Group-Differentiated Rights and the Problem of Membership

In recent decades the literature surrounding what Will Kymlicka has termed “group-differentiated rights”\(^1\) has burgeoned. Much progress has been made in exploring the various justifications for, and limitations of, the allocation of rights and benefits to individuals on the basis of group membership. For the purposes of this paper, though, I will be simply assuming that the theoretical justifications of group-differentiated rights can be defended. I want to explore a different problem, one that I feel has been given insufficient attention by those who advocate the introduction of group-differentiated rights at a policy level. The problem is this: once we move from the theoretical justification of group-differentiated rights to their implementation in practice, we are immediately confronted with the dilemma of identifying which particular individuals are to benefit. In other words, for any given group-differentiated right, we need to be able to pinpoint who the members of that group are. For example, if we hold that the state has an obligation to create legal exemptions for some citizens on the basis of their cultural or religious affiliations, to which particular citizens are we going to grant the exemption? Or if we hold that the state has an obligation to institute some form of affirmative action for positions of power or status, which particular citizens are we going to include under this policy? While defenders of group-differentiated rights do not appear to see this as a problem, the issue of determining membership has been seized upon by skeptics as a fatal flaw in the practice. If group-differentiated rights are to be more than an abstract ideal, then, the problem of group membership must be addressed.

In this paper I explore a possible solution to this problem. I argue that determining group membership can be achieved whilst largely avoiding the theoretical and practical difficulties highlighted by opponents. I do this by introducing a typology that tracks the various interests that individuals have in group membership. I argue that we can use this typology as a tool to achieve a more nuanced and flexible understanding of group membership that can still be sufficiently determinate to serve as a prac-

\(^1\)The term was coined in Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995).
tical guide. The argument proceeds through five sections. In section 1, I examine the various positions taken in the literature towards the issue of group membership. This will serve to introduce the scope of the problem and the challenges that will need to be overcome in developing a coherent and practical account of group membership. In section 2, I consider three possible models of determining group membership. These models illustrate the range of options available in determining group membership, as well as their limitations. In section 3, I turn to my typology, briefly sketching the various ways in which individual interests are tied up in group membership. In section 4, I demonstrate how this typology can be integrated with the three models of group membership to provide a workable matrix for determining group membership while mitigating many of the problems commonly taken to undermine the application of group-differentiated rights. Section 5, in conclusion, explores how the matrix can function in practice.

1. Positions on Group Membership

There are four broad schools of thought regarding group membership evident in the literature. Within the first school of thought the problem of membership is occluded, since it is taken as axiomatic. For the second and third schools, meanwhile, the problem is foregrounded as a way of discrediting the very notion of group rights. The fourth school of thought, in response, has noticeably contracted the scope of group rights discussion to avoid the problematic implications of membership.

1.1. Membership as axiomatic

Will Kymlicka can be taken as the prime example of the first school of thought. In his view, we all belong to a discrete societal culture, and it is in virtue of membership in that societal culture that we are entitled to certain rights. While lip service is occasionally paid to the fact that groups are internally heterogeneous, their demarcations opaque, and their memberships overlapping, these problems feature only marginally in the account of group rights developed, as caveats to be noted before the theorizing begins. To which group each individual belongs will be ob-

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3While I do not address it here, I take it that there are serious problems with the concept of societal cultures that go beyond the question of determining membership. For an overview of some of these problems, see Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000), pp. 52-87.
vious and unproblematic: she will be a member of an indigenous tribe; or she will be a Quebecois; or she will be part of the broader liberal nation.

1.2. The empirical critique

The second school of thought seizes on the empirical falsity of this claim. Critics point out that it is simply not true that each individual belongs to one, and only one, societal culture: immigrants, for example, or those born to parents of different backgrounds, can lay claim to belonging to multiple societal cultures. Furthermore, there is no room within this framework for internal dissent or contested identities. It thus has no mechanism to deal with those who consider themselves members of a particular group whilst objecting to some of its major tenets (Muslim women attempting to reform patriarchal interpretations of the Koran, for example), or those who consider themselves members of a particular group whilst being rejected by the group’s leadership (such as homosexuals within conservative churches). The problem is pervasive. Since variants on these examples can be developed for practically every group imaginable, a theory of group rights that is premised on groups being holistic and homogeneous will be significantly compromised. The empirical realities of individuals’ complex identities are thus taken to cast doubt on the entire project of group rights.4

1.3. The normative critique

The empirical shortcomings of such an approach would be sufficient to discount the first school of thought. There are, however, further normative concerns with such an account of membership that many critics have pressed. These fall within the third school of thought. This line of criticism has three distinct strands, each of which tracks a different normative problem with group membership: divided loyalties, destabilization, and internal harms. Each of these approaches concurs with the empirical objection, but points further to the socially damaging consequences of allocating group rights as if membership were axiomatic. It is not just that individuals do not belong to a single group—acting as if they do, particularly through the legislative mechanisms of the state, leads to injustice.

