

*Reclaiming Universalism:
Negotiating Republican Self-Determination
and Cosmopolitan Norms*

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I. THE PHILOSOPHICAL FOUNDATIONS OF COSMOPOLITAN NORMS

I. THE EICHMANN TRIAL

It is December 12, 1960. Israeli secret agents have captured Adolf Eichmann, and the Israeli government has declared its intention to put Eichmann on trial. Karl Jaspers writes to Hannah Arendt: “The Eichmann trial is unsettling...because I am afraid Israel may come away from it looking bad no matter how objective the conduct of the trial... Its significance is not in its being a legal trial but in its establishing of historical facts and serving as a reminder of those facts for humanity.”¹ For the next several months and eventually years an exchange ensues between Hannah Arendt and her teacher and mentor, Karl Jaspers, about the legality or illegality of the Eichmann trial, about institutional jurisdiction, and about the philosophical foundations of international law and in particular of “crimes against humanity.”

Arendt replies that she is not as pessimistic as Jaspers is about “the legal basis of the trial” (*Correspondence*, 414). Israel can argue that Eichmann had been indicted in the first trial in Nuremberg and escaped arrest. In capturing Eichmann, Israel was capturing an outlaw—*hostis humani generis* (an enemy of the human race)—who had been condemned for “crimes against humanity.” He should have appeared before the Nuremberg Court, but since there was no successor court to carry out its mission, Arendt thinks that Israeli courts have a plausible basis for assuming jurisdiction.²

1. *Hannah Arendt–Karl Jaspers Correspondence: 1926–1969*, ed. Lotte Kohler and Hans Saner, trans. Robert and Rita Kimber, pp. 409–10. All future references to *Correspondence* in the text are to this edition.

2. In the epilogue to *Eichmann in Jerusalem*, written several years later, Arendt no longer considers the analogy of Eichmann’s crime to “piracy” useful and points out that “[the] pirate’s exception to the territorial principle—which, in the absence of an international penal code, remains the only valid principle—is made not because he is the enemy of all, and hence can be judged by all, but because his crime is committed in the high seas, and the high seas are no man’s land.” Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, p. 261. All references in the text to “Arendt 1963” are to this edition.

According to Hannah Arendt, *genocide* is the one crime that truly deserves the title “crime against humanity.”³ “Had the court in Jerusalem,” she writes, “understood that there were distinctions between discrimination, expulsion and genocide, it would have become clear that the supreme crime it was confronted with, the physical extermination of the Jewish people, was a crime against humanity, perpetrated upon the body of the Jewish people . . .” (Arendt 1963: 269).

If, however, there are crimes that can be perpetrated against humanity itself, then the individual human being is considered not only as a being worthy of moral respect but as having a legal status as well that ought to be protected by international law. This legal status would take precedence over all existing legal orders and be binding on them (*Correspondence*, 419). In this sense, *crimes against humanity* are different from other crimes, which can only exist when there is a known and promulgated law that has been violated. But which are the laws that crimes against humanity violate, particularly if, as in the case of Eichmann and the Nazi genocide of the Jews, a state and its established legal system sanctify genocide and even order it to be committed? A crime, as distinct from a moral injury, cannot be defined independently of posited law and a positive legal order.

Arendt is aware that on account of philosophical perplexities there will be a tendency to think of crimes against humanity as “crimes against humanness” or “humaneness,” as if what was intended was a moral injury that violated some kind of shared moral code. The Nuremberg Charter’s definition of “crimes against humanity” (*Verbrechen gegen die Menschheit*) was translated into German as *Verbrechen gegen die Menschlichkeit* (crimes against humaneness), “as if,” she observes, “the Nazis had simply been lacking in human kindness, certainly the understatement of the century” (Arendt 1963: 275; *Correspondence*, 423, 431).

Although Jaspers is willing to accept Arendt’s distinction of *crimes against humanity* versus *humaneness*, he points out that, since international law and natural law are not “law in the same sense that underlies normal court proceedings” (*Correspondence*, 424), it would be most appropriate for Israel to transfer the competency to judge Eichmann to the

3. Although technically the Charter of the International Military Tribunal (the Nuremberg tribunal) defined “crimes against humanity” only with reference to crimes committed during international armed conflicts, after the Genocide Convention was adopted by the UN General Assembly on December 9, 1948, genocide was also included as a crime against humanity but left distinct due to its own jurisdictional status.

UN, to the International Court at the Hague, or to courts provided for by the UN Charter.

Neither Arendt nor Jaspers harbors any illusions, however, that the UN General Assembly would rise up to this task (Arendt 1963: 270). The postscript to *Eichmann in Jerusalem* ends on an unexpected and surprising note: “It is quite conceivable that certain political responsibilities among nations might someday be adjudicated in an international court; what is inconceivable is that such a court would be a criminal tribunal which pronounces on the guilt or innocence of individuals” (Arendt 1963: 298).

Why does Arendt deny that an International Criminal Court is conceivable? Does she mean that it is unlikely to come into existence, or rather that, even if it were to come into existence, it would be without authority? Her position is all the more baffling since her very insistence upon the juridical as opposed to the merely moral dimension of crimes against humanity suggests the need for a standing international body that would possess the jurisdiction to try such crimes committed by individuals.

We encounter here a perplexity whose significance goes well beyond the consistency or lack thereof in Arendt’s views on international law. Although both Jaspers and Arendt are Kantians and are deeply indebted to the cosmopolitan legacy of Kantian thought, Arendt is more of a civic republican, or maybe even a political existentialist, than Jaspers is. Arendt, while a Kantian in moral theory, remains committed to a civic republican vision of political self-determination. She is therefore more skeptical that an international body with criminal jurisdiction can come into existence, although, as we will see below, this is by no means her last word on the matter.

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I begin my reflections on “Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms” by recalling this exchange between Jaspers and Arendt on the fate of Eichmann. The Eichmann trial, much like the Nuremberg trials before it, captured some of the perplexities of the emerging norms of international and, eventually, cosmopolitan justice. It will be my thesis that since the UN Declaration of Human Rights in 1948 we have entered a phase in the evolution of global civil society that is characterized by a transition from *international* to *cosmopolitan* norms of justice. While norms of international justice frequently, though not always, emerge through treaty

obligations to which states and their representatives are signatories, cosmopolitan norms of justice accrue to individuals as moral and legal persons in a worldwide civil society. Even if cosmopolitan norms also originate through treaty-like obligations, such as the UN Charter, their peculiarity is that they bind states and their representatives, sometimes against the will of the signatories themselves, because they create protections for individuals as human beings. This is the uniqueness of the many human rights agreements concluded since World War II. They signal an eventual transition from international law based on treaties to cosmopolitan law understood as public law that binds and bends the will of sovereign nations.

In contemporary thought, terms such as “globalization” and “empire” are often used to capture these transformations. Yet these terms are misleading, in that they fail to address the distinctiveness of cosmopolitan norms. Defenders of globalization reduce cosmopolitan norms to a thin version of the human rights to life, liberty, equality, and property, which are supposed to accompany the spread of free markets and trading practices. Theorists of “empire,” most notably Tony Negri and Michael Hardt, distinguish between *imperialism* and *empire* in order to capture the novel logic of the international order.⁴ While “imperialism” refers to a predatory, extractive, and exploitative order through which one (or more) sovereign power imposes its will on others, “empire” refers to an anonymous network of rules, regulations, and structures that entrap one in the system of global capitalism. Empire is a hegemon without a center. Thus it seems that global capitalism and cosmopolitan norms are imbricated in one another. Hardt and Negri’s residual skepticism toward human rights and the rule of law is so intense, however, that in the final analysis they hollow out the real challenge of cosmopolitanism, which is the reconciliation of universalistic norms with democratic politics, in favor of an undifferentiated concept of the masses or of the multitude.

I argue that while the evolution of cosmopolitan norms of justice is a tremendous development, the relationship between democratic self-determination and cosmopolitan norms is fraught, both theoretically and politically. How can the will of democratic majorities be reconciled with norms of cosmopolitan justice? How can legal norms and standards, which originate outside the will of democratic legislatures, become

4. Michael Hardt and Antonio Negri, *Empire*.

binding upon them? To examine this fraught relationship will be my task in these lectures. In the first lecture, I clarify what I mean by cosmopolitanism by engaging in a complex dialogue with Arendt, Jaspers, and Kant (sections 2 and 3). The distinguishing feature of the period we are in cannot be captured through the *bon mots* of “globalization” and “empire”; rather, we are facing the rise of an international human rights regime and the spread of cosmopolitan norms, while the relationship between state sovereignty and such norms is becoming more contentious and conflictual (4). I conclude the first lecture by elucidating the “paradox of democratic legitimacy,” namely, the necessary and inevitable limitation of democratic forms of representation and accountability in terms of the formal distinction between members and non-members (5). This is the core tension, even if not a contradiction, between democratic self-determination and the norms of cosmopolitan justice.

2. COSMOPOLITANISM AND DISCURSIVE SCOPE

The term “cosmopolitanism,” along with “empire” and “globalization,” has become one of the key words of our times. For some, cosmopolitanism signifies an attitude of enlightened morality that does not place “love of country” ahead of “love of mankind” (Martha Nussbaum); for others, cosmopolitanism signifies hybridity, fluidity, and recognizing the internally differentiated and conflictual character of human selves and citizens, whose complex aspirations cannot be circumscribed by national fantasies and primordial communities (Jeremy Waldron). For a third group of thinkers, whose lineages are those of Critical Theory, cosmopolitanism is a normative philosophy for carrying the universalistic norms of discourse ethics beyond the confines of the nation-state (Jürgen Habermas, David Held, and James Bohman).⁵

My argument in these lectures is closely aligned with the aspirations of this latter group. In extending the norms of discourse ethics beyond

5. See Martha Nussbaum, “Patriotism and Cosmopolitanism,” in *For Love of Country: Debating the Limits of Patriotism*, ed. Joshua Cohen, pp. 3–17; Jeremy Waldron, “Minority Cultures and the Cosmopolitical Alternative,” in *The Rights of Minority Cultures*, ed. Will Kymlicka, pp. 93–119; Jürgen Habermas, “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight,” in *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal*, ed. James Bohman and Matthias Lutz-Bachmann, pp. 113–55; James Bohman, “The Public Spheres of the World Citizen,” *ibid.*, pp. 179–201; David Held, “Cosmopolitan Democracy and the Global Order: A New Agenda,” *ibid.*, pp. 235–53; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*.

the confines of the nation-state, however, Held and Bohman in particular have not addressed the paradox of bounded communities. The question of “discursive scope” has not been given serious consideration. Here I part company from my Critical Theory colleagues and join in the anxiety expressed by Arendt’s puzzling observations about an International Criminal Court. I do so, not because I agree with Arendt, but because I believe that this anxiety must be indulged in by any serious deliberative democrat. In my second lecture, I turn to the challenge formulated by Arendt and argue that the relationship between cosmopolitan norms and democratic will-formation can be conceptualized as a process of democratic iterations, often resulting in jurisgenerative politics.

What is meant by “discursive scope”? Since the discourse theory of ethics articulates a universalist moral standpoint, it cannot limit the scope of the *moral conversation* only to those who reside within nationally recognized boundaries; it views the moral conversation as potentially including all of *humanity*. Put sharply, every person, and every moral agent who has interests and whom my actions and the consequences of my actions can impact and affect in some manner or another, is potentially a moral conversation partner with me: I have a moral obligation to *justify my actions with reasons* to this individual or to the representatives of this being. I respect the moral worth of others by recognizing that I must provide them with a justification for my actions. We are all potential participants in such conversations of justification.

Due to the open-endedness of discourses of moral justification there will be an inevitable and necessary tension between those moral obligations and duties resulting from our membership in bounded communities and the moral perspective that we must adopt as human beings *simpliciter*. From a universalist and cosmopolitan point of view, however, boundaries, including state borders and frontiers, require moral justification. The stipulations of discourse ethics cannot be applied to the domain of political membership without the aid of further premises; nor is it necessary to do so. A discursive approach should place *significant limitations* on what can count as *morally permissible* practices of inclusion and exclusion, engaged in by sovereign polities.

This confronts the discourse theorist with a dilemma: a shared feature of all norms of membership including, but not only, norms of citizenship is that those who are affected by the consequences of these norms and, in the first place, by criteria of exclusion *per definitionem* cannot be party to their articulation. Membership norms impact those who are not

members precisely by distinguishing insiders from outsiders, citizens from noncitizens. This then gives rise to a dilemma: either a discourse theory is simply *irrelevant* to membership practices in bounded communities in that it cannot articulate *any* justifiable criteria of exclusion, or it simply *accepts* existing practices of exclusion as *morally neutral* historical contingencies that require no further validation. This would suggest that a discourse theory of democracy is itself chimerical insofar as democracy requires a morally justifiable closure that discourse ethics cannot deliver.

