external partition is an option that minority groups are eager to accept, and they may demand it by appealing to a right of self-determination. The second form of this option is *internal partition*. It involves creating a semi-autonomous region within the country for the minority, normally using a territorial boundary for this purpose. Illustrations of this are found in the national sub-units of Yugoslavia or the Soviet Union, the Indian reservations that exist in many countries in North and South America, and the "homelands" in South Africa.

Both forms of the partition option attempt to avoid or reduce conflict by putting a border between the conflicting groups. Sometimes it is easier for both individuals and groups to get along if they don't have to live together. This isn't always totally successful, however, since external partition may just turn domestic conflict or civil war into international war. The history of relations between India and Pakistan illustrates this.

### C. *Co-existence*

As used here, "co-existence" simply means that two or more religious or cultural groups are trying to live together within a single, non-partitioned political unit. This includes systems where the minority is forced into an inferior and subordinate position as an alternative to elimination or partition. Co-existence, like the other two broad options, has more than one form.

Perhaps the most repressive form of co-existence, apart from enslavement, is where the minority group is segregated, subordinated and silenced. I'll call this *Triple S Co-existence*. Obviously, separation and subordination admit of degrees. If the degree of separation is so large as to involve formal territorial boundaries, then this is an example of partition rather than co-existence.

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it leaves Hindu minorities in Pakistan and Muslim minorities in India, the major problem of Hindu-Muslim relations within the sub-continent has become manageable because of the partition. Without it, a stable government capable of dealing reasonably with any problem could not have been formed for any part of the country. — D. R. Gadgil, *Human Rights in a Multi-National Society*, Gokhale Institute of Politics and Economics (Bombay: Asia Publishing House, 1968), p. 17.

Under Triple S Co-existence, the majority effectively says to the minority, “we won’t kill you or exile you, and we won’t partition you externally or internally, but in order to be allowed to live here in peace the members of your group are going to have to keep to yourselves (except when you go to work), accept a socially and politically subordinate position, and keep quiet. You’re going to have to lay low.” This approach is a way of having many of the advantages of partition without having to go to the trouble of redrawing political boundaries and without having to give the minority control over some territory. The Triple S system is exemplified by the Jim Crow system of segregating blacks in the U.S. and by the system of apartheid in South Africa. Historically, Jews in Europe and the Arab countries often lived under something like the Triple S system.

Separation sometimes occurs without subordination or silencing. This kind of society has different groups that stay largely separate from each other, but none of the groups forces any of the others into a subordinate position.<sup>8</sup>

Co-existence without separation or subordination is another possibility. It involves trying to live together without using formal or informal boundaries to separate different groups and without using social or political measures to assign greater status or power to some groups at the expense of others. If successful, this kind of society might be described as “tolerant”. People in such a society generally accept cultural and religious differences without penalizing them, without insisting that they be confined to some separate area, and without using cultural and religious boundaries to impose a hierarchy of status or power.

The United States seems committed, at least at the level of national policy, to moving towards this form of co-existence and tolerance. Landmarks of the commitment to full religious tolerance can be seen in constitutional guarantees of religious freedom, in protections against discrimination based on religion, and in Supreme Court interpreta-

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<sup>8</sup> On unranked relations between ethnic groups, see Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985), pp. 21–36.

tions extending religious freedom.<sup>9</sup> Landmarks of the commitment to full racial tolerance can be seen in the *Brown* decision and subsequent desegregation cases, the 1964 Civil Rights Act, the Voting Rights Act of 1965, and in many state statutes protecting minority rights.<sup>10</sup>

## II. TOLERANCE AND THE PLURALIST IDEAL

To connect tolerance with freedom of expression, we can ask why “silenced” often goes together with separation and subordination. Separation (or “segregation”) may be sought as a symbol of superiority, or because the majority group dislikes the minority’s religion or culture and wishes to avoid its influence. Subordination involves imposing an inferior social, political and economic status on the minority. Such subordination often confers advantages on members of the majority in the social, political and economic spheres.

To understand the role of silencing a minority that is separated and subordinated, consider that members of the minority who are able to speak publicly and freely are likely to do two things the majority dislikes. First, members of a minority group may spread the religion or culture whose influence the majority wishes to limit. Second, members of a minority group may assert their group’s equality or superiority and protest or attempt to upset the system the majority has imposed.

