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COSMOPOLITANISM INSIDE OUT: INTERNATIONAL NORMS AND THE STRUGGLE FOR CIVIL RIGHTS AND LOCAL JUSTICE

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INTRODUCTION: THE HOPE, THE MOVE

On a number of fronts, progressive people working on behalf of historically disenfranchised groups have been turning, ever hopeful, to international human rights law as a source of aid. Civil rights organizations invoke the Genocide Convention to oppose forced sterilization of women of color and high rates of capital punishment for men.¹ American Indian lawyers and scholars have been turning to United Nations commissions and working groups in hopes of righting historic wrongs not easily redressed locally.² Activists opposing pornography, hate

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1. See Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2360 (1991); see also LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* (1991); Symposium, *The Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1195 (1991).

2. Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 665.

speech, and prostitution similarly have tried to link their campaigns to various principles of international human rights law.³

This international turn is attractive on a number of levels. First, it is idealistic and aspirational. By invoking norms ratified by the international human community, we transcend parochialism and self-interest.⁴ By focusing on laws and standards laid down by all for the governance of all, we reinforce the bonds that unite people everywhere. On a more pragmatic level, the move may serve to shame local authorities into acting in situations where a minority group, struggling alone, lacks the authority or influence to accomplish its ends.⁵ Thus, when a leading writer and activist against hate speech and pornography points out that the International Convention on the Elimination of All Forms of Racial Discrimination outlaws hate propaganda; that states which have signed and ratified this convention are obligated to adopt laws that prohibit racist speech; that over two dozen countries, including many in western Europe have done so; that Article 20 of the International Covenant on Civil and Political Rights obliges states to enact legislation prohibiting "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence";⁶ that Article 13 of the American Convention on Human Rights holds that any hate propaganda that constitutes an incitement to lawless violence against a person or group on account of race, color, religion, language or national origin shall be punishable by law; and that a new Convention on Elimination of Sexual Exploitation is now being considered by the Human Rights Committee of the United Nations,⁷ it behooves us to take note.

Will the international move (by which we mean the turn to broader bodies of law and policy than merely United States norms like the Equal Protection Clause and the First Amendment) prove successful? Although we applaud the effort, we have our doubts. As frequently happens in United States civil rights law, countervailing norms are quickly found to curtail the claim to relief.⁸ Minority groups who band

3. THE PRICE WE PAY: THE CASE AGAINST HATE SPEECH AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., forthcoming 1995).

4. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 489-99 (1992).

5. Williams, *supra* note 2, at 665, 667, 699-704.

6. International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, art. 20, 999 U.N.T.S. 171.

7. Letter from Laura Lederer to Spencer Carr (Oct. 1994) (on file with the authors).

8. See DERRICK BELL, AND WE ARE NOT SAVED (1988) (detailing twists and turns in search for racial justice in U.S.).

together to seek protection are charged with engaging in identity politics and seeking group rights.⁹ Recognizing claims to cultural uniqueness is said to operate in derogation of the ideal of the cosmopolitan person, the citizen of the world who is not bound by ties of narrow nationalism but who draws from and identifies with the tradition, the art, the culture of many nations at once.¹⁰ In this Essay, we sketch, in Part I, one guise in which the counterattack against group rights proceeds, namely "cosmopolitanism." We then identify, in Part II, the virtues and defects of the cosmopolitan ideal as a standard for national and international behavior. In Part III, we draw some lessons for reformers who may be tempted to place unwarranted faith in international human rights law as a source of progressive arguments and change.