Unlike communitarians who reduce the demands of morality to the claims of specific ethical, cultural, and political communities, and unlike realists and postmodernists who are skeptical that political norms can ever be subordinated to moral ones, I insist *upon the necessary disjunction as well as the necessary mediation between the moral and the ethical, the moral and the political*. The task is one of mediations, not reductions. How can one mediate moral universalism with ethical particularism? How can one mediate legal and political norms with moral ones? Such a strategy of mediation is crucial to reclaiming dialogic universalism.

My understanding of cosmopolitanism situates the philosophical project as one of mediations, not of reductions or of totalizations. I do not view cosmopolitanism as a global ethic as such; nor is it adequate to characterize cosmopolitanism through cultural attitudes and choices alone. I follow the Kantian tradition in thinking of cosmopolitanism as the emergence of norms that ought to govern relations among individuals in a global civil society. These norms are neither merely moral nor just legal. They may best be characterized as framing the “morality of the law,” but in a global rather than a domestic context. They signal the eventual legalization and juridification of the rights claims of human beings everywhere, regardless of their membership in bounded communities. Membership in bounded communities, which may be smaller or larger than territorially defined nation-states, is nevertheless crucial. My task in these lectures is to offer a solution to the problems of discursive scope in ethical theory by thinking through cosmopolitan norms and bounded membership.

3. KANT'S COSMOPOLITAN LEGACY

The Eichmann trial and the Arendt-Jaspers exchange surrounding it are interesting precisely because they stand at the beginning of the evolution of cosmopolitan norms, the full implications of which have only

become clear in our time. To appreciate Arendt's and Jaspers's positions, as well as the differences between them, it is necessary to examine briefly Kant's doctrine of cosmopolitan right. Arendt and Jaspers are grappling with a Kantian legacy: neither accepts legal positivism or natural law. Legal positivism, best captured by Thomas Hobbes's phrase "And Covenants, without the sword, are but Words,"⁶ makes an immanent moral critique of legality impossible.⁷ That is, from within the logic of the legal system itself, norms refer to other higher norms, in a system of conceptual and juridical hierarchy. Any criticism voiced against this system relies upon norms that transcend the logic of legality. The moral critique of legality presents an "extra-legal" moment, alien to the logic of the law. By contrast, after the experiences of the Third Reich and Nazi dictatorship, Arendt and Jaspers consider legal positivism a vacuous doctrine and reject as illusory that the legal system can serve as its own moral foundation; yet philosophically as well as historically, for them, natural law doctrines are also obsolete. For reasons that I cannot develop further here, they accept that to postulate a fixed human nature, as natural law doctrines do, is to fall into a metaphysics of substance and to view the human being as an entity. Following Martin Heidegger's insight that *Dasein* is the only being for whom the question of its existence is meaningful, they prefer the language of "human *Existenz*" or of the "human condition" to that of human nature.⁸ The human condition refers to those circumstances under which life is given to human beings. These circumstances constrain our choices, but nevertheless we are free to choose our fate. Yet if natural law is not defensible, and legal positivism is morally suspect, how can one give meaning to concepts such as "crimes against humanity"?⁹ Kant's doctrine of cosmopolitan right shows the way here.

6. Thomas Hobbes, *Leviathan*, ed. and with an introduction by C. B. McPherson, chap. 17, p. 223.

7. Legal positivism is a complicated and rich tradition, with distinct legacies in Anglo-Saxon and Continental jurisprudence. Not all legal positivists would subscribe to the "command view of the law," defended by Hobbes and further developed by John Austin (1788–1859). For a comprehensive account of the status of international law, and of the underlying philosophical puzzles associated with it, see Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, pp. 39–54.

8. See Hannah Arendt: "the human condition is not the same as human nature," in *The Human Condition*, p. 10.

9. See, for example, the objections that American representatives made to the category of "laws of humanity" during international negotiations after World War I: "As pointed out by the American Representatives on more than one occasion, war was and is by its very nature

The conceptual innovation of Kant's doctrine of cosmopolitanism is that Kant recognized three interrelated but distinct levels of "right," in the juridical senses of the term.¹⁰ First is domestic law, the sphere of posited relations of right, which Kant claims should be in accordance with a republican constitution; second is the sphere of rightful relations among nations (*Völkerrecht*), resulting from treaty obligations among states; third is cosmopolitan right, which concerns relations between persons and organized political entities in a global civil society.¹¹

Kant introduces the term *Weltbürgerrecht* (cosmopolitan right) in the Third Article of "Perpetual Peace," with reference to the duty of hospitality.¹² The duty of hospitality is of interest because it touches upon the quintessential case of an individual coming into contact with an organized and bounded political entity. The German reads: "Das Weltbürgerrecht soll auf Bedingungen der allgemeinen Hospitalität eingeschränkt sein" ("Cosmopolitan right should be restricted to conditions of universal

inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment of this court. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and contrary to the laws and principles of humanity." U.S. Representatives on the Commission of Responsibilities, *Memorandum of Reservations to the Majority Report*, April 4, 1919, excerpted in Michael Marrus, *The Nuremberg War Crimes Trial 1945–46: A Documentary History*, p. 10.

10. I have dealt more extensively with Kant's doctrine of cosmopolitanism in *The Rights of Others: Aliens, Citizens and Residents*, chap. 1.

11. I disagree with Jeremy Waldron's reading of Kant's theory in terms of anthropological assumptions such as the fact that the earth is round, that therefore human beings must inevitably come into contact with one another, etc. These anthropological observations correspond to what we might call, borrowing a term from John Rawls, "the circumstances of cosmopolitan justice"; they neither serve as a philosophical foundation to it nor are the most important innovation in it. See Jeremy Waldron, "What Is Cosmopolitan?" *Journal of Political Philosophy* 8, no. 2 (2000): 227–43, here p. 238. A more detailed exchange with Jeremy Waldron's reading of cosmopolitanism is in preparation. See Seyla Benhabib, *Reclaiming Universalism: Democracy and Cosmopolitanism*, with comments by Jeremy Waldron, Bonnie Honig, and Will Kymlicka and a reply (Oxford University Press: forthcoming).

12. The Articles are titled "The Civil Constitution of Every State should be Republican"; "The Law of Nations shall be founded on a Federation of Free States"; and "The Law of World Citizenship shall be Limited to Conditions of Universal Hospitality." Much scholarship on this essay has focused on the precise legal and political form that these articles could or would take, and on whether Kant meant to propose the establishment of a world federation of republics (*eine föderative Vereinigung*) or a league of sovereign nation-states (*Völkerbund*). I have used the following Kant editions: Immanuel Kant, "Zum Ewigen Frieden: Ein philosophischer Entwurf" [1795], in *Immanuel Kants Werke (Schriften von 1790–1796)*, ed. A. Buchenau, E. Cassirer, and B. Kellermann, pp. 425–74 (referred to in the text as "Kant [1795] 1923"); Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" [1795], trans. H. B. Nisbet, in *Kant: Political Writings*, ed. Hans Reiss, pp. 93–131 (referred to in the text as "Kant [1795] 1994").

hospitality.” Kant [1795] 1923: 443). Kant himself notes the oddity of the locution “hospitality” in this context and therefore remarks that “it is not a question of philanthropy but of right.” In other words, *hospitality* is not to be understood as a virtue of sociability, as the kindness and generosity one may show to strangers who come to one’s land or who become dependent upon one’s act of kindness through circumstances of nature or history; hospitality is a right that belongs to all human beings insofar as we view them as potential participants in a world republic. Likewise, following Kant, Arendt argues that “crimes against humanity” are not violations of moral norms alone, but violations of the rights of humanity in our person. Are these moral or juridical rights?

According to Kant, the right of hospitality entails a claim to temporary residency on the part of the stranger who comes upon us. This cannot be refused, if such refusal would involve the destruction—Kant’s word here is *Untergang*—of the other. To refuse sanctuary to victims of religious wars, to victims of piracy or shipwreck, when such refusal would lead to their demise, is untenable. What remains unclear in Kant’s discussion is whether such relations among peoples and nations involve acts of supererogation, which go beyond the reasonable demands of morality into the realm of altruism, or whether they entail a moral claim pertaining to the rights of humanity in the person of the other.

The right of hospitality is situated at the boundaries of the polity; it delimits civic space by regulating relations among members and strangers. It occupies that space between human rights and civil and political rights, between the rights of humanity in our person and the rights that accrue to us insofar as we are citizens of specific republics.

We may identify here the juridical and moral ambivalence that affects discussions of the right of asylum and refuge to this day. Are the rights of asylum and refuge rights in the sense of being *reciprocal moral obligations* that, in some sense or another, are grounded upon our mutual humanity? Or are these right claims in the legal sense of being *enforceable norms* of behavior that individuals and groups can hold each other to and, in particular, force sovereign nation-states to comply with? Kant’s discussion provides no clear answer. The right of hospitality entails a moral claim with potential legal consequences, in that the obligation of the receiving states to grant temporary residency to foreigners is anchored in a republican cosmopolitical order. Such an order does not have a supreme executive law governing it. In this sense the obligation to show hospitality to foreigners and strangers cannot be enforced; it remains a volun-

tarily incurred obligation on the part of the political sovereign. The right of hospitality expresses all the dilemmas of a republican cosmopolitical order in a nutshell: how to create quasi-legally binding obligations through voluntary commitments and in the absence of an overwhelming sovereign power with the ultimate right of enforcement.

By delineating a conceptual space between universal norms of morality and positive law with respect to the actions and interactions of individuals in the world community—he uses the locution *der Erdkugel* to characterize this space—Kant laid the foundational stones for a post-Westphalian legal order. His “Perpetual Peace” essay signaled a watershed between two conceptions of sovereignty and paved the way for the transition from the first to the second. We can name these “Westphalian sovereignty” and “liberal international sovereignty.”¹³ In the classical Westphalian regime of sovereignty states are free and equal; they enjoy ultimate authority over all objects and subjects within a circumscribed territory; relations with other sovereigns are voluntary and contingent; these relations are limited in kind and scope to transitory military and economic alliances as well as cultural and religious affinities; above all, states “regard cross-border processes as a ‘private matter’ concerning only those immediately affected.”¹⁴

By contrast, according to conceptions of liberal international sovereignty the formal equality of states is increasingly dependent upon their subscribing to common values and principles, such as the observance of human rights, the rule of law, and respect for democratic self-determination. Sovereignty no longer means ultimate and arbitrary authority over a circumscribed territory; states that treat their citizens in violation of certain norms, close their borders, prevent freedoms of market, speech, and association, and the like are thought not to belong within a specific society of states or alliances; the anchoring of domestic principles in institutions shared with others is crucial. In Michael Ignatieff’s words, this mode of sovereignty is subject to the “naming and shaming” processes of civil and cultural sanctions, which, while not forcing states to comply militarily, nonetheless can influence their behavior.¹⁵

13. David Held, “Law of States, Law of Peoples: Three Models of Sovereignty,” *Legal Theory* 8 (2002): 1–44; here pp. 4ff.

14. *Ibid.*, p. 4.

15. Michael Ignatieff, *Human Rights as Politics and Idolatry*, with commentary by K. Anthony Appiah, David Hollinger, Thomas W. Laquer, and Diane F. Orentlicher, p. 12.

Cosmopolitan norms go beyond liberal international sovereignty in that, while historically the subjects of international law were states and organized political entities, “cosmopolitan right” envisages a conceptual and juridical space for a domain of rights-relations that would be binding upon nonstate actors as well as upon state actors when they come into contact with individuals who are not members of their own polities. Kant envisaged a world in which all members of the human race eventually would become participants in a civil order and enter into a condition of lawful association with one another. Yet this civil condition of lawful coexistence was not equivalent to membership in a republican polity. In an extremely important move, Kant argued that cosmopolitan citizens still needed their individual republics to be citizens at all. This is why he so carefully distinguished a “world government” from a “world federation.” A “world government” would result only in a “universal monarchy,” he argued, and would be a “soulless despotism,” whereas a federative union (*eine föderative Vereinigung*) would still permit the exercise of citizenship within bounded communities (Kant [1795] 1923: 453).

Concepts such as “the right to universal hospitality,” “crimes against humanity,” and “the right to have rights” (Arendt) are the legacy of Kantian cosmopolitanism. In each instance, they articulate a shared philosophical perplexity: Kant, Arendt, and Jaspers want to give these concepts a binding power over and beyond the moral obligation that they impose on individual agents. These concepts should not be treated as mere “oughts”; they must generate binding norms not only for individuals but for collective actors as well, and, in the first place, for states and governments. The right to universal hospitality, for example, if it means anything at all, imposes an obligation on the political sovereign, by interdicting states to deny refuge and asylum to those whose intentions are peaceful and if refusing them sojourn would result in their demise. The right to have rights, in Arendt’s memorable formulation,¹⁶ prohibits states from *denaturalizing* individuals by denying them citizenship rights and state protection.