Co-existence that rejects separation and subordination and embraces tolerance must create attitudes and institutions that allow people to be both full-fledged citizens and full-fledged members of distinctive religious and cultural groups. More specifically, people are not viewed as traitors, assigned to a lower civic status, or penalized economically because of their distinctive identities or desires to keep these identities.

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<sup>9</sup> See Kenneth L. Karst, ‘Paths to Belonging: The Constitution and Cultural Identity’, *North Carolina Law Review* 64 (1986), particularly pp. 357–361 and the citations *re-eto*.

<sup>10</sup> *Brown v. Board of Education* (I), 347 U.S. 483 (1954); *Brown v. Board of Education* (II), 349 U.S. 294 (1955). More generally, see Harry Kalven, Jr., *The Negro and the First Amendment* (1965); and Kenneth L. Karst, *Belonging to America* (New Haven: Yale University Press, 1989).

We can view the attempt to make ethnic and religious identity compatible with full membership in the larger society as embodying a norm, a regulative principle for the kind of society the United States is becoming. This norm prescribes respect both for people's common bond as citizens of the United States and respect for their distinctive identities as members of specific religious, ethnic, cultural or racial groups. It calls for the creation of a social and political framework in which these two aspects of a person's life do not conflict importantly with each other, in which maintaining one's distinctive identity — if one wants to — does not require one to lay low or flee. I will call this norm *the pluralist ideal*.<sup>11</sup>

To have convenient labels, let's say that the first part of this ideal involves *full national membership* and that the second part involves *keeping one's distinctive identity*. Expressed in terms of these labels, the pluralist ideal is that full national membership should be genuinely compatible with keeping one's distinctive identity.

The two sides of this ideal are based on somewhat different considerations. Issues about "full membership" are matters of equality. An advocate of the pluralistic ideal might argue, for example, that separating and subordinating members of a minority, where this imposes an inferior set of legal and political rights, is insulting to these people's dignity. It tells them that their commitment to the country doesn't count because of who they are, or that they are inferior personally or culturally and hence not worthy of full membership. The case for full membership is familiar to Americans because it has been made so many times by black civil rights activists and others concerned to obtain full status for minorities. It is the "full membership" side of the pluralist ideal that supports freedom from discrimination.

The case for permitting people to retain a distinctive identity if they want to is a matter of respecting people's choices and deep commitments, and thus a matter of liberty. Commitments to one's religion or to one's ethnic group often go so deep they provide an important part

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<sup>11</sup> My formulation of the pluralist ideal is indebted to the work of Kenneth L. Karst, cited in notes 9 and 10 above.

of one's identity. A liberty principle prescribing respect for people's fundamental choices and projects is likely to give considerable weight, other things being equal, to choices that are so central to who one is and what one is about.

Other defenses of the pluralist ideal could focus on the instrumental value of having a diverse but nonsegregated society. For example, an argument in terms of the instrumental attractions of a diverse society might claim that such a society is likely to be interesting and dynamic, or likely to be tolerant of other forms of human diversity and thus allow greater personal and social freedom.

Giving institutional expression to the pluralist ideal is complicated. On the side of "full national membership" this principle calls for institutions to create sufficient unity or community among diverse people to give practical meaning to shared citizenship. This requirement will have implications in areas such as education, language policy, political participation, military service, and immigration and naturalization. Also required are measures to ensure access for people with distinctive identities to all of the rights and duties that attach to full citizenship.

On the side of "keeping one's distinctive identity" the pluralist ideal calls for institutions to ensure that people will have protected space for their distinctive identities. To gather with people like themselves they will need freedom of association and protections of privacy. To pass on their identities to their children they will need freedom to educate their children in ways they choose (within limits). To avoid having to lay low they will need opportunities to express their beliefs and culture and to complain about and seek remedies for grievances.