I. THE COUNTER-MOVE: WALDRON, RUSHDIE AND THE COSMO BOYS

In a recent article,¹¹ Jeremy Waldron, an English-trained lawyer and philosopher teaching at the University of California-Berkeley School of Law, makes a determined statement in favor of the cosmopolitan ideal and against identity politics. A cosmopolitan person, he writes, may live all his or her life in one city and maintain the same citizenship throughout.¹² He or she is not necessarily an exile (like his hero Salman Rushdie), nor a perpetual refugee or traveler.¹³ But "he refuses to think of himself as *defined* by his location or his ancestry or his citizenship or his language."¹⁴ Such a person is eclectic: "[H]e does not take his identity to be compromised when he learns Spanish, eats Chinese, wears clothes made in Korea, listens to arias by Verdi sung by a Maori princess on Japanese equipment, follows Ukrainian

9. See Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REF. 751 (1992). For other (less accusatory) writings on cosmopolitanism in international or domestic affairs, see CHRIS BROWN, *INTERNATIONAL RELATIONS THEORY: NEW NORMATIVE APPROACHES* (1992); *UNIVERSALISM VERSUS COMMUNITARIANISM* (David M. Rasmussen ed., 1990); David Hollinger, *Postethnic America*, 2 *CONTENTION* 79 (1992); see also ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 388 (1988); Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE* 159 (Nancy L. Rosenblum ed., 1989).

10. Waldron, *supra* note 9, at 752-66.

11. Waldron, *supra* note 9. For a recent diatribe against the domestic version of Waldron's target, see Richard Epstein, *Legal Education and the Politics of Exclusion*, 45 *STAN. L. REV.* 1607 (1993).

12. Waldron, *supra* note 9, at 754.

13. *Id.*

14. *Id.*

politics, and practices Buddhist meditation techniques.”¹⁵ Such a person “is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self.”¹⁶

Living such a life commends itself, according to Waldron, first, because it is practically unavoidable today,¹⁷ and, second, because cosmopolitanism can guard against the excesses of narrow nationalism, of which Salman Rushdie’s death threat and resulting perpetual refugee status is a prime example.¹⁸ Finally, communitarian excess (cosmopolitanism’s opposite) is costly. It entails the propping up of dying cultures by the modern, thriving ones that surround them.¹⁹ The former want to have things both ways—they want to be allowed to survive, but their survival needs financing by more successful cultures that have modernized and joined the marketplace of commerce and ideas.²⁰ The desire of an indigenous person to enjoy immersion in his culture “may be something that particular people like and enjoy. But they no longer can claim that it is something that they need.”²¹

The modern world is becoming thoroughly international. The citizen of today watches the same news watched by a citizen of a city thousands of miles away, eats international cuisine, and wears clothes designed in Paris and Milan and produced in Hong Kong or Korea.²² From the viewpoint of such a cosmopolite, “immersion in the traditions of a particular community in the modern world is like living in Disneyland”²³ And the agitation we see today “is like demanding the funds to live in Disneyland and the protection of modern society for the boundaries of Disneyland, while still managing to convince oneself that what happens inside Disneyland is all there is to an adequate and fulfilling life.”²⁴ For Waldron, the demise of such a racial identity or cultural minority group is no great loss. “It is like the death of a fashion or a hobby, not the demise of anything that people really

15. *Id.*

16. *Id.*

17. *See id.* at 763.

18. *See id.* at 765.

19. *Id.* at 763.

20. *Id.*

21. *Id.* at 762.

22. *Id.* at 754, 756; *see also id.* at 769-74 (cosmopolitanism of taste, reading, other influences).

23. *Id.* at 763.

24. *Id.*

need."²⁵

Citing Salman Rushdie's famous "I am a mongrel" passages,²⁶ Waldron equates preserving minority cultures with "a fascinating anthropological experiment,"²⁷ one that "involves an artificial dislocation from what actually is going on in the world. That it is an artifice is evidenced by [the way in which] immersion often requires special subsidization and extraordinary provision by those who live in the real world The charge, in other words, is one of *inauthenticity*."²⁸

Old national industries have been destroyed, he goes on to point out.²⁹ Modern persons "have intercourse in every direction."³⁰ Our interdependence is global, not national, "and certainly not civic or parochial."³¹ Citing F. A. Hayek, Adam Smith, Rawls, and Walzer, Waldron urges that our interdependence is also moral and intellectual; we read and are shaped by the same influences.³² We also face the same problems: pollution crosses boundaries.³³ Depletion of resources in one part of the world affects all.³⁴ Only broad, worldly perspectives will enable us to come to grips with these problems—not the narrow ones of a Zulu villager, a feminist in Minneapolis, or a race reformer in Hartford. The forces that shape us today are our language, our literature, our science, our civilization, and less and less the peculiar rituals, historical animosities, and self-centered passions of small villages or ethnic groups.³⁵ Liberals should recognize these things and waste less time in agitating for the narrow agendas of small groups that are bound for oblivion.³⁶ We all need culture, but that is no reason to deify and make special efforts to preserve small ones.³⁷ Cultures live, grow, change, amalgamate with other cultures, and adapt themselves to chang-

25. *Id.* at 762.