The concept of “crimes against humanity” expressly prohibits government officials, state bureaucrats, and others in positions of power from acting in such a way as to engage in “murder, extermination, enslavement, deportation, and other inhumane acts committed against any

16. See Hannah Arendt, *The Origins of Totalitarianism*, pp. 296–99.

civilian population, before or during war; or persecution on political, racial or religious grounds... whether or not in violation of domestic law of the country where perpetrated.”¹⁷ The “right to have rights” and “crimes against humanity” are intended not only to provide precepts of individual conduct but to articulate principles of public morality and institutional justice as well. They transcend the specific positive laws of any existing legal order by stipulating norms that no promulgated legislation ought to violate. What then is the philosophical puzzle concerning cosmopolitan norms? I distinguish among three different issues here:

- First are questions concerning the philosophical foundations of cosmopolitan right claims. Certainly, prior to Kant the Western legal tradition also recognized a sphere of international law that went beyond specific treaty obligations entered into by various sovereigns. Stoic conceptions of natural law, Roman conceptions of *jus gentium* (the law of nations), and Christian conceptions of the law of the Christian commonwealth established guidelines for nations in their dealings with one another. Kant relied upon the work of other natural law thinkers prior to him, such as Samuel von Pufendorf, Hugo Grotius, and Emmerich von Vattel.¹⁸ But how could one justify *cosmopolitan right* without falling back upon some conception of a fixed human nature or a shared system of religious belief? What, if any, are the ontological foundations of cosmopolitan right after Kantian critical philosophy?
- Second, cosmopolitan right, if it is to deserve its name at all, must bind the actions and the will of sovereign legal and political entities. Cosmopolitan right “trumps” positive law, although there is no higher instance besides sovereign states, with the authority to enforce it. What is the authority of norms that themselves are not backed by a higher authority, either in the conceptual sense or in the sense of enforcement?

17. Article 6 (c), Charter of the International Military Tribunal, as cited in James Friedman, “Arendt in Jerusalem, Jackson at Nuremberg: Presuppositions of the Nazi War Crimes Trials,” *Israel Law Review* 28, no. 4 (1994): 601–25; here p. 614.

18. Richard Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant*.

- Third, Kant, Arendt, and Jaspers, although anticipating a world society governed by cosmopolitan norms of justice, also proceed from the premise of a “divided” humankind that is organized into discrete, self-determining, and sovereign political entities. At times this is a concession to political realism on their part; more often though, and particularly for Kant and Arendt, the division of humankind into self-governing polities is not a *factum brutum*, but has a value in itself. Whereas Jaspers is ultimately willing to abdicate republican self-governance and entertain the possibility of world government,¹⁹ neither Kant nor Arendt can reconcile world government with the values of private and public autonomy. Therefore, the tension between the demands of cosmopolitan justice and the values of republican self-governance is greatest in their work.

I address these philosophical puzzles in my lectures by discussing them in reverse order. I will proceed from an analysis of the tension between cosmopolitan norms and republican self-governance to discuss the authority of cosmopolitan norms and finally arrive at the ontological puzzle. My concern is less with the kind of ontological universe in which cosmopolitan norms can be said to “exist,” but more with how these norms, whatever their ontological status, can shape, guide, and constrain our political life, by creating new spaces for evaluative articulation and by extending our political imagination.

4. THE RISE OF AN INTERNATIONAL HUMAN RIGHTS REGIME

Kant, Arendt, and Jaspers anticipated and intimated the evolution of cosmopolitan norms of justice. In the intervening years, institutional developments have led us to frame certain questions differently, while others can very much be understood in terms of puzzles they had identified. What are these institutional developments? Since the 1948 Universal Declaration of Human Rights an international human rights regime has emerged. By an “international human rights regime,” I understand a set of interrelated and overlapping global and regional regimes that encompass human rights treaties as well as customary international law or international soft law.²⁰

19. See Karl Jaspers, *The Origin and Goal of History*, trans. Michael Bullock, pp. 193–213.

20. Such examples would include the UN treaty bodies under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial

The rise of multiple human rights regimes causes both collusion and confluence between international and domestic law. The consequence is a complex system of interdependence that gives the lie to Carl Schmitt's dictum that "there is no sovereign to force the sovereign."²¹ As Gerald Neuman observes, "National constitutions vary greatly in their provisions regarding the relationship between international and domestic law. Some are more or less dualist, treating international norms as part of a distinct legal system. . . . Others are more or less monist, treating international law and domestic law as a single legal system, often giving some category of international norms legal supremacy over domestic legislation."²² This transformation of human rights codes into generalizable norms that ought to govern the behavior of sovereign states is one of the most promising aspects of contemporary political globalization processes.

We are witnessing this development in at least three related areas:

i. *Crimes against Humanity, Genocide, and War Crimes.* The concept of *crimes against humanity*, first articulated by the Allied powers in the Nuremberg trials of Nazi war criminals, stipulates that there are certain norms in accordance with which state officials as well as private individuals are to treat one another, even, and precisely, under conditions of extreme hostility and war. Ethnic cleansing, mass executions, rape, and cruel and unusual punishment of the enemy, such as dismemberment, that occur under conditions of a "widespread or systematic attack" are proscribed and can all constitute sufficient grounds for the indictment and prosecution of individuals who are responsible for these actions,

Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. The establishment of the European Union has been accompanied by a Charter of Fundamental Rights and by the formation of a European Court of Justice. The European Convention for the Protection of Human Rights and Fundamental Freedoms, which encompasses states that are not EU members as well, permits the claims of citizens of adhering states to be heard by a European Court of Human Rights. Parallel developments can be seen on the American continent through the establishment of the Inter-American System for the Protection of Human Rights and the Inter-American Court of Human Rights. See Gerald Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance," *Stanford Law Review* 55, no. 5 (May 2003): 1863–1901. By "soft law" is meant an international agreement that is not concluded as a treaty and therefore not covered by the Vienna Convention on the Law of Treaties. Such an agreement is adopted by states that do not want to have a treaty-based relationship and thus be governed by treaty or customary law in the event of a breach of their obligations.

21. Carl Schmitt, *The Concept of the Political*, trans., introduction, and notes by George Schwab.

22. Neuman, "Human Rights and Constitutional Rights," p. 1875.

even if they are or were state officials or subordinates who acted under orders. The refrain of the soldier and the bureaucrat—"I was only doing my duty"—is no longer an acceptable ground for abrogating the rights of humanity in the person of the other, even when, and especially when, the other is your enemy.

During the Nuremberg trials, the term "crimes against humanity" was used to refer to crimes committed during international armed conflicts.²³ Immediately after the Nuremberg trials, *genocide* was also included as a crime against humanity but was left distinct due to its own jurisdictional status, which was codified in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). Genocide is the knowing and willful destruction of the way of life and existence of a collectivity whether through acts of total war, racial extinction, or ethnic cleansing. It is the supreme crime against humanity, in that it aims at the destruction of human variety, of the many and diverse ways of being human. Genocide does not only eliminate individuals who may belong to this or another group; it aims at the extinction of their way of life.²⁴

War crimes, by contrast, as defined in the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), initially applied only to *international conflicts*. With the Statute of the International Criminal Tribunal for Rwanda (1994), recognition was extended to *internal armed conflict* as well. "War crimes" now refers to international as well as internal conflicts that involve the mistreatment or abuse of civilians and noncombatants as well as one's enemy in combat.²⁵

Thus, in a significant development since World War II, crimes against humanity, genocide, and war crimes have all been extended to apply not only to atrocities that take place in international conflict situations but also to events *within* the borders of a sovereign country that may be perpetrated by officials of that country and/or by citizens during peacetime.

23. Charter of the International Military Tribunal, 1945, Art. 6 (c) as cited in Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, pp. 26–45; William A. Schabas, *An Introduction to the International Criminal Court*, pp. 6–7.

24. Ratner and Abrams, *Accountability for Human Rights Atrocities*, pp. 35–36.

25. *Ibid.*, pp. 80–110; Schabas, *Introduction to the International Criminal Court*, pp. 40–53.

The continuing rearticulation of these three categories in international law, and in particular their extension from situations of international armed conflict to civil wars within a country and to the actions of governments against their own people, has in turn encouraged the emergence of the concept of “humanitarian interventions.”

ii. *Humanitarian Interventions.* The theory and practice of humanitarian interventions, which the United States and its North Atlantic Treaty Organization (NATO) allies appealed to in order to justify their actions against the ethnic cleansing of the civilian population in Bosnia and Kosovo, suggest that when a sovereign nation-state egregiously violates the basic human rights of a segment of its population on account of religion, race, ethnicity, language, or culture there is a *generalized moral obligation* to end actions such as genocide and crimes against humanity.²⁶ In such cases human rights norms trump state sovereignty claims. No matter how controversial in interpretation and application they may be, humanitarian interventions are based on the growing consensus that the sovereignty of the state over the life, liberty, and property of its citizens or residents is not unconditional or unlimited.²⁷ State sovereignty is no longer the ultimate arbiter of the fate of citizens or residents. The exercise of state sovereignty even within domestic borders is increasingly subject to internationally recognized norms that prohibit genocide, ethnocide, mass expulsions, enslavement, rape, and forced labor.

iii. *Transnational Migration.* The third area in which international human rights norms are creating binding guidelines upon the will of sovereign nation-states is that of international migration. *Humanitarian interventions* deal with the treatment by nation-states of their citizens or residents; *crimes against humanity* and *war crimes* concern relations among enemies or opponents in nationally bounded as well as extraterritorial settings. *Transnational migrations*, by contrast, pertain to the rights of individuals, not insofar as they are considered members of concrete bounded communities but insofar as they are human beings *simpliciter*, when they come into contact with, seek entry into, or want to become members of territorially bounded communities.

26. Allen Buchanan, “From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform,” *Ethics* 111 (July 2001): 673–705.

27. Michael Doyle, “The New Interventionism,” in *Global Justice*, ed. Thomas W. Pogge, pp. 219–42.

The Universal Declaration of Human Rights recognizes the right to freedom of movement across boundaries—a right to emigrate (that is, to leave a country), but not a right to immigrate, a right to enter a country (Article 13). Article 14 anchors the right to enjoy asylum under certain circumstances, while Article 15 of the Declaration proclaims that everyone has “the right to a nationality.” The second part of Article 15 stipulates: “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”²⁸

Yet the Universal Declaration is silent on states’ *obligations* to grant entry to immigrants, to uphold the right of asylum, and to permit citizenship to alien residents and denizens. These rights have no specific addressees, and they do not anchor *specific* obligations on the part of second and third parties to comply with them. Despite the cross-border character of these rights, the Universal Declaration upholds the sovereignty of individual states. Thus a series of internal contradictions between universal human rights and territorial sovereignty is built right into the logic of the most comprehensive international law document in our world.

The Geneva Convention of 1951 Relating to the Status of Refugees (and its Protocol added in 1967) is the second most important international legal document after the Universal Declaration. Nevertheless, neither the existence of this document nor the creation of the United Nations High Commissioner on Refugees has altered the fact that the Geneva Convention and its Protocol are binding on signatory states alone and can be brazenly disregarded by nonsignatories and, at times, even by signatory states themselves.

Some lament the fact that as international human rights norms are increasingly invoked in immigration, refugee, and asylum disputes, territorially delimited nations are challenged not only in their claims to control their borders but also in their prerogative to define the “boundaries of the national community.” Others criticize the Universal Declaration for not endorsing “institutional cosmopolitanism,” and for upholding an “interstatal” rather than a truly cosmopolitan international order.²⁹ Yet one thing is clear: the treatment by states of citizens and residents within their boundaries is no longer an unchecked prerogative.

28. Text available at <http://www.unhcr.ch/udhr/lang/eng.htm>.

29. For the first position, see David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship*, p. 5; for the second, Onora O’Neill, *Bounds of Justice*, p. 180.

One of the cornerstones of Westphalian sovereignty, namely, that states enjoy ultimate authority over all objects and subjects within their circumscribed territory, has been delegitimized through international law. I concur with David Held that cosmopolitan justice “conceives of international law as a system of public law. . . . Cosmopolitan sovereignty is the law of peoples because it places at its center the primacy of individual human beings as political agents, and the accountability of power.”³⁰

The evolution of cosmopolitan norms is rife with a central contradiction: while territorially bounded states are increasingly subject to international norms, states themselves are the principal signatories as well as enforcers of the multiple and varied human rights treaties and conventions through which international norms spread. In this process, the state is both sublated and reinforced in its authority. Throughout the international system, as long as territorially bounded states are recognized as the sole legitimate units of negotiation and representation, a tension, and at times even a fatal contradiction, is palpable: the modern state system is caught between *sovereignty* and *hospitality*, between the prerogative to choose to be a party to cosmopolitan norms and human rights treaties and the obligation to extend recognition of these human rights to all.