The first strand is motivated by a distrust of differentiated citizenship, and the instability that divided loyalties can cause. Critics contend that a sense of cohesion, mutual trust, and identification is necessary to support the institutions that the state provides: institutions such as welfare, education, defense, and even the system of governance itself. Official recog-

nition of group identity is seen to undermine allegiance to those institutions. Brian Barry, for example, writes:

It is not hard to appreciate the relation between institutional pluralism and the potential for group conflict: a situation in which groups live in parallel universes is not one well calculated to advance mutual understanding or encourage the cultivation of habits of cooperation and sentiments of trust.5

Similarly, both Nathan Glazer and Michael Walzer observe that an inevitable side effect of enforcing group rights in legislation is that they cement difference.6 This has the consequence of institutionalizing identity, requiring individuals to be assigned exclusive social identities that then become immutable. This argument amounts to the claim that recognition of group rights, because it legitimizes difference, is incompatible with the institutions of a liberal democratic state.7 The second strand is also concerned with the divisiveness of recognizing group membership, though here directed at the potentially violent and destabilizing affects of group loyalty. Writing against the phenomenon of fervent nationalism that took so many by surprise at the end of the Cold War, Michael Ignatieff warns of what he terms the “narcissism of minor difference”:

Ignatieff is concerned that in finding commonality with one’s fellow group members, there is a tendency to focus upon and disparage differences in others. The final strand focuses not on the harm to social cohesion, but the potential harm to individuals of being (mis)categorized. There are two aspects to this claim. It is in part alerting us to the problem of


7For an empirical rebuttal of such concerns, see Keith Banting and Will Kymlicka (eds.), *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (Oxford: Oxford University Press, 2006).

framing.\textsuperscript{9} Who is affected by a particular action is as salient a question as whether the action itself is morally required, and to exclude certain people from our account because we do not see them as belonging to the group in question is to commit an injustice in itself. For example, if we were to institute a right to affirmative action for African-Americans, but then deny this right to those who could not trace their ancestry back a certain distance, we would be committing an injustice towards numerous individuals who suffered the costs of discrimination but could not draw upon the remedy. Implicit in this claim is the idea that no theory of membership will be sensitive enough to accurately demarcate the group—given the fuzziness of any group’s boundaries, attempts to institutionalize membership will inevitably exclude some who should be included, and include some who should be excluded.

Compounding the problem of misframing is the issue of differential effect. The totalizing account of groups given by Kymlicka obscures the extent to which the same policy will differentially affect members who are differently placed within the group. Any theory of group rights that presupposes group members have identical interests, or would benefit symmetrically from a change in state policy, implies that there are no internal divisions within a given group, and so occludes the possibility that a policy might benefit some while harming others within the group. This is a particular concern of feminist theorists, who point out that many of the enabling rights demanded by groups can in fact be utilized to facilitate and legitimate the oppression of women.\textsuperscript{10}

1.4. Contraction of scope

Each of these objections raises significant and pressing concerns for advocates of group-differentiated rights. It is largely in response to these concerns that the fourth school of thought has arisen.\textsuperscript{11} Coming from the perspective that any overarching attempt to categorize individuals into


\textsuperscript{11}There is also a fifth position evident in the literature, which also accepts the empirical and normative critiques. This is the position that makes reference to the hybridity and heterogeneity of groups, but then makes no further reference as to how we would actually deal with the problem of identifying group members in practice. See, e.g., Carens, \textit{Culture, Citizenship, and Community}. 
groups will lead to injustice, some philosophers have developed theories that involve a contraction in the scope of identity politics. For some, this means that the focus is narrowed to more ephemeral obligations such as recognition, in which case the question of who the particular members are can be safely left to one side. For others, attention is directed towards a particular right, and a theory developed that can reconcile its differential effects on internal minorities such as women.

While both of these tactics lead to conclusions that I accept, the narrowness of their application is cause for concern. By implicitly conceding the impossibility of determining group membership across a variety of domains, these theories fail to provide the means to justify policies such as affirmative action or legal exemptions. What is required, then, is an account of group membership that can accommodate the concerns of critics while also providing a theoretical basis for a generalizable defense of group rights. It is to that challenge that I now turn.

2. Three Models of Group Membership

There are three methods a state could feasibly employ in order to determine an individual’s membership in a group, for the purpose of distributing goods and benefits: through reference to an objective list; through self-identification; or through group-endorsement. The objective criteria model holds that there is some set (or subset) of features that all members of the group must instantiate; self-identification simply involves designating oneself a member of a particular group; and group-endorsement refers to the acceptance of the individual by the group in question. In this section I consider the advantages and disadvantages of each approach, and suggest that membership in a group cannot be determined through application of any one of these methods.

2.1. Objective list

The first method to be assessed is the determination of group membership through reference to objective criteria. For example, we might think that group members must share some or all of a history, language, culture, ancestry, or physical attributes. That is, there are some objective

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12This tactic is evident to some degree in Benhabib, *The Claims of Culture*, and Phillips, *Multiculturalism Without Culture*.
14This taxonomy is adapted from one proposed by Annamari Vitikainen, “Minority Rights: A Liberal Individualist Account,” Australasian Association of Philosophy Annual Conference, Melbourne, Australia, 2008.
and identifiable features that would be necessary and sufficient to determine group membership. In its less subtle incarnations, this method immediately encounters the problem of essentialism. It presumes that there is some essential Aboriginal, for example, or some essential woman, that we can define in objective terms and against which we can judge all other potential members of the group. As noted, it relies on being able to identify a set of characteristics that are necessary and sufficient to qualify as a member. The problem is that all of the social groups with which we are concerned—ethnicity, culture, religion, gender, sexuality—defy such attempts at rigid characterization.

This approach is therefore liable to