26. *Id.* at 751-52 (quoting Salman Rushdie: "a love song to our mongrel selves I was already a mongrel self").

27. *Id.* at 763.

28. *Id.*

29. *Id.* at 770.

30. *Id.* at 771 (quoting Karl Marx).

31. *Id.*

32. *Id.* at 775.

33. *Id.* at 776 (and thus "localism . . . would be catastrophic").

34. *Id.*

35. *Id.* at 776; *see also id.* at 761-63.

36. *See id.* at 761-63, 793.

37. *See id.* at 761-63.

ing circumstances.³⁸ "[T]he hybrid lifestyle of the true cosmopolitan is in fact the only appropriate response to the modern world in which we live."³⁹

Indians demanding protection of their lands and culture, women and minorities demanding respectful treatment, and cultures demanding protection of rituals and practices, then, should be evaluated straightforwardly according to how these demands would be seen by a cosmopolitan member of the larger culture.⁴⁰ If to such a person, these demands appear petty, expensive, frivolous, troublesome, or inauthentic—calculated only to prop up a tottering regime or ego—then the majority group has no obligation to satisfy them (except, perhaps, as anthropological curiosities).⁴¹ Indeed, in the final pages of his article, Waldron urges that it may, indeed, be immoral for the major powers to do so. Far from being "cozy and attractive," group allegiances today are as apt to build on "ancient hatreds of one's neighbors as immemorial traditions of culture."⁴²

II. COSMOPOLITANISM INSIDE OUT: THE GOOD AND THE BAD

Can anything positive be said about cosmopolitanism, as it is deployed in the international arena by authors like the ones mentioned? Of course. Cosmopolitanism *can* operate as a brake against narrow nationalism, focusing attention on our common humanity.⁴³ Yet, like other neutral principles,⁴⁴ cosmopolitanism has its downside. It urges us to disregard features of social life that otherwise would call for action.⁴⁵ Readers of postmodern literature will recognize the deconstructionist move.⁴⁶ A minority group comes forward and asks for protection or preservation. It says, "I hurt," or, "I am in danger, please help." The cosmopolitan's response is, "Who are you? I don't recognize selves, particularly of your sort. And your harms, insofar as

38. *Id.* at 787-88; *see also id.* at 775, 785.

39. *Id.* at 763.

40. *Id.* at 761-66, 793.

41. *Id.* at 763, 764.

42. *Id.* at 793.

43. *See supra* notes 4-7, 17-18 and accompanying text.

44. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

45. An example is substantive injustices. *See supra* notes 1-10; *see also infra* notes 70-79.

46. *See* Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071 (1991); Pierre Schlag, *Stances*, 139 U. PA. L. REV. 1065 (1991).

they are related to preserving what you call your ancient identity, I am not bound to recognize. Modernize—get with the program.”⁴⁷

Cosmopolitanism can thus impair the task of remedying ancient and not so ancient wrongs. Remedies will seem like tribalism; like catering to the unique sensitivity of a small group.⁴⁸ “You hurt me” is met by the rebuff: “Don’t be so parochial. Think about something else.” Harms to groups become practically incoherent, an insistence on a sentimental, preservationist program.⁴⁹ Yet, in a hundred ways, our laws and patterns of thinking do recognize harms to groups. We provide recompense for harm to a corporation, a baseball team, a husband and wife for loss of the other’s consortium.⁵⁰ Ordinary intuitions reveal that we rely on others, present and past, to sustain us and our sense of selves.⁵¹

But the cosmopolitan move makes it difficult to see this. Like Wechsler’s neutral principles,⁵² cosmopolitanism points us only to a particular range of considerations; that is, what is happening at this moment in time, across cultures. The uniqueness of the clamoring group and its history are lost. We are given only a snapshot, a horizontal slice of their situation, and we are told to ascertain what, if anything, they are due in light of what this shows.⁵³ Debts, obligations, the need for reparations—all of these are not easily captured by the cosmopolitan calculus, which merely asks: what would a citizen of the world—urbane, educated, broadly traveled—want? Neutral principles cannot easily capture non-symmetric events, such as A harmed B.