In a Kantian vein, by “hospitality” I mean all human rights claims that are cross-border in scope. The tension between sovereignty and hospitality is all the more real for liberal democracies since they are based on the fragile but necessary negotiation of constitutional universalism and territorial sovereignty.

30. Held, “Law of States, Law of Peoples,” p. 1. In this article Held develops cosmopolitanism into a “moral and political outlook,” characterized by adherence to seven principles: equal worth and dignity; active agency; personal responsibility and accountability; consent; reflexive deliberation; inclusiveness and subsidiarity; and avoidance of serious harm and the amelioration of urgent need (p. 24). I am puzzled by this list and fear that, with this move, cosmopolitanism is understood by Held as a “comprehensive doctrine” in Rawls’s sense. A comprehensive doctrine entails not only a vision of justice but one of the good as well. I think that this is unnecessary; from the standpoint of a Kantian cosmopolitan federalist understanding it is also incoherent to make this move. What the elements of an “overlapping cosmopolitan consensus” are is an open question, but I disagree that to spell them out one must subscribe to a comprehensive account such as Held provides. Furthermore, many of these principles are aspects of a wide variety of moral theories, so it is unclear to me what is gained by this added stipulation.

5. THE PARADOX OF DEMOCRATIC LEGITIMACY

Ideally, democratic rule means that all members of a sovereign body are to be respected as bearers of human rights, and that the consociates of this sovereign freely associate with one another to establish a regime of self-governance under which each is to be considered both author of the laws and subject to them. This ideal of the original contract, as formulated by Jean-Jacques Rousseau and adopted by Kant, is a heuristically useful device for capturing the logic of modern democracies. Modern democracies, unlike their ancient counterparts, conceive of their citizens as rights-bearing consociates. The rights of the citizens rest upon the “rights of man.” *Les droits de l’homme et de citoyen* do not contradict one another; quite to the contrary, they are coimplicated. This is the idealized logic of the modern democratic revolutions following the American and French examples.

The democratic sovereign draws its legitimacy not merely from its act of constitution, but, equally significantly, from the conformity of this act to universal principles of human rights that are in some sense said to precede and antedate the will of the sovereign and in accordance with which the sovereign undertakes to bind itself. “We, the people” refers to a particular human community, circumscribed in space and time, sharing a particular culture, history, and legacy; yet this people establishes itself as a democratic body by acting in the name of the “universal.” The tension between universal human rights claims and particularistic cultural and national identities is constitutive of democratic legitimacy. Modern democracies act in the name of universal principles that are then circumscribed within a particular civic community. This is the “Janus face of the modern nation,” in the words of Jürgen Habermas.³¹

Since Rousseau, however, we also know that the will of the democratic people may be legitimate but unjust, unanimous but unwise. “The general will” and “the will of all” may not overlap either in theory or in practice. Democratic rule and the claims of justice may contradict one another. The democratic precommitments expressed in the idealized allegiance to universal human rights—life, liberty, and property—need to be reactualized and renegotiated within actual polities as democratic intentions. Potentially, there is always a conflict between an interpreta-

31. Jürgen Habermas, “The European Nation-State: On the Past and Future of Sovereignty and Citizenship,” in *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff, pp. 105–29; here p. 115.

tion of these rights claims that precede the declared formulations of the sovereign and the actual enactments of the democratic people that could potentially violate such interpretations. We encounter this conflict in the history of political thought as the conflict between liberalism and democracy, and even as the conflict between constitutionalism and popular sovereignty. In each case the logic of the conflict is the same: to assure that the democratic sovereign will uphold certain constraints upon its will in virtue of its precommitment to certain formal and substantive interpretations of rights. Liberal and democratic theorists disagree with one another as to the proper balance of this mix: while strong liberals want to bind the sovereign will through precommitments to a list of human rights, strong democrats reject such a prepolitical understanding of rights and argue that they must be open to renegotiation and reinterpretation by the sovereign people—admittedly within certain limits.

Yet this paradox of democratic legitimacy has a corollary that has been little noted: every act of self-legislation is also an act of self-constitution. “We, the people,” who agree to bind ourselves by these laws, are also defining ourselves as a “we” in the very act of self-legislation. It is not only the general laws of self-government that are articulated in this process; the community that binds itself by these laws defines itself by drawing boundaries as well, and these boundaries are territorial as well as civic. The will of the democratic sovereign can extend only over the territory that is under its jurisdiction; democracies require borders. Empires have frontiers, while democracies have borders. Democratic rule, unlike imperial dominion, is exercised in the name of some specific constituency and binds that constituency alone. Therefore, at the same time that the sovereign defines itself *territorially*, it also defines itself in *civic* terms. Those who are full members of the sovereign body are distinguished from those who “fall under its protection,” but who do not enjoy “full membership rights.” Women and slaves, servants, propertyless white males, non-Christians, and nonwhite races were historically excluded from membership in the sovereign body and from the project of citizenship. They were, in Kant’s famous words, “mere auxiliaries to the commonwealth.”³²

32. Immanuel Kant, “Die Metaphysik der Sitten in zwei Teilen” [1797], in *Immanuel Kants Werke*, p. 121; *The Metaphysics of Morals*, trans. and ed. Mary Gregor, p. 140.

The boundaries of the civil community are of two kinds then: first, these boundaries define the status of those who enjoy second-class citizenship status within the polity but who can be considered members of the sovereign people in virtue of cultural, familial, and religious attachments. Women, as well as nonpropertied males before the extension of universal suffrage, fell under this category; the status of these groups is distinct from that of other residents who not only have second-class status but who also do not belong to the sovereign people in virtue of relevant identity-based criteria. Such was the case with African-American slaves until after the Civil War and the declaration in 1865 of the 14th Amendment to the U.S. Constitution, which conferred U.S. citizenship upon African-American peoples; such was also the status of American Indians who were granted tribal sovereignty. The status of those of Jewish faith in the original thirteen colonies of the United States can be described as one of transition from being “a mere auxiliary to the commonwealth” to being a full-fledged citizen.

Second, in addition to these groups are those residents of the commonwealth who do not enjoy full citizenship rights because they do not possess the requisite identity criteria through which the people defines itself, or because they belong to some other commonwealth, or because they choose to remain as outsiders. These are the “aliens” and “foreigners” amidst the democratic people. They are different from second-class citizens like women and workers, as well as from slaves and tribal peoples. Their status is governed by mutual treaties among sovereign entities—as would be the case with official representatives of a state-power upon the territory of the other; and if they are civilians, and live among citizens for economic, religious, or other cultural reasons, their rights and claims exist in that murky space defined by respect for human rights on the one hand and by international customary law on the other. They are refugees from religious persecution, merchants and missionaries, migrants and adventurers, explorers and fortune-seekers.

I have circumscribed in general theoretical terms the paradox of democratic legitimacy. The paradox is that the republican sovereign should undertake to bind its will by a series of precommitments to a set of formal and substantive norms, usually referred to as “human rights.”

While this paradox can never be fully resolved in democracies, its impact can be mitigated through the renegotiation and reiteration of the dual commitments to human rights and sovereign self-determination.

Popular sovereignty is not identical with territorial sovereignty, although the two are closely linked, both historically and normatively. Popular sovereignty means that all full members of the demos are entitled to have a voice in the articulation of the laws by which the demos governs itself. Democratic rule extends its jurisdiction to those who can view themselves as the authors of such rule. But there has never been a perfect overlap between the circle of those who stand under the law's authority and those recognized as full members of the demos. Every democratic demos has disenfranchised some, while recognizing only certain individuals as full citizens. Territorial sovereignty and democratic voice have never matched completely. Yet presence within a circumscribed territory, and in particular continuing residence within it, brings one under the authority of the sovereign—whether democratic or not. The new politics of cosmopolitan membership is about negotiating this complex relationship between rights of full membership, democratic voice, and territorial residence. While the demos, as the popular sovereign, must assert control over a specific territorial domain, it can also engage in reflexive acts of self-constitution, whereby the boundaries of the demos can be readjusted.

The evolution of cosmopolitan norms, from crimes against humanity to norms extending to refuge, asylum, and immigration, has caught most liberal democracies within a network of obligations to recognize certain rights claims. Although the asymmetry between the “demos” and the “populus,” the democratic people and the population as such, has not been overcome, norms of hospitality have gone far beyond what they were in Kant's understanding: the status of alienage is now protected by civil as well as international laws; the guest is no longer a guest but a resident alien, as we say in American parlance, or a “foreign co-citizen,” as Europeans say. In a remarkable evolution of the norms of hospitality, within the European Union in particular, the rights of third-country nationals are increasingly protected by the European Convention on Fundamental Rights and Freedoms, with the consequence that citizenship, which was once the privileged status entitling one to rights, has now been disaggregated into its constituent elements. Liberal democracies must learn to negotiate these paradoxes between the spread of cosmopolitan norms and the boundedness of democratic communities; that they can do so successfully is the topic, as well as the hope, of my second lecture.

II. DEMOCRATIC ITERATIONS: THE LOCAL, THE NATIONAL, AND THE GLOBAL

I would like to begin with the following proposition: We are at a point in the political evolution of human communities when the unitary model of citizenship that bundled together residency upon a single territory with the subjection to a common bureaucratic administration of a people perceived to be a more or less cohesive entity is at an end. We are facing today the “disaggregation of citizenship.” These are institutional developments that unbundle the three constitutive dimensions of citizenship, namely: collective identity, the privileges of political membership, and the entitlements of social rights and benefits. More and more human beings, and hailing from many parts of the world extending from North America to Europe to South Asia and Latin America, find themselves not sharing in the collective identity of their host countries while enjoying certain rights and benefits as guest workers or permanent residents. The entitlement to social rights, which T. H. Marshall had considered the pinnacle of citizenship, has been dissociated from shared collective identity and political membership.¹

Part 1 considers the disaggregation of citizenship; building on the promise of “jurisgenerative politics,” part 2 develops the concept of “democratic iterations” as offering normative and institutional solutions to the paradoxes of democratic legitimacy. Examining several cases from contemporary European debates about the rights of foreigners and immigrants, parts 3 and 4 illustrate processes of democratic iteration at work. Democratic iterations are complex ways of mediating the will and opinion-formation of democratic majorities and cosmopolitan norms. In conclusion, I return to the ontological puzzles of cosmopolitan norms outlined in lecture I (part 5).

I. DISAGGREGATION OF CITIZENSHIP WITHIN THE EUROPEAN UNION

Within the European Union, in which this disaggregation effect has proceeded most intensively and which I have examined in detail in other writings,² the privileges of political membership now accrue to all citi-

1. T. H. Marshall, *Citizenship and Social Class and Other Essays*. See also my essay “Transformations of Citizenship: The Case of Contemporary Europe,” *Government and Opposition: An International Journal of Comparative Politics* 37, no. 4 (2002): 439–65.

2. See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, chap. 6; and Benhabib, *The Rights of Others: Aliens, Citizens and Residents*, chap. 4.

zens of member countries of the EU who may be residing in territories other than those of their nationality. It is no longer nationality of origin but EU citizenship that entitles one to these rights. Citizens of the EU can vote and stand for office in local elections in their host countries; they can also participate in elections to the European Parliament. If they are long-term residents in their respective foreign countries, on the whole they are also entitled to an equivalent package of social rights and benefits.

The condition of the EU's third-country nationals, whose countries of origin do not belong to the EU, is of course different. While European Union citizenship makes it possible for all EU citizens to vote and to run for and hold office in local as well as Union-wide elections, this is not the case for third-country nationals. Their entitlement to political rights depends on their national and cultural origins and the political regimes of their host countries. In Denmark, Sweden, Finland, and Holland, third-country nationals can participate in local and regional elections; in Ireland, these rights are granted at the local but not the regional level. In the United Kingdom, Commonwealth citizens can vote in national elections as well.

The most important conclusion to be drawn from these developments is that the entitlement to rights is no longer dependent upon the status of citizenship; legal resident aliens have been incorporated into civil and social rights regimes, as well as being protected by supra- and subnational legislations. The condition of undocumented aliens, as well as of refugees and asylum seekers, however, remains in that murky domain between legality and illegality. Until their applications have been approved, refugees and asylum seekers are not entitled to choose their domicile freely or to accept employment. A resolution to permit those whose application is still in process the right to work after three months of residency has recently been approved by the EU Council of Ministers. In some cases, children of refugees and asylees can attend school; on the whole, asylees and refugees are entitled to certain forms of medical care. Undocumented migrants, by contrast, are cut off from rights and benefits and mostly live and work clandestinely. The conflict between *sovereignty* and *hospitality* has weakened in intensity, but it has by no means been eliminated. In fact, the EU is caught in contradictory currents that move it toward norms of cosmopolitan justice in the treatment of those who are within its boundaries, while leading it to act in accordance with outmoded Westphalian conceptions of unbridled

sovereignty toward those who are on the outside. The negotiation between insider and outsider status has become tense and almost warlike.