Implementing the pluralist ideal is not just a matter of institutions. It is also a matter of developing tolerant attitudes, of learning to accept people as good neighbors and good citizens even though one has fundamental disagreements with them about religion, values, culture, politics, or morality. The process of developing these tolerant attitudes may need to be accompanied by a process of mutual accommodation in which features of each group's morality, culture, or religion that are most irritating to other groups are moderated or abandoned. The majority may need to learn to accept people who are different from them and to grant such people full status. Minorities, on the other side,

may have to give up values, practices and demands that are extremely abhorrent to the majority.

### III. THE PLURALIST IDEAL AND FREEDOM OF EXPRESSION

The pluralist ideal does more than suggest that distinctive religious and cultural groups should enjoy the same degree of freedom of speech that other groups do. This would be compatible with depriving all people and all groups of freedom of speech. Both sides of the pluralist ideal require speech and expression for their full realization. Crudely put, one can't enjoy either full national membership or keeping one's identity without doing a lot of talking. Freedom of expression falls under both sides of this ideal. Let's look more closely at both sides of this.

#### *A. Speech Connected with Full Membership*

Full membership requires being able to speak as freely as anyone else. To participate in the social, political and economic life of a country one needs to be able to speak about general political and cultural matters without fear of being told to shut up because one is alien, not really an American. Specific areas in which this applies include social and political debate, petitioning government for relief of grievances, using the legal system, participating in political campaigns, and running for political office.

Concerns expressed may be either local or national. For example, Pennsylvania Mennonites may wish to protest a highway that will diminish the amount of land available for farming, or protest aid to the Contras. Immigrants from India living in New Jersey may wish to protest their harassment by white teenagers, or help elect a congressional representative that they find attractive. Blacks may need to bring law suits to challenge some of the ways in which their position in the United States continues to be segregated and subordinated.

These examples illustrate one side of not having to "lay low". When minorities are forced to keep quiet and out of sight they cannot vigorously pursue remedies for grievances or seek to elect their own members to political office. They must rather seek out officials in a

quiet and obsequious way, hat (or bribe) in hand, and plead for relief as a matter of mercy or good will. Similarly, they cannot take to the streets to express noisily their political views. They must rather express their views in a low key manner that relies on personal communications and polite persuasion. The pluralist ideal is incompatible with these restrictions.

B. *Speech Connected with Keeping One's Distinctive Identity*

Keeping and expressing one's distinctive identity also requires speech in many areas. To use and preserve a distinctive language one may wish to speak it at home and in public, hold language classes so that others can learn it or improve their facility, and broadcast or publish in that language. To practice one's distinctive religion one may wish to communicate through rituals, sermons, and music. To retain an ethnic identity associated with another country one may wish to read foreign newspapers, take positions on who should be elected in foreign elections, and publicly denounce countries considered to be enemies of one's ancestral country as well as U.S. aid to them. The general free speech issue raised here is one of tolerance — both by the assimilated majority and by other groups — of cultural, religious and political expressions of alien, foreign or different perspectives. This is the other side of not having to “lay low”. It may involve wearing distinctive clothing, speaking foreign languages in public, flaunting group membership and pride, and dissociating from other groups.

Common national institutions used by almost all groups — such as schools, government agencies, the military — are likely to be the focus of controversies about expressions of distinctive identities. Controversies about bilingual education illustrate this, as does the recent case of *Goldman v. Weinberger* in which a Jewish psychologist in the Air Force sued to obtain the right to wear a yarmulke with his uniform while on duty.<sup>12</sup>

To be tolerant of a distinctive ethnic or religious group it is not required that one approve of or like its culture, morality, beliefs and

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<sup>12</sup> *Goldman v. Weinberger* 475 U.S. 503 (1986).

activities. Tolerance is easier when it is allied with affection, but it is quite possible to be tolerant of people belonging to a distinctive group even when one thinks, say, that their religious beliefs are superstitions, their rituals vulgar, their language harsh on the ears, their morals shameful, and their attitude towards other groups dangerous. Commitment to tolerance involves a serious decision that permitting diverse ethnic and religious groups to enjoy equal status is the best policy for dealing with ethnic and religious differences within a single society. This is quite different from the foolish and sentimental view that one must learn to like all cultures and religions.