Return for a moment to the hate-speech illustration mentioned in the introduction to this Essay.⁵⁴ It is instructive on two levels. First,

47. Carol Weisbrod, *Minorities and Diversities: The “Remarkable Experiment” of the League of Nations*, 8 CONN. J. INT’L L. 359 (1993).

48. Waldron, *supra* note 9, at 757, 761-64, 776, 793.

49. *Id.* at 761, 763, 793.

50. ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS* I (1991).

51. Frank Michelman, *Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1986).

52. Wechsler, *supra* note 44.

53. Waldron, *supra* note 9, at 757-58, 761-65, 792-93.

54. On the hate speech controversy in general see Robin Barnes, *Standing Guard for the P.C. Militia, or, Fighting Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R. C.L. L. REV. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); ACLU Policy Statement: Free Speech and Bias on College Campuses (Oct. 13, 1990), reprinted in Nadine Strossen, *Regulating Free Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 571.

consider how the controversy has played itself out in the United States, particularly with respect to the part played by the main neutral principle at stake, namely the First Amendment to the U.S. Constitution.⁵⁵ Beginning about ten years ago, a number of U.S. schools and universities began experiencing an upsurge in the number of racist incidents and name-calling taking place on their campuses.⁵⁶ These incidents included out-and-out hate crimes, such as physical attacks on blacks and arson against buildings housing black departments or living groups.⁵⁷ Others took the form of racist expression, such as taunts, epithets, anonymous leaflets, the defacing of posters, and hate-filled graffiti written on campus walls or structures.⁵⁸ On several campuses, the number of minority group students dropped, as students transferred and parents of color opted to send their sons and daughters elsewhere.⁵⁹ Empirical studies conducted by the National Institute Against Prejudice and Violence indicate that about 80 percent of minority-group students are the victims of hate speech at least once during their college years.⁶⁰

Many institutions responded by issuing official statements condemning campus racism, and by offering special classes and counseling.⁶¹ Others—as many as 200—responded by enacting student conduct codes that penalize various types of hate speech, generally in face-to-face, one-on-one situations.⁶² These codes were immediately challenged in court.⁶³ The national American Civil Liberties Union (ACLU) has declared its intention to challenge each and every one as a

55. U. S. CONST. amend. I ("Congress shall make no law respecting . . . the freedom of speech, or of the press . . .").

56. Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Campus Anti-Racism Rules*].

57. *Id.* at 348-54; see also Matsuda, *supra* note 54, at 2326-31.

58. Delgado, *Campus Anti-Racism Rules*, *supra* note 56, at 348-58; see also Matsuda, *supra* note 54, at 2332-33.

59. Delgado, *Campus Anti-Racism Rules*, *supra* note 56, at 387 n.359.

60. Howard C. Ehrlich et al., *The Traumatic Effect of Ethnoviolence*, in *THE PRICE WE PAY*, *supra* note 3.

61. Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994).