The end of the unitary model of citizenship, therefore, does not mean that its hold upon our political imagination or its normative force in guiding our institutions has grown obsolete. It does mean that we must be ready to imagine forms of political agency and subjectivity that anticipate new modalities of political citizenship. In the era of cosmopolitan norms, new forms of political agency have emerged that challenge the distinctions between citizens and long-term residents, insiders and outsiders. The spread of cosmopolitan norms, under whose aegis the disaggregation of citizenship proceeds, has led to contestations of the boundaries of the demos. Using the concepts of “jurisgenerative politics” and “democratic iterations,” I would first like to propose an analytical and normative grid for thinking about these transformations.

2. DEMOCRATIC ITERATIONS

“Iteration” is a term that was introduced into the philosophy of language through Jacques Derrida’s work.³ In the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways. In fact, there really is no “originary” source of meaning, or an “original” to which all subsequent forms must conform. It is obvious in the case of language that an act of original meaning-giving makes no sense, since, as Ludwig Wittgenstein famously reminded us, to recognize an act of meaning-giving as precisely this act, we would need to possess language itself.⁴ A patently circular notion!

Nevertheless, even if the concept of “original meaning” makes no sense when applied to language as such, it may not be so ill-placed in conjunction with documents such as laws and other institutional norms. Thus, every act of iteration might be assumed to refer to an antecedent that is taken to be authoritative. The iteration and interpretation of norms, and of every aspect of the universe of value, however, is never

3. Jacques Derrida, “Signature, Event, Context” [1971], in *Limited Inc.*, pp. 90ff. I am indebted to the insights of Judith Butler and Bonnie Honig in highlighting the significance of iterative practices for democratic politics. See Judith Butler, *Excitable Speech: Politics of the Performative*; Bonnie Honig, *Democracy and the Foreigner*; and Bonnie Honig, “Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic,” *American Political Science Review* 85, no. 1 (March 1991): 97–113.

4. Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe.

merely an act of repetition. Every iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is repositied and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well. Iteration is the reappropriation of the “origin”; it is at the same time its dissolution as the original and its preservation through its continuous deployment.

“Democratic iterations” are linguistic, legal, cultural, and political repetitions-in-transformation, invocations that are also revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent. Robert Cover and following him Frank Michelman have made these observations fruitful in the domain of legal interpretation. In “*Nomos and Narrative*,” Robert Cover writes:

...there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. *The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must “have meaning,” but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking.* Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion. (emphasis added)⁵

I want to suggest that we think of “jurisgenerative politics” as being exemplified in iterative or destabilizing acts through which a democratic people, which considers itself bound by certain guiding norms and principles, reappropriates and reinterprets them, thus showing itself to be not only the *subject* but also the *author of the laws* (Michelman). Whereas natural right doctrines assume that the principles that undergird democratic politics are impervious to transformative acts of popular collective will, and whereas legal positivism identifies democratic legitimacy with the correctly generated legal norms of a sovereign legislature,

5. Robert M. Cover, “*Nomos and Narrative*,” *Harvard Law Review* 97, no. 1 (1983): 4–68; here p. 18; Frank Michelman, “*Law’s Republic*,” *Yale Law Journal* 97, no. 8 (July 1988): 1493–1537.

jurisgenerative politics signals a space of interpretation and intervention between universal norms and the will of democratic majorities. The rights claims that frame democratic politics, on the one hand, must be viewed as transcending the specific enactments of democratic majorities under specific circumstances; on the other hand, such democratic majorities *reiterate* these principles and incorporate them into democratic will-formation processes through argument, contestation, revision, and rejection.

Since they are dependent on contingent processes of democratic will-formation, not all jurisgenerative politics yields positive results. Thus one ought not make the *validity of cosmopolitan norms* dependent upon jurisgenerative and democratic iterations. This validity must be based on independent normative grounds. But productive or creative jurisgenerative politics results in *the augmentation of the meaning of rights claims* and in *the growth of the political authorship of political actors*, who make these rights their own by democratically deploying them.

Sterile, legalistic, or populist jurisgenerative processes are also conceivable. In some cases, no normative learning may take place at all, but only a strategic bargaining among the parties may result; in other cases, the political process may simply run into the sandbanks of legalism or the majority of the demos may trample upon the rights of the minority in the name of some totalizing discourse of fear and war.

In the following I focus on two complex legal, political, and cultural phenomena through which democratic iterations have occurred and collective resignifications have emerged.⁶ I begin with the “scarf affair,” or “l’affaire du foulard,” which preoccupied French public opinion and politics throughout the 1990s and still continues to do so. The banning of the wearing of the headscarf by Muslim girls in public schools pitted the right to freedom of conscience, which all French citizens and residents alike are entitled to, against the specific French understanding of the separation of church and state, known as the principle of *laïcité*. This affair led to an intense and unending debate about the meaning of French citizenship in an increasingly multicultural and multifaith society. The extension of a democratic schedule of rights to citizens and residents in a member country of the European Union, such as France, brings in its wake controversy about who precisely the subject of rights is. Can a Muslim woman be a good French citizen and be true to herself?

6. For a more extensive version of this argument, see Benhabib, *The Rights of Others*, chap. 5.

And what exactly does it mean to be a “good” French citizen? Who defines the terms here?

On February 10, 2004, the French National Assembly voted by an overwhelming majority of 494 for, 36 against, and with 31 abstentions to ban the wearing of all religious symbols from public schools. Although the new law applies to any ostentatiously displayed religious symbol such as Christian crosses and the yarmulkes of Orthodox Jewish students as well as the headscarves worn by Muslim girls, its main target was Muslim religious attire. To understand the severity of this legislation, which drew criticism even from France’s allies in the European Union, such as the British and the Dutch governments, it is important to reconstruct the history of the scarf affair (see 3 below).

Unlike France, Germany until recently had not accepted the naturalization of immigrant children through territorial birthright. The German understanding of citizenship has been less encompassing and republican than the French one and has focused much more on ethnic belonging. This regressive understanding of German citizenship could hardly be reconciled with the realities of modern Germany as a regional and global economic superpower. One of the first challenges to the restrictive German understanding of citizenship came as a request from the city-state of Hamburg and the province of Schleswig-Holstein to permit noncitizen but long-term resident foreigners to vote in municipal and district-wide elections. The German Federal Constitutional Court rejected their request through a resounding declaration on the role of the nation and national belonging in a democracy. Although the Maastricht Treaty (1993), to which Germany is party, has since then overridden this decision by granting all nationals of EU member states who are residents of Germany the right to vote in and run for municipal elections, the earlier decision remains one of the most philosophically interesting, even if conceptually troubling, interpretations of democratic sovereignty and the identity of the demos.

3. “L’AFFAIRE DU FOULARD” (THE SCARF AFFAIR)

A consequence of the transformation of citizenship is the long- and short-term coexistence of individuals and groups of distinct, and often quite contradictory, cultures, mores, and norms in the same public space.⁷ If globalization brings with it the ever-rapid movement of peoples and

7. Parts of this discussion have previously appeared in Benhabib, *The Claims of Culture*, pp. 94–100.

goods, information and fashion, germs and news across state boundaries, one consequence of these trends is their multidirectionality. Globalization does not simply mean the spread of multinational, and usually American-, British-, or Japanese-run corporations, around the globe. Benjamin Barber's phrase "Jihad vs. McWorld" certainly captures a partial truth.⁸ There is also the phenomenon of "reverse globalization," through which the peoples of the poorer regions of the world hailing from the Middle East, Africa, and South-Eastern Asia flock to global cities, such as London and Paris, Toronto and Rome, Madrid and Amsterdam. These groups, a good number of whom originally came to Western countries as guest workers and immigrants, have seen their numbers multiply in the last decades through the entry of refugees and asylum seekers from other regions of the world. The most spectacular examples of multicultural conflict that have recently occupied public consciousness, such as the Salman Rushdie affair in Great Britain, the affair over the "foulard" (headscarf) in French schools, and scandals around the practice of female circumcision, have concerned new ethno-cultural groups, as they have sought to adapt their religious and cultural beliefs to the legal and cultural environment of secular, but mostly Protestant, Catholic, or Anglican, liberal democratic states.

"L'affaire du foulard" refers to a long and drawn-out set of public confrontations that began in France in 1989,⁹ with the expulsion from their school in Creil (Oise) of three scarf-wearing Muslim girls, and continued

8. Benjamin Barber, *Jihad vs. McWorld*.

9. A note of terminological clarification first: the practice of veiling among Muslim women is a complex institution that exhibits great variety across many Muslim countries. The terms *chador*, *bijab*, *niqab*, and *foulard* refer to distinct items of clothing that are worn by Muslim women coming from different Muslim communities: for example, the *chador* is essentially Iranian and refers to the long black robe and headscarf worn in a rectangular manner around the face; the *niqab* is a veil that covers the eyes and the mouth and leaves only the nose exposed; it may or may not be worn in conjunction with the *chador*. Most Muslim women from Turkey are likely to wear either long overcoats and a *foulard* (a headscarf) or a *çarşaf* (a black garment that most resembles the *chador*). These items of clothing have a symbolic function within the Muslim community itself: women coming from different countries signal to one another their ethnic and national origins through their clothing, as well as signifying their distance from or proximity to tradition in doing so. The brighter the colors of their overcoats and scarves—bright blue, green, beige, lilac as opposed to brown, gray, navy, and, of course, black—and the more fashionable their cuts and material by Western standards, the more we can assume the distance from Islamic orthodoxy of the women who wear them. Seen from the outside, however, this complex semiotic of dress codes gets reduced to one or two items of clothing, which then assume the function of crucial symbols in the complex negotiation among Muslim religious and cultural identities and Western cultures.

to the mass exclusion of twenty-three Muslim girls from schools in November 1996 upon the decision of the Conseil d'Etat.¹⁰ The affair, referred to as a “national drama,”¹¹ or even a “national trauma,”¹² occurred in the wake of France’s celebration of the second centennial of the French Revolution and seemed to question the foundations of the French educational system and its philosophical principle, *laïcité*. This concept is hard to translate in terms like the “separation of church and state” or even “secularization”: at its best, it can be understood as the public and manifest neutrality of the state toward all kinds of religious practices, institutionalized through a vigilant removal of sectarian religious symbols, signs, icons, and items of clothing from official public spheres. Yet within the French Republic the balance between respecting the individual’s right to freedom of conscience and religion, on the one hand, and maintaining a public sphere devoid of all religious symbolisms, on the other, was so fragile that it only took the actions of a handful of teenagers to expose this fragility. The ensuing debate went far beyond the original dispute and touched upon the self-understanding of French republicanism for the left as well as the right, on the meaning of social and sexual equality, and on liberalism vs. republicanism vs. multiculturalism in French life.

The affair began when on October 19, 1989, M. Ernest Chenière, headmaster of the college Gabriel-Havez of Creil, forbade three girls—Fatima, Leila, and Samira—to attend classes with their heads covered. The three had appeared in class that morning wearing their scarves, despite a compromise reached between their headmasters and their parents encouraging them to go unscarfed. The three girls has apparently decided to wear the scarf once more upon the advice of M. Daniel Yousouf Leclerq, the head of an organization called Intégrité and the ex-president of the National Federation of Muslims in France (FNMF).

Although hardly noted in the press, the fact that the girls had been in touch with M. Leclerq indicates that wearing the scarf was a conscious political gesture on their part, a complex act of identification and defiance.

10. My discussion of these incidents relies primarily upon two sources: *Le Foulard et la République*, by Françoise Gaspard and Farhad Khosrokhavar, and an excellent seminar paper by Marianne Brun-Rovet, “A Perspective on the Multiculturalism Debate: ‘L’Affaire Foulard’ and *Laïcité* in France, 1989–1999.”

11. Gaspard and Khosrokhavar, *Le Foulard et la République*, p. 11.

12. Brun-Rovet, “Perspective on the Multiculturalism Debate,” p. 2.

In doing so, Fatima, Leila, and Samira, on the one hand, claimed to exercise their freedom of religion as French citizens; on the other hand, they exhibited their Muslim and North African origins in a context that sought to envelop them within an egalitarian, secularist ideal of republican citizenship as students of the nation. In the years to come, the girls and their followers and supporters forced what the French state wanted to view as a private symbol—an individual item of clothing—into the shared public sphere, thus challenging the boundaries between the public and the private. Ironically, they used the freedom given to them by French society and French political traditions, not the least of which is the availability of free and compulsory public education for all children on French soil, to transpose an aspect of their private identity into the public sphere. They problematized the school as well as the home: they no longer treated the school as a neutral space of French acculturation but brought their cultural and religious differences into open manifestation. They used the symbol of the home to gain entry into the public sphere by retaining the modesty required of them by Islam in covering their heads; yet at the same time, they left the home to become public actors in a civil public space in which they defied the state. Those who saw in the girls' actions simply an indication of their oppression were just as blind to the symbolic meaning of their deeds as those who defended their rights simply on the basis of freedom of religion.