#### IV. TOLERANCE, EXPRESSION, AND FREEDOM FROM DISCRIMINATION

An obvious part of implementing a tolerant response to religious and ethnic diversity is enacting and implementing a legal right against ethnic or religious discrimination. A model for such a right is provided in the United Nations *International Convention on the Elimination of All Forms of Racial Discrimination* (1966).<sup>13</sup> In this convention, "racial" discrimination is defined broadly to include "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Part I, Article I). Governments agreeing to this convention commit themselves not to engage in racial discrimination, to avoid sponsoring, defending or supporting racial discrimination, to nullify laws having the effect of

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<sup>13</sup> The text of this convention is available in Brownlie, ed., *Basic Documents on Human Rights* (Oxford: Clarendon Press, 1971). Similar clauses defining a right against discrimination are found in the *Universal Declaration of Human Rights* (1948), article 2; *The European Convention on Human Rights* (1952), article 14; the *International Covenant on Civil and Political Rights* (1966, entered into force 1976); and the *International Covenant on Social, Economic and Cultural Rights* (1966, entered into force 1976). For a fuller discussion of international human rights, see James W. Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987).

creating or perpetuating racial discrimination, and to prohibit discrimination by private parties or organizations.

This account of the right against racial discrimination is too narrow for our purposes since it does not include discrimination against people on the basis of religion or belief. This omission is easily remedied. A more difficult problem is how to define the boundaries of the “public” sphere in which discrimination is forbidden and the “private” sphere in which people are free to associate with and give advantages to members of their own group. For example, construction companies owned by Mormons may hire only or mainly Mormons. Here the desire to be with one’s co-religionists in the workplace conflicts with employment opportunities for non-Mormons. A practical compromise, widely adopted in American law, is to permit this in very small businesses — which can be viewed almost as extensions of the family — but to forbid it in large businesses. This may be the best we can do at reconciling freedom from discrimination with freedom of association in this area of conflict.

Article 5 of the discrimination convention is interesting for our purposes in that it contains a list of rights to be guaranteed and applied without discrimination. Most internationally recognized human rights are on this list — including “Political rights, in particular the right to participate in elections”, “The right to freedom of thought, conscience and religion”, and “The right to freedom of opinion and expression”. The effect of saying that the right to discrimination applies to other rights is to require that these other rights not be granted, applied, administered or enforced in a way that is discriminatory. This makes the right against discrimination into a “meta-right”. Its requirements are incorporated into all other general rights. Because of this, an account of the right against discrimination is far reaching in its implications; it has the potential to influence what we say about the possession and scope of all other rights.

Discrimination in regard to expression is a matter of letting some people speak (write, publish or broadcast) in certain circumstances and forbidding other people to speak or protest in those same circumstances. This may be a matter of law, policy, or application. For example, if police officers are largely drawn from majority or dominant

groups, they may permit members of their own groups to protest and criticize the government but not allow members of minority groups to do these things. During the Jim Crow era blacks were kept from voting (and hence from serving in political office), subjected to official or private harassment — or murder — if they tried to organize politically or express publicly their political views, denied access to the legal system as a means of seeking remedies for wrongs and grievance.<sup>14</sup>

Some ways of repressing expression by distinctive groups involve backsliding to ways of dealing with diversity that were presented earlier. These ways of dealing with diversity involved killing or exiling distinctive groups, and partitioning them externally or internally. If one threatens with death members of distinctive groups if they don't keep quiet and lay low one returns on a small scale to the policy of annihilating those who are excessively different. If one threatens to throw members of distinctive ethnic or cultural groups out of the country if they express themselves or protest one returns on a small scale to the policy of external partition. If one allows members of distinctive groups to express themselves only in their own homes or neighborhoods, one returns on a small scale to the policy of internal partition.

## V. CONCLUSION

One approach to justifying a norm or policy is to offer a description and explanation of it that shows its attractions and the flaws of its rivals. In this paper I have tried to show how full freedom of expression for members of distinctive religious and cultural groups connects with tolerance more generally and that freedom of expression is part of an attractive ideal, namely allowing members of distinctive groups to enjoy full national membership without sacrificing their distinctive identities.

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<sup>14</sup> See C. Vann Woodward, *The Strange Career of Jim Crow* 2nd rev. ed. (New Haven: Yale University Press, 1966). See also Karst, *Belonging to America*, pp. 62–72.