62. *Id.*

63. See *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (holding that a university rule prohibiting students from directing discriminatory epithets at particular individuals was overly broad and unduly vague); *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (recognizing the standing to challenge the constitutionality of a university policy on discrimination and discriminatory harassment on the grounds that its vagueness violated due process).

violation of the First Amendment.⁶⁴ That amendment prohibits the regulation of speech, at least in the absence of a very good reason. In most cases, the ACLU has found no such good reason. Speech codes regulate expression based on its content and, hence, are non-neutral.⁶⁵ A better approach to the problem of hate speech, according to many free-speech purists and defenders, is more speech in which the victim speaks back to the hurler of the offending language.⁶⁶ Message A cancels out the harm of message B, exactly as the marketplace of ideas is supposed to operate. Indeed, if the minorities have the better argument, they ought to prevail and argue down the ignorant or bigoted hate speaker. Not only is this a preferred way to resolve controversies in a political system like ours which is committed to dialog and change, it is especially appropriate on a college campus, which ought to be a bastion of free speech and inquiry.⁶⁷

We call this argument neutralist because it is indifferent to the content of the two messages. The business of courts and universities is to monitor and assure a free exchange of ideas, not that one or the other wins out. What does this argument ignore? At least two things. First, it overlooks that First Amendment jurisprudence is anything but neutral. Over the years, courts have tolerated or carved out dozens of "exceptions" and special doctrines aimed at protecting the interest of some strong party or the state.⁶⁸ These include libel and defamation—which protect the interest of wealthy individuals in not having the property interest in their reputations damaged;⁶⁹ copyright—which protects the interest of established writers in not having their works imitated;⁷⁰ words of monopoly;⁷¹ words of threat;⁷² perjury;⁷³ false

64. Strossen, *supra* note 54.

65. *Id.* at 504.

66. The most noted proponent of this position is Nat Hentoff. See, e.g., NAT HENTOFF, *FREE SPEECH FOR ME, BUT NOT FOR THEE?* (1992).

67. *Id.*

68. Delgado, *Campus Anti-Racism Rules*, *supra* note 56, at 377-78.

69. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (holding that libelous utterances are not within the ambit of constitutionally protected speech); see also *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (holding that a member of Congress is not protected by the First Amendment for allegedly defamatory statements made in press releases and news releases); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding that the ability of the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties).

70. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

71. On punishment of price-fixing, see L. SULLIVAN, *ANTITRUST* 29-30, 132-34 (1977).

72. On the various crimes of threat, see R. PERKINS & R. BOYCE, *CRIMINAL LAW* 177-82,

advertising;⁷⁴ and dozens of other forms of speech that have been deemed unprotected because they threaten either the state, consumers as a group, or other interest groups with the power to insist on such an "exception." Free speech turns out not to be neutral when the interests of a powerful group are at stake.

Second, it overlooks that hate speech of the sort we are discussing has no ready, free market remedy. Talking back is often impossible. Hate speech is a performative, less an invitation to a discussion than a slap in the face.⁷⁵ "Nigger, go back to Africa" is hardly rebutted by "Sir, I may indeed be an African American, but prevailing notions of morality and the political theory of equality of all persons provide that I am nevertheless just as entitled as you are to attend school here. Indeed, let me cite you to a number of Supreme Court cases that so hold." This response is absurd on its face, and often foolhardy—an invitation to serious violence. Hate speech is part of a system of slights, microaggressions, and put downs that render persons of color "one-down" in many transactions that clearly matter.⁷⁶ It is not an invitation to a discussion, but rather the opposite—a way of silencing and communicating to the victim that he or she is *not* worthy of inclusion in the human community.⁷⁷

Hate speech directed against blacks and other minority groups has no ready analog in speech against whites. "Honky" is more a badge of respect than a put-down, as is "dead white males." "Cracker," while disrespectful, lacks the ability to wound. "Redneck," too, implies power. The fact is that our language contains nothing that compares to racist insults against blacks and other minorities. Whites may suffer words of criticism, envy, and so on, but there really is no such thing as hate speech directed against them. The cultural background of meanings, practices, and history that render "Nigger, go back to Africa" so offensive and wounding for a black student is simply not there for whites, at least in any comparable degree. Indeed, our culture contains a host of narratives, plots, scripts, stories, and stereotypes that make it difficult for speakers of color to be taken seriously when they do speak out

448-52, 1113-15 (3d ed. 1982).