The French sociologists Françoise Gaspard and Farhad Khosrokhavar capture this set of complex symbolic negotiations as follows:

[The veil] mirrors in the eyes of the parents and the grandparents the illusions of continuity, whereas it is a factor of discontinuity; it makes possible the transition to otherness (modernity), under the pretext of identity (tradition); it creates the sentiment of identity with the society of origin, whereas its meaning is inscribed within the dynamic of relations with the receiving society. . . . it is the vehicle of the passage to modernity within a promiscuity that confounds traditional distinctions, of an access to the public sphere that was forbidden to traditional women as a space of action and the constitution of individual autonomy. . . .¹³

13. Gaspard and Khosrokhavar, *Le Foulard et la République*, pp. 44–45 (my translation).

The complexity of the social and cultural negotiations hidden behind the simple act of veiling elicited an equally ambiguous and complex decision by the French Conseil d'Etat. On November 4, 1989, the French minister of education, Lionel Jospin, took the matter to the Conseil d'Etat. The Conseil responded by citing France's adherence to constitutional and legislative texts and to international conventions and invoked from the outset the necessity of doing justice to two principles: that the *laïcité* and neutrality of the state be retained in the rendering of public services and that the liberty of conscience of the students be respected. All discrimination based upon the religious convictions or beliefs of the students would be inadmissible. The Conseil then concluded:

...the wearing by students, in the schools, of signs whereby they believe to be manifesting their adherence to one religion is itself not incompatible with the principle of *laïcité*, since it constitutes the exercise of their liberty of expression and manifestation of their religious beliefs; but this liberty does not permit students to exhibit [*d'arborer*] signs of religious belonging that, by their nature, by the conditions under which they are worn individually or collectively, or by their ostentatious or combative [*revendicatif*] character, would constitute an act of pressure, provocation, proselytizing, or propaganda, threatening to the dignity or liberty of the student or to the other members of the educational community, compromising their health or their security, disturbing the continuation of instructional activities or the educational role of the instructors, in short, [that] would disturb proper order in the establishment or the normal functioning of public service.¹⁴

This Solomonic judgment attempted to balance the principles of *laïcité* and freedom of religion and conscience. Yet instead of articulating some clear guidelines, the Conseil left the proper interpretation of the meaning of wearing of these signs up to the judgment of the school authorities. Not the individual students' own beliefs about what a religious scarf (or for that matter yarmulke) meant to them but its interpretation by the school authorities, and whether or not such articles could be seen as signs of provocation, confrontation, or remonstrance, became

14. Ruling of the Conseil d'Etat, November 27, 1989 (my translation).

the decisive factors in curtailing the students' freedom of religion. It is not difficult to see why this judgment encouraged both sides in the conflict to pursue their goals further and led to further repression through the promulgation on September 10, 1994, of the Bayrou Guidelines, issued by Minister of Education François Bayrou. Lamenting the ambiguities of the judgment of the Conseil for conveying an impression of "weaknesses" vis-à-vis Islamicist movements, the minister declared that students had the right to wear discreet religious symbols, but that the veil was not among them.¹⁵

"L'affaire du foulard" eventually came to stand for all dilemmas of French national identity in the age of globalization and multiculturalism: how is it possible to retain French traditions of *laïcité*, republican equality, and democratic citizenship in view of France's integration into the European Union on the one hand and the pressures of multiculturalism generated through the presence of second- and third-generation immigrants from Muslim countries on French soil on the other hand? Would the practices and institutions of French citizenship be flexible and generous enough to encompass multicultural differences within an ideal of republican equality? Clearly, and despite the decision of the French Parliament to pass a law forbidding the wearing of all religious items of clothing in public schools, this affair is by no means over; and as European integration and multiculturalist pressures continue, France will have to discover new models of legal, pedagogical, social, and cultural institutions to deal with the dual imperatives of liberal democracies to preserve freedom of religious expression and the principles of secularism.¹⁶

We appear to have a paradoxical situation here in which the French state intervenes to dictate more autonomy and egalitarianism in the public sphere than the girls themselves wearing the headscarves seem to wish for. What exactly is the meaning of the girls' actions? Is this an act of religious observance and subversion, or one of cultural defiance, or of adolescent acting out to gain attention and prominence? Are the girls acting out of fear, out of conviction, or out of narcissism? It is not hard to

15. *Le Monde*, September 12, 1994, p. 10.

16. For an assessment of the intensity of the debate and the polarization caused by it, see "Derrière la Voile," *Le Monde Diplomatique* 599 (February 2004): 6–9. Among the organizations opposing this legislation were the League for Human Rights and the Movement against Racism and for Friendship among Peoples (MRAP), as well as the United Syndical Federation (FSU) and the Federation of Parents' Councils (FCPE).

imagine that their actions may involve all these elements and motives. The girls' voices are not heard in this heated debate; although there was a genuine public discourse in the French public sphere and a soul-searching on the questions of democracy and difference in a multicultural society, as the sociologists Gaspard and Khosrokhavar pointed out, until they carried out their interviews, the girls' own perspectives were hardly listened to. Even if the girls involved were not adults and in the eyes of the law were still under the tutelage of their families, it is reasonable to assume that at the ages of fifteen and sixteen they could account for themselves and their actions. Had their voices been heard and listened to,¹⁷ it would have become clear that the meaning of wearing the scarf itself was changing from being a religious act to one of cultural defiance and increasing politicization. Ironically, it was the very egalitarian norms of the French public educational system that brought these girls out of the patriarchal structures of the home and into the French public sphere and gave them the confidence and the ability to *resignify the wearing of the scarf*. Instead of penalizing and criminalizing their activities, would it not have been more plausible to ask these girls to account for their actions and doings at least to their school communities, and to encourage discourses among the youth about what it means to be a Muslim citizen in a laic French Republic? Unfortunately, the voices of those whose interests were most vitally affected by the norms prohibiting the wearing of the scarf under certain conditions were silenced.

I am not suggesting that legal norms should originate through collective discursive processes and outside the framework of legal institutions: the legitimacy of the law is not at stake in this example; rather it is the *democratic legitimacy* of a lawful but, in my view, unwise and unfair decision that is at stake. It would have been both more democratic and fairer if the meaning of their act were not simply dictated to these girls by their school authorities, and if they were given more public say in the interpretation of their own actions. Would or should this have changed the Conseil d'Etat's decision? Maybe not, but the clause that permitted the prohibition of "ostentatiously" and "demonstratively" displayed religious symbols should have been reconsidered. There is sufficient evidence in the sociological literature that in many other parts of the world as well Muslim women are using the veil as well as the chador to cover

17. A recent publication tries precisely to let the girls speak for themselves. See *Alma et Lila Levy: Des Filles comme les Autres—Au-delà du Foulard*, interviews by Véronique Giraud and Yves Sintomer.

up the paradoxes of their own emancipation from tradition.¹⁸ To assume that the meaning of their actions is purely one of religious defiance of the secular state constrains these women's own capacity to write the meaning of their own actions and, ironically, reimprisons them within the walls of patriarchal meaning from which they are trying to escape.

Learning processes would have to take place on the part of the Muslim girls as well: while the larger French society would have to learn not to stigmatize and stereotype as "backward and oppressed creatures" all those who accept to wear what appears at first glance to be a religiously mandated piece of clothing, the girls themselves and their supporters, in the Muslim community and elsewhere, have to learn to give a justification of their actions with "good reasons in the public sphere." In claiming respect and equal treatment for their religious beliefs, they have to clarify how they intend to treat the beliefs of *others* from different religions, and how, in effect, they would institutionalize the separation of religion and the state within Islamic tradition.

Despite the harshness of the recent legislation banning the scarf by the French National Assembly, a moderate French Islam may be emerging. On April 14, 2003, the *New York Times* reported the formation of an official Muslim Council to represent the five million Muslims of France. Among other issues, the council will deal with the rights of Muslim women in the workplace. Thus, Karima Debza, an Algerian-born mother of three, is reported as saying, "I cannot find work here because of my head scarf. . . . But my head scarf is part of me. I won't take it off. We have to educate the state about why the scarf is so important"; and she added, "and why there should be no fear of it."¹⁹

What Debza is asking for is no less than a process of democratic iteration and cultural resignification. While she is urging her French co-citizens to reconsider the strict doctrine of laicism, which precludes her from appearing in public places with a symbol that bears religious meaning, she herself is resignifying the wearing of the scarf in terms that involve what some have called a "Protestantization" of Islam. The covering of one's head, which in Islam as well as Judaism is an aspect of women's modesty and also, more darkly, an aspect of the repression of female sexuality that is viewed as threatening, is now reinterpreted as a

18. Nilüfer Gole, *The Forbidden Modern: Civilization and Veiling*.

19. Elaine Sciolino, "French Islam Wins Officially Recognized Voice," *New York Times*, April 14, 2003, sec. A, p. 4.

private act of faith and conscience. In presenting the wearing of the scarf as an aspect of her identity and her self-understanding as a Muslim, Debza is transforming these traditional connotations and is pleading for reciprocal recognition from others of her right to wear the scarf, as long as doing so does not infringe upon the rights of others. “Because wearing the scarf,” she is saying, “is so fundamental to who I am” (her own words are “it is a part of me”), “you should respect it as long as it does not infringe on your rights and liberties.” The wearing of the scarf is resignified as expressing an act of conscience and moral freedom.

Her point can be summarized thus: the protection of the equal right to religious freedom of all citizens and residents of France (a right also protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms) should be considered more fundamental—in Ronald Dworkin’s terms, should “trump”—the clause concerning the specific separation of religion and state that France practices, namely, laicism. In this process, Debza states, “we have to educate the state not to fear us”—a marvelous thought coming from an immigrant Muslim woman vis-à-vis the daunting traditions of French republicanism!

The challenge posed to French traditions of *laïcité* cannot be underestimated, and the French legislators’ recent decision to ban the wearing of all religious symbols, except those that are very small and hardly visible publicly, in public schools signals a hardening of the fronts. But the clause of the separation of religion and state, while being a cornerstone of liberal democracies, also permits significant democratic variation. Thus the United Kingdom has a Church of England, while Germany subsidizes the three officially recognized denominations—Protestant, Catholic, and Jewish—through an indirect “church tax” known as *Kirchensteuer*. It would be no exaggeration to add that the First Amendment to the U.S. Constitution concerning the separation of church and state is periodically contested and democratically reiterated. Its significance is never frozen in time; rather, it is repeatedly the site of intense public battles. By contrast, emerging out of the historical experience of intense anticlericalism and antagonism toward the institutions of the Catholic church, the French republican tradition finds itself faced today with an unprecedented challenge: how can it accommodate demands for religious diversity in the context of global trends toward increasingly multicultural societies? Is the republican public sphere, cherished by French traditions, really defaced when individuals of different races, colors, and

faiths want to function in this very public sphere carrying the signs and symbols of their private faiths and identities? Should their self-presentation through their particular identities be viewed as a threat to French understandings of citizenship?

In an explicit acknowledgment of the “changing face of France,” in both the literal and figurative senses, in August 2003 thirteen women (eight of them of North African Muslim origin, and the rest African immigrants or the children of immigrants) were chosen to represent “Marianne,” the icon of the Revolution, painted in 1830 by Eugène Delacroix, bare-chested and storming the barricades. Continuing the contentious national dialogue about the separation of church and state, these women wore the ancient Phrygian cap, a symbol of the French Revolution, rather than the Islamic veil or other ethnic or national head-dress.²⁰ Yet, paradoxically, the political body that has decided to honor these women as a countersymbol to others like Debza who insist upon wearing the headscarf has also empowered them to challenge the overwhelmingly white, male, and middle-aged French Assembly, where only 12 percent of the members are women. One of them is quoted as saying: “These Mariannes have made visible something that has been the reality of the last twenty years. Look at the National Assembly. It’s all white, rich, male and well educated. Now we have entered their space. We exist.”²¹

Culture matters; cultural evaluations are deeply bound up with interpretations of our needs, our visions of the good life, and our dreams for the future. Since these evaluations run so deep, as citizens of liberal democratic polities, we have to learn to live with what Michael Walzer has called “liberalism and the art of separation.”²² We have to learn to live with the otherness of others whose ways of being may be deeply threatening to our own. How else can moral and political learning take place, except through such encounters in civil society? The law provides the framework within which the work of culture and politics goes on. The laws, as the ancients knew, are the walls of the city, but the art and passions of politics occur within those walls; and very often politics leads

20. Elaine Sciolino, “Paris Journal—Back to Barricades: Liberty, Equality, Sisterhood,” *New York Times*, August 1, 2003, sec. A, p. 4.