73. See, e.g., MCCORMICK ON EVIDENCE 544-48 (E. Cleary ed., 1984).

74. On fraud, see R. PERKINS & R. BOYCE, *supra* note 72, at 304-08, 1048.

75. See Lawrence, *supra* note 54, at 452.

76. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

77. On the silencing argument, see Frank Michelman, *Silencing and Caste*, in THE PRICE WE PAY, *supra* note 3.

against unfair treatment.⁷⁸ Moreover, the prevailing stereotype of the black in our culture—stupid, lascivious, and so on—denies speakers credibility. Who would put much faith in the words of someone who, in the prevailing scripts and stock parts, is either an athlete, an action figure like a cop, or a buffoon?⁷⁹

Hate speech wounds, then, and there is no ready recourse for it in our system. The playing field is not neutral, the marketplace far from equally open to all. Yet we treat demands for campus codes, torts for racial slurs, and other remedies as though they were egregious breaches of a legal principle—the First Amendment—that is of equal benefit to all society. As we have urged in our previous writing, it is not.⁸⁰

Much the same drama is likely to be replayed on the international law front as anti-hate speech and anti-pornography advocates turn to this arena. A case can indeed be made that these forms of injurious depiction violate international norms by inciting violence and stirring up racial and other forms of hatred.⁸¹ International covenants and treaties do require nations to take steps to prevent those forms of injury.⁸² Yet, all such efforts will inevitably be portrayed as demands for special treatment and as illegitimate racial politics. A true cosmopolitan would not complain of a slur directed to his or her ethnicity because he or she has none. He or she is a citizen of the world, not tied to a particular culture, language, cuisine, or set of ethnic loyalties. How could such a person dwell on the sting of an ethnic or other form of insult? One of the reasons why hate speech injures is that it compounds, drawing on a legacy of hatred and unfair treatment aimed at a group throughout its history and coordinated against it still today.⁸³ The cosmopolitan, who considers himself or herself the product of a multitude of influences, genes, and cultures, does not consider that these wounds and scars lie in his past, at least not in an exclusive or serious way.

Cosmopolitanism thus makes it difficult for us to see historic harms and ones that today act in concert to disadvantage particular people. It blinds us to the need for remediation, just as Wechsler's neutral principles⁸⁴ and the neutralist approach to First Amendment jurisprudence⁸⁵

78. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

79. *Id.* at 1261-75.

80. *Id.* at 1284-88.

81. See *supra* notes 5-7 and accompanying text.

82. See *supra* notes 3-7 and accompanying text.

83. Delgado, *Campus Anti-Racism Rules*, *supra* note 56, at 38-84.

84. See *supra* note 44 and accompanying text.

blind us, in the United States, to the need to redress school discrimination and hate speech. But cosmopolitanism not only threatens to render us insensitive to the needs of oppressed groups, it can perform a real disservice to the majority group that embraces it. The writings of the cosmo boys (most of whom, for reasons on which we will not speculate, are males) make clear who the citizen of the world is: an educated, white or white-trained student of Western culture and ideas.⁸⁶ He watches Western-made TV programs. While he may enjoy Indian food, black music, and Eastern meditation techniques, he is thoroughly Western in outlook. He is not a Zulu warrior or Guatemalan Indian—these are the residents of Disneyland that Professor Waldron has no interest in saving.

Yet, there is a case for saving those cultures, one that does not rest merely on sentiment or anthropology, and one that is quite consistent with cosmopolitanism, as the two of us would like it to be understood. Minority cultures will often possess knowledge that Western nations need. For example, the cosmopolitan citizen that Waldron praises does indeed live in a society whose technology and industry cross national boundaries.⁸⁷ Yet those industries also generate pollution that crosses the same boundaries. As we and others have pointed out, the solution to the environmental crisis may well entail a fundamental rethinking of our relation to values such as nature, land, water, and wildlife.⁸⁸ It may well be that other cultures, including especially the Indians, are more advanced in this respect.⁸⁹ If those cultures fall by the wayside, something our own civilization vitally needs to ensure its own survival may be lost. Such is the case with old age care, an increasingly pressing need in our society, but a problem other nations seem to have solved more satisfactorily than we.⁹⁰ Second, consider the range of options from which Waldron's or Rushdie's cosmopolitan man picks

85. See *supra* notes 54-80 and accompanying text.

86. See, e.g., the list of writers cited *supra* note 32 and accompanying text.

87. See, e.g., Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1351, 1369, 1370, 1372 (1991).

88. *Id.*; see also Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1218-23 (1991) [hereinafter Delgado, *Our Better Natures*].

89. Delgado, *Our Better Natures*, *supra* note 88, at 1220-21.

90. Delgado, *Our Better Natures*, *supra* note 88, at 1375; see also Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387, 391-92 (1993).

and chooses. Such a man may wish to eat Guatemalan food one day, Caribbean the next. He may spend his vacation on an Indian reservation or on safari in the Serengeti accompanied by a native guide. Will not the cosmopolitan's range of options be radically narrowed if we do not provide protection for diverse cultures? Life in U.S. and European capitals is becoming increasingly the same. A banker in Amsterdam lives in a house, drives a car, wears clothes, and watches TV programs very much like his counterpart in New York or Seattle. Cosmopolitanism in Rushdie's sense—the life of a vital, hybridized person of the world⁹¹—becomes difficult unless the options that make it possible are preserved and protected. How could Richard Rodriguez's "I am Chinese"⁹² make sense if San Francisco did not have a Chinatown? Yet Chinatowns are precisely the Disneylike outposts, artificially maintained through the determined solidarity of their members, that Waldron says are inauthentic and should be allowed to lapse into desuetude.⁹³

III. LESSONS FROM THE COSMO-BATTLES: WHAT CAN PROGRESSIVE PEOPLE LEARN?

There are thus many reasons not to apply cosmopolitanism as its latter day advocates urge. Doing so stands to deprive so-called advanced countries of a source of knowledge and experience that they may need.⁹⁴ And, as we have pointed out, in narrowing the range of options available, it renders cosmopolitanism of taste and life choice difficult, if not impossible, even for Westerners.⁹⁵ Is the recent interpretation of it merely an intriguing "flip," a clever reversal, like political correctness and reverse discrimination, put forward by conservatives who basically do not much care for diversity and rowdy, noisy, clamorous identity politics?⁹⁶ We think there is more to it than that, and that the kind of anti-minority, anti-identity sentiment that marches under the cosmopolitanism banner has a thinly veiled power dimension.

Consider the timing of the cosmopolitan turn. Many formerly backward nations, which suffered under the yoke of colonialism, are devel-

91. See *supra* notes 13-16, 26-32 and accompanying text.

92. Pico Iyer, *The Global Village Finally Arrives*, TIME, Fall, 1993, at 87 (Special Issue entitled *The New Face of America*) (quoting Richard Rodriguez).

93. See *supra* notes 18-21, 24-25 and accompanying text.

94. See *supra* notes 87-90 and accompanying text.

95. See *supra* notes 91-93 and accompanying text.

96. See Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994) (detailing this movement).

oping. They are building industry and beginning to contribute to pollution and the international environmental crisis. At the same time, their populations are booming. Since many of them are still not yet economically self-sufficient nor politically stable, their excess populations are finding their way to economically advanced countries in a wave of immigration, both legal and illegal.⁹⁷ If these countries can be persuaded to be "cosmopolitan" and to accept environmental standards dictated by the advanced countries and billed as "the law of nations," their economic development will be slowed but pollution may be abated somewhat.⁹⁸ If they can be encouraged to cooperate with immigration controls and standards according to which only urbane, skilled, college-educated citizens (not unskilled laborers) will immigrate to the advanced countries, countries in the First World will be better off. Third World countries will be encouraged to forget historic injustices they have suffered and grievances they may justly harbor, and begin doing business with the advanced countries on terms which disrupt these First World countries as little as possible.