21. *Ibid.*

22. Michael Walzer, “Liberalism and the Art of Separation,” *Political Theory* 12 (August 1984): 315–30.

to the breaking down of these barriers or at least to assuring their permeability.

There is a dialectic between constitutional essentials and the actual politics of political liberalism. Rights, and other principles of the liberal democratic state, need to be periodically challenged and rearticulated in the public sphere in order to retain and enrich their original meaning. It is only when new groups claim that they belong within the circles of addressees of a right from which they have been excluded in its initial articulation that we come to understand the fundamental limitedness of every rights claim within a constitutional tradition as well as its context-transcending validity. The democratic dialogue and also the legal hermeneutic one are enhanced through the repositioning and rearticulation of rights in the public spheres of liberal democracies. The law sometimes can guide this process, in that legal reform may run ahead of popular consciousness and may raise popular consciousness to the level of the constitution; the law may also lag behind popular consciousness and may need to be prodded along to adjust itself to it. In a vibrant liberal multicultural democracy, cultural-political conflict and learning through conflict should not be stifled through legal maneuvers. The democratic citizens themselves have to learn the art of separation by testing the limits of their overlapping consensus.

While the intervention of French authorities to ban the wearing of the veil in the schools at first seemed like the attempt of a progressive state bureaucracy to modernize the “backward-looking” customs of a group, this intervention cascaded into a series of democratic iterations. These ranged from the intense debate among the French public about the meaning of wearing the veil, to the self-defense of the girls involved and the rearticulation of the meaning of their actions, to the encouragement of other immigrant women to wear their headscarves into the workplace, and finally to the very public act of resignifying the face of “Marianne,” via having immigrant women from Arab countries as well as Africa represent her.

I do not want to underestimate, however, the extent of public dissatisfaction with and significant xenophobic resentment toward France’s Muslim population. Democratic iterations can lead to processes of public self-reflection as well as generating public defensiveness. The mobilization of many right-wing parties throughout Europe is intensifying: in France, the Netherlands, the United Kingdom, Denmark, Germany, and elsewhere, we see well that the status of Europe’s migrants, and

particularly of its Muslim population, remains an incendiary issue. Nevertheless, it is clear that all future struggles with respect to the rights of Muslim and other immigrants will be fought for within the framework created by the universalistic principles of Europe's commitment to human rights on the one hand and the exigencies of democratic self-determination on the other.²³

4. WHO CAN BE A GERMAN CITIZEN? REDEFINING THE NATION

On October 31, 1990, the German Constitutional Court ruled against a law passed by the provincial assembly of Schleswig-Holstein on February 21, 1989, that changed the qualifications for participating in local municipal (*Bezirk*) and district-wide (*Kreis*) elections (BVerfG, vol. 83, II, Nr. 3, p. 37; the following translations from the German are all mine).²⁴ According to Schleswig-Holstein's election laws in effect since May 31, 1985, all those who were defined as German in accordance with

23. In recent years, the German public and the courts have dealt with a challenge quite akin to the scarf affair in France. An elementary school teacher in Baden-Württemberg, Fereshda Ludin, of Afghani origin and German citizenship, insisted on being able to teach her classes with her head covered. The school authorities refused to permit her to do so. The case ascended all the way to the German Constitutional Court (BVerfG), and on September 30, 2003, the court decided as follows. Wearing a headscarf, in the context presented to the court, expresses that the claimant belongs to the "Muslim community of faith" (*die islamische Religionsgemeinschaft*). The court concluded that to describe such behavior as lack of qualification (*Eignungsmangel*) for the position of a teacher in elementary and middle schools clashed with the right of the claimant to equal access to all public offices in accordance with Article 33, Paragraph 2, of the Basic Law (*Grundgesetz*), and also clashed with her right to freedom of conscience, as protected by Article 4, Paragraphs 1 and 2, of the Basic Law, without, however, providing the required and sufficient lawful reasons for doing so (BVerfG, 2BvR, 1436/02, IVB 1 and 2). While acknowledging the fundamental rights of Fereshda Ludin, the court nevertheless ruled against the claimant and transferred the final say on the matter to the democratic legislatures. "The responsible provincial legislature is nevertheless free to create the legal basis [to refuse to permit her to teach with her head covered], by determining anew within the framework set by the constitution the extent of religious articles to be permitted in the schools. In this process, the provincial legislature must take into consideration the freedom of conscience of the teacher as well as of the students involved, and also the right to educate their children on the part of parents as well as the obligation of the state to retain neutrality in matters of world-view and religion" (BVerfG, 2BvR, 1436/02, 6; my translation). This case is discussed more extensively in Benhabib, *The Rights of Others*, chap. 5.

24. A similar change in its election laws was undertaken by the free state of Hamburg to enable its foreign residents at least eighteen years old to participate in the election of local municipal assemblies (*Bezirkerversammlungen*). Since Hamburg is not a federal province (*Land*) but a free city-state, with its own constitution, some of the technical aspects of this decision are not parallel to those in the case of Schleswig-Holstein. I chose to focus on the latter case alone. It is nonetheless important to note that the federal government, which had opposed Schleswig-Holstein's electoral reforms, supported those of Hamburg. See BVerfG 83, 60, II, Nr. 4, pp. 60–81.

Article 116 of the Basic Law, who had reached the age of eighteen, and who had resided in the electoral district for at least three months were eligible to vote. The law of February 21, 1989, proposed to amend this as follows: all foreigners residing in Schleswig-Holstein for at least five years who possessed a valid permit of residency or who were in no need of one, and who were citizens of Denmark, Ireland, the Netherlands, Norway, Sweden, and Switzerland, would be able to vote in local and district-wide elections. The choice of these six countries was made on the grounds of reciprocity. Since these countries permitted their foreign residents to vote in local, and in some cases regional, elections, the German provincial legislators considered it appropriate to reciprocate.

The claim that the new election law was unconstitutional was brought by 224 members of the German Parliament, all of them members of the conservative CDU/CSU (Christian Democratic and Christian Social Union) Party; it was supported by the Federal Government of Germany. The court justified its decision with the argument that the proposed change of the electoral law contradicted “the principle of democracy,” as laid out in Articles 20 and 28 of Germany’s Basic Law, and according to which “All state-power [*Staatsgewalt*] proceeds from the people” (BVerfG 83, 37, Nr. 3, p. 39). Furthermore:

The people [*das Volk*], which the Basic Law of the Federal Republic of Germany recognizes to be the bearer of the authority [*Gewalt*] from which issues the constitution, as well as the people that is the subject of the legitimation and creation of the state, is the German people. Foreigners do not belong to it. Membership in the community of the state [*Staatsverband*] is defined through the right of citizenship. . . . Citizenship in the state [*Staatsangehörigkeit*] constitutes a fundamentally indissoluble personal right between the citizen and the state. The vision [or image: *Bild*] of the people of the state [*Staatsvolkes*], which underlies this right of belonging to the state, is the political community of fate [*die politische Schicksalsgemeinschaft*], to which individual citizens are bound. Their solidarity with and their embeddedness in [*Verstrickung*] the fate of their home country, which they cannot escape [*sich entinnen können*], are also the justification for restricting the vote to citizens of the state. They must bear the consequences of their decisions. By contrast, foreigners, regardless of how long they may have resided in the territory of the state, can always return to their homeland. (BVerfG 83, 37, Nr. 3, pp. 39–40)

This resounding statement by the court can be analyzed into three components: first, a disquisition on the meaning of *popular sovereignty* (all power proceeds from the people); second, a *procedural* definition of how we are to understand *membership* in the state; third, a philosophical explanation of the nature of the bond between the state and the individual, based on the vision of a “political community of fate.” The court argued that, according to the principle of popular sovereignty, there needed to be a “congruence” between the principle of democracy, the concept of the people, and the main guidelines for voting rights, at all levels of state power—namely, federal, provincial, district, and communal. Different conceptions of popular sovereignty could not be employed at different levels of the state. Permitting long-term resident foreigners to vote would imply that popular sovereignty would be defined in different fashion at the district-wide and communal levels than at the provincial and federal levels. In an almost direct repudiation of the Habermasian discursive democracy principle, the court declared that Article 20 of Germany’s Basic Law does not imply that “the decisions of state organs must be legitimized through those whose interests are affected [*Betroffenen*] in each case; rather their authority must proceed from the people as a group bound to each other as a unity [*das Volk als eine zur Einheit verbundene Gruppe von Menschen*]” (BVerfG 83, 37, II, Nr. 3, p. 51).

The provincial parliament of Schleswig-Holstein challenged the court’s understanding and argued that neither the principle of democracy nor that of the people excludes the rights of foreigners to participate in elections: “The model underlying the Basic Law is the construction of a democracy of human beings, and not that of the collective of the nation. This basic principle does not permit that one distinguish in the long run between the people of the state [*Staatsvolk*] and an association of subservients [*Untertanenverband*]” (BVerfG, 83, 37, II, p. 42).

The German Constitutional Court eventually resolved this controversy about the meaning of popular sovereignty by upholding a unitary and functionally undifferentiated version of it; but it did concede that the sovereign people, through its representatives, could change the definition of citizenship. Procedurally, “the people” simply means all those who have the requisite state membership. If one is a citizen, one has the right to vote; if not, one does not. “So the Basic Law. . . leaves it up to the legislator to determine more precisely the rules for the acquisition and loss of citizenship and thereby also the criteria of belonging to the people. The law of citizenship is thus the site at which the legislator can

do justice to the transformations in the composition of the population of the Federal Republic of Germany.” This can be accomplished by expediting the acquisition of citizenship by all those foreigners who are long-term permanent residents of Germany (BVerfG 83, 37, II, Nr. 3, p. 52).

The court here explicitly addresses what I have called “the paradox of democratic legitimacy” in the first lecture, namely, that those whose rights to inclusion or exclusion from the demos are being decided upon will not themselves be the ones to decide upon these rules. The democratic demos can change its self-definition by altering the criteria for admission to citizenship. The court still holds to the classical model of citizenship according to which democratic participation rights and nationality are strictly bundled together; but by signaling the procedural legitimacy of changing Germany’s naturalization laws, the court also acknowledges the power of the democratic sovereign to alter its self-definition such as to accommodate the changing composition of the population. The line separating citizens and foreigners can be renegotiated by the citizens themselves.

Yet the procedural democratic openness signaled by the court stands in great contrast to the conception of the democratic people, also adumbrated by it, according to which the people is viewed as “a political community of fate,” held together by bonds of solidarity in which individuals are embedded (*verstrickt*). Here the democratic people is viewed as an *ethnos*, as a community bound together by the power of shared fate, memories, solidarity, and belonging. Such a community does not permit free entry and exit. Perhaps marriage with members of such a community may produce some integration over generations; but, by and large, membership in an *ethnos*—in a community of memory, fate, and belonging—is something that one is born into, although as an adult one may renounce this heritage, exit it, or wish to alter it. To what extent should one view liberal democratic polities as communities based on *ethnos*? Despite its emphatic evocation of the nation as “a community of fate,” the court also emphasizes that the democratic legislator has the prerogative to transform the meaning of citizenship and the rules of democratic belonging. Such a transformation of citizenship may be necessary to do justice to the changed nature of the population. The demos and the *ethnos* do not simply overlap.

In retrospect this decision of the German Constitutional Court, written in 1990, is a swan song to a vanishing ideology of nationhood. In 1993 the Treaty of Maastricht, or the Treaty on the European Union,

established European citizenship, which granted voting rights and rights to run for office for all members of the fifteen signatory states residing in the territory of other member countries. Of the six countries to whose citizens Schleswig-Holstein wanted to grant reciprocal voting rights—Denmark, Ireland, the Netherlands, Norway, Sweden, and Switzerland—only Norway and Switzerland remained nonbeneficiaries of the Maastricht Treaty since they were not EU members.

In the following years, an intense process of democratic iteration unfolded in the now-unified Germany, during which the challenge of bringing the definition of citizenship in line with the composition of the population posed by the German Constitutional Court to the democratic legislator was taken up, rearticulated, and reappropriated. The city-state of Hamburg, in its parallel plea to alter its local election laws, stated this very clearly. “The Federal Republic of Germany has in fact become in the last decades a country of immigration. Those who are affected by the law that is being attacked here are thus not strangers but cohabitants [*Inländer*], who only lack German citizenship. This is especially the case for those foreigners of the second and third generation born in Germany” (BVerfG 83, 60, II, Nr. 4, p. 68). The demos is not an ethnos, and those living in our midst who do not belong to the ethnos are not strangers either; they are rather “cohabitants,” or, as later political expressions would have it, “our co-citizens of foreign origin [*Ausländische Mitbürger*].” Even these terms, which may sound odd to ears not accustomed to any distinctions besides those of citizens, residents, and nonresidents, suggest the transformations of German public consciousness in the 1990s.