Developing countries, like minority groups everywhere, need protection first, then the opportunity to assimilate ("mongrelize," as Rushdie puts it) later. Unless this order is followed, cosmopolitanism will be exploitive and one way, as exemplified, for example, by those in the United States who appropriate black music but have little to do otherwise with black culture,⁹⁹ or like immigration laws that cause a brain drain from Third World countries because they allow resettlement by surgeons, engineers, and others likely to fit into the professional managerial sectors of the economy.¹⁰⁰

Finally, consider how Waldron ends his article. He gives a dire warning of the dangers of Balkanization and warfare. He evokes the image of exiled writers living under death sentences, of shells raining down on innocent villagers—all of which he lays at the doorstep of

97. See *The New Face of America: How Immigrants are Shaping the World's First Multicultural Society*, TIME, Fall, 1993 (Special Issue, *The New Face of America*, (collection of articles on the effects of immigration on U.S. society)).

98. We are, of course, not saying that controlling pollution is bad. Rather, we merely point out that the United States, which imposed few controls on itself during its period of rapid industrialization, is adopting a double standard with respect to Third World countries.

99. On the appropriation of black music by white entrepreneurs and society in general, see MARTHA BAYLES, *HOLE IN OUR SOUL: THE LOSS OF MEANING IN AMERICAN POPULAR MUSIC* (1992). See also Spike Lee, *MO' BETTER BLUES* (7 Acres and a Mule Productions 1988).

100. On the "brain drain," see Eugene Skalnoff, *Internationalization of the Research Universities*, 122 DAEDALUS 225 (1993).

narrow nationalism.¹⁰¹

The images he points out are, indeed, deplorable. But "Balkanization" properly refers to small nations feuding with each other senselessly, reliving and settling old scores. When a small nation makes a demand for recognition or protection or reparations from a large one that has been mistreating it, that is not Balkanization, but rather an exercise in national or group self-determination. From the viewpoint of the English-educated philosopher sitting in his study, it may appear petty, rowdy, and the opposite of the serene Olympian spirit of a famous novelist.¹⁰² But that is because to such a person the history of oppression, stolen lands, smashed cultures, and damaged self-esteem that the large nation may have been guilty of on its way to world power status is not in the forefront of consciousness. To the smaller group, these things are.

The moral for progressive people, then, is that there are no safe havens, no areas of law—not jurisprudence, not moral philosophy, not constitutional law, not international law—where one will be embraced, where one will find wholehearted allies. There is no banner that cannot be turned against one, just as conservatives have done with the concepts we just mentioned and as they are doing now with cosmopolitanism. One can try flipping things back; for example, one can point out that pain-avoidance and the impulse to counter discrimination are universal human needs, even more basic and entitled to protection than the wish to be eclectic or to travel and enjoy other cultures and cuisines, and that a true cosmopolitan would devote himself to abetting them. One could, and should, make arguments such as these. But at the same time, one should not lose sight of the more basic feature of the dialectic that caused one to become beleaguered in the first place.

That is the hope that there is a structure of thought—or, if one likes, a layer of legal doctrine—out there, somewhere, and that if one could find it, it would do its magic and all the ills that befall one or one's clients will fall away as though on command. There is no such universal principle—which is not to say that there are not truths worth fighting for. Pain is universally feared and shunned. All people desire preservation and self-respect. People everywhere fear destruction of the familiar social arrangements that give their lives meaning. Disneylands

101. Waldron, *supra* note 9, at 751, 793.

102. For a recent discussion of cosmopolitanism by a noted philosopher and several respondents, see Martha Nussbaum, *Patriotism and Cosmopolitanism*, BOSTON REV., Oct/Nov. 1994, at 3.

are bad—and not just because they are tawdry,¹⁰³ but because they almost always have racist stereotypes, of which their managers and operators are blithely unaware until they are called to their attention and insistently demanded to be removed.¹⁰⁴ Cosmopolitanism is good only when it concedes these things, finds a place for identity politics, and learns to take the best from small groups and cultures without denying their right to exist.

103. *Id.* at 763-64.

104. On the Disney Corporation's resistance to removing racist shows and displays, see, e.g., Jon Wiener, *Tall Tales and True*, THE NATION, Jan. 31, 1994, at 33. For a critical assessment of the Corporation's role, as well as that of its founder, see DOUGLAS KENNEDY, WALT DISNEY: HOLLYWOOD'S DARK PRINCE (1994).