This intense and soul-searching public debate finally led to an acknowledgment of the *fact* as well as the *desirability* of immigration. The need to naturalize second- and third-generation children of immigrants was recognized, and the new German citizenship law was passed in January 2000. Ten years after the German Constitutional Court turned down the election law reforms of Schleswig-Holstein and the city-state of Hamburg on the grounds that resident foreigners were not citizens, and were thus ineligible to vote, Germany’s membership in the European Union led to the disaggregation of citizenship rights. Resident members of EU states can vote in local as well as EU-wide elections; furthermore, Germany now accepts that it is a country of immigration; immigrant children become German citizens according to *jus soli* and keep dual nationality until the age of twenty-four, at which point they

must choose either German citizenship or that of their country of birth. Furthermore, long-term residents who are third-country nationals can naturalize if they wish to do so.

With the cases of the scarf affair and German voting laws, I have sought to elucidate processes of democratic iteration that attest to a dialectic of rights and identities. In such processes, both the identities involved and the very meaning of rights claims are reappropriated, resignified, and imbued with new and different meaning. Political agents, caught in such public battles, very often enter the fray with a present understanding of who they are and what they stand for; but the process itself frequently alters these self-understandings. Thus, in the scarf affair in France, we witness the increasing courage, maybe even militancy, of a group of women usually considered to be “docile subjects,” in Michel Foucault’s sense.²⁵ Traditional Muslim girls and women are not supposed to appear in the public sphere at all; ironically, precisely the realities of Western democracies with their more liberal and tolerant visions of women’s role permit these girls and women to be educated in public schools, to enter the labor force, and, in the case of Fereshda Ludin, even to become a German teacher with the status of a civil servant. They are transformed from “docile bodies” into “public selves.” Although their struggle at first is a struggle to retain their *traditional identities*, whether they choose it or not, as women they also become empowered in ways they may not have anticipated. They learn to *talk back to the state*. My prediction is that it is a matter of time before these women, who are learning to talk back to the state, will also engage and contest the very meaning of the Islamic traditions that they are now fighting to uphold. Eventually, these public battles will initiate private gender struggles about the status of women’s rights within the Muslim tradition.²⁶

25. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan.

26. The French scarf affair is being followed very closely in Turkey, a secular, multiparty democracy, the majority of whose population is Muslim. Throughout the 1980s and 1990s, Turkey confronted its own version of the scarf affair as the Islamist parties increased their power in Parliament and unprecedented numbers of Turkish Islamist women began attending the universities. From the standpoint of Turkish state authorities, the scarf is seen as a violation of the principle of *laiklik* (laïcité) articulated by Kemal Atatürk, the founder of the Republic. The Turkish Constitutional Court decided in 1989 against the use of scarves as well as turbans in universities. Students and the Islamist organizations representing them appealed to Article 24 of the Turkish Constitution, which guarantees freedom of religious expression, and to Article 10, which prohibits discrimination due to religious belief and differences in language, ethnicity, and gender. Their appeals were rejected. While officially the

These cases also show that outsiders are not only at the borders of the polity, but also within. In fact the very binarism between nationals and foreigners, citizens and migrants, is sociologically inadequate; the reality is much more fluid, since many citizens are of migrant origin, and many nationals themselves are foreign-born. The practices of immigration and multiculturalism in contemporary democracies flow into one another.²⁷ While the scarf affair both in France and in Germany challenges the vision of the “homogeneity” of the people, the German Constitutional Court’s decision shows that there may often be an incongruity between those who have the formal privilege of democratic citizenship and others who are members of the population but who do not formally belong to the demos. In this case, the challenge posed by the German court to the democratic legislature of adjusting the formal definition of German citizenship to reflect the changing realities of the population was taken up, and the citizenship law was reformed. The democratic people can reconstitute itself through such acts of democratic iteration so as to enable the extension of democratic voice. Aliens can become residents, and residents can become citizens. Democracies require porous borders.

The constitution of “we, the people” is a far more fluid, contentious, contested, and dynamic process than either Rawlsian liberals or decline-of-citizenship theorists would have us believe. The Rawlsian vision of peoples as self-enclosed moral universes is not only empirically but also normatively flawed.²⁸ This vision cannot do justice to the dual identity of a people as an ethnos (as a community of shared fate, memories, and moral sympathies), on the one hand, and as the demos (as the democratically enfranchised totality of all citizens, who may or may not belong to the same ethnos), on the other. All liberal democracies that are modern nation-states exhibit these two dimensions. The politics of peoplehood consists in their negotiation. The people is not a self-enclosed and self-sufficient entity. The presence of so many migrants from Algeria, Tunisia, and Morocco, as well as from central Africa, testifies to France’s imperial past and conquests, just as the presence of so many *Gastarbeiter*

wearing of the “turban” (a form of headscarf worn by observant Muslim women) is banned, many faculty members as well as administrators tolerate it when they can. See Benhabib, *The Claims of Culture*, p. 203.

27. See *ibid.*, pp. 165–77.

28. John Rawls, *The Law of Peoples*, pp. 23–35, and my critique in Benhabib, *The Rights of Others*, chap. 3.

in Germany is a reflection of the economic realities of Germany since World War II. Some would even argue that, without their presence, the post–World War II German miracle would not have been conceivable.²⁹ Peoplehood is dynamic and not a static reality.

Decline-of-citizenship theorists, such as Michael Walzer and David Jacobson,³⁰ are just as wrong as Rawlsian liberals, in conflating the ethnos and the demos. The presence of others who do not share the dominant culture's memories and morals poses a challenge to the democratic legislatures to rearticulate the meaning of democratic universalism. Far from leading to the disintegration of the culture of democracy, such challenges reveal the depth and the breadth of the culture of democracy. Only polities with strong democracies are capable of such universalist rearticulation, through which they refashion the meaning of their own peoplehood. Will French political traditions be less strong if they are now carried forth and reappropriated by Algerian women or women from the Cote d'Ivoire? Will German history be less confusing and puzzling if it is taught by an Afghani-German woman, as in the Fereshda Ludin case? Rather than the decline of citizenship, I see in these instances the reconfiguration of citizenship through democratic iterations.

5. COSMOPOLITAN RIGHTS AND REPUBLICAN SELF-DETERMINATION

I began these lectures with a puzzle, the first articulations of which I attributed to Hannah Arendt and Karl Jaspers. After the capture of Eichmann by Israeli agents in 1960, Arendt and Jaspers initiated a series of reflections on the status of international law and norms of cosmopolitan justice. I summarized their queries in terms of three questions: (1) What is the ontological status of cosmopolitan norms in a postmetaphysical universe? (2) What is the authority of norms that are not backed by a sovereign with the power of enforcement? (3) How can we reconcile cosmopolitan norms with the fact of a divided humankind? I promised that I would begin by answering the last question first and then proceeding to the others.

29. James F. Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe*.

30. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*; David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship*.

In regard to question 3—how to reconcile cosmopolitanism with the unique legal, historical, and cultural traditions and memories of a people—we must respect, encourage, and initiate multiple processes of democratic iteration. Not all such processes are instances of jurisgenerative politics. Jurisgenerative politics are cases of legal and political contestation when the meaning of rights and other fundamental principles are repositied, resignified, and reappropriated by new and excluded groups, or by the citizenry in the face of unprecedented hermeneutic challenges and meaning constellations. I have tried to illustrate such cases of “rights at work,” in instances when cosmopolitan norms that apply to the rights of residents or immigrant foreigners are rearticulated by constituted democratic legislatures. The French scarf affair and the German Constitutional Court’s decision concerning the voting rights of resident foreigners are cases in which democratic majorities contested and redeployed cosmopolitan norms.

As we see in the French scarf affair, processes of democratic iteration do not invariably and necessarily result in political outcomes that we may want to endorse. It is clear that with the passing of legislation banning the wearing of all religious symbols in the schools, the French state has heightened the confrontation with its observant populations, Jewish and Muslim alike. It is also clear that future battles will take place inside and outside France. The Iraq War has already produced restiveness among France’s Muslim population. It is likely to be a matter of time before some group brings charges against the actions of the French National Assembly in front of the European Court of Human Rights. Along with the debate that is unfolding in the new Europe about the separation of church and state within the EU Constitution, France’s strict understanding of laicism, deplored even by its closest neighbors, will itself be challenged at the highest levels of jurisgenerative politics. This is the peculiarity of cosmopolitan justice: precisely because France is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as to the European Charter of Human Rights, even the actions and decisions of its National Assembly are not immune to future juridical challenges.

Such controversies reenact in practice the theoretical dilemma of discursive scope: universalist norms are mediated by the self-understanding of local communities. The availability of cosmopolitan norms, however, increases the threshold of justification to which formerly exclusionary practices are now submitted. Exclusions take place, but the threshold for

justifying them is now higher. This higher threshold also heralds an increase in democratic reflexivity. It becomes increasingly more difficult to justify practices of exclusion by democratic legislatures simply because they express the will of the people; such decisions are now subject to constitutional checks and balances not only in domestic law but in the international arena as well.

The French courts and politicians find it necessary to ban the wearing of religious symbols only on the basis of grounds that can be generalized for all: it is the future well-being and integrity of French society, as a society of *all* its citizens, that is appealed to. Reflexive grounds must be justifiable through reasons that would be valid for all. This means that such grounds can themselves be recursively questioned for failing to live up to the threshold set in their own very articulation.

In regard to Arendt's and Jaspers's question as to the authority of cosmopolitan norms, my answer is: *the democratic power of global civil society*. Of course, the global human rights regime by now has its agencies of negotiation, articulation, observation, and monitoring. In addition to processes of naming, shaming, and sanctions that can be imposed upon sovereign nations in the event of egregious human rights violations, the use of power by the international community, as authorized by the UN Security Council and the General Assembly, remains an option.

Finally, I come to the first question: what is the ontological status of cosmopolitan norms in a postmetaphysical universe? Briefly, such norms and principles are morally constructive: they create a universe of meaning, values, and social relations that had not existed before by changing the normative constituents and evaluative principles of the world of "objective spirit," to use Hegelian language. They found a new order—a *novus ordo saeculorum*. They are thus subject to all the paradoxes of revolutionary beginnings. Their legitimacy cannot be justified through appeal to antecedents or to consequents: it is the fact that there was no precedent for them that makes them unprecedented, and likewise we can only know their consequences once they have been adopted and enacted. The act that "crimes against humanity" has come to name and to interdict was itself unprecedented in human history—that is, the mass murder of a human group on account of race through an organized state power with all the legal and technological means at its disposal. Certainly, massacres, group murder, and tribal atrocities were known and practiced throughout human history. But the full mobilization of state power, with all the means of a scientific-technological civilization

at its disposal, in order to extinguish a human group on account of their claimed racial characteristics was wholly novel. Once we name “genocide” as the supreme crime against humanity, we move into a new normative universe. I would even dare say that we move into a universe that now contains a new moral fact—“Thou shalt not commit genocide and perpetrate crimes against humanity.” It is precisely because we as humankind have learned from the memories of genocide that we can name it as the supreme crime. Cosmopolitan norms, of which the prohibition against “crimes against humanity” is the most significant, create such new moral facts by opening novel spaces for signification, meaning, and rearticulation in human relations.

Let me end by turning to Arendt once more. Although she was skeptical that international criminal law would ever be formulated and reinforced, Arendt in fact praised and commended the judges who sought to extend existing categories of international law to the criminal domain. She wrote:

...that the unprecedented, once it has appeared, may become a precedent for the future, that all trials touching upon “crimes against humanity” must be judged according to a standard that is today still an “ideal.” If genocide is an actual possibility of the future, then no people on earth...can feel reasonably sure of its continued existence without the help and the protection of international law. Success or failure in dealing with the hitherto unprecedented can lie only in the extent to which this dealing may serve as a valid precedent on the road to international penal law... in consequence of this as yet unfinished nature of international law, it has become the task of ordinary trial judges to render justice without the help of, or beyond the limitation set upon them through, positive, posited laws.³¹

However fragile their future may be, cosmopolitan norms have evolved beyond the point anticipated and then problematized by Hannah Arendt. An International Criminal Court exists, although the oldest democracy in the world, the United States, has refused to sign the Rome Treaty legitimizing it. It is this paradox that these lectures have sought to understand—and, I hope, to transcend. The spread of cosmopolitan norms, from interdictions of war crimes, crimes against humanity, and

31. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, pp. 273–74.

genocide to the increasing regulations of cross-border movements through the Geneva Conventions and other accords, has yielded a new political condition: the local, the national, and the global are all imbricated in one another. Future democratic iterations will make their interconnections and interdependence deeper and wider. Rather than seeing this situation as a challenge to democratic sovereignty, we can view it as promising the emergence of new political struggles and forms of agency.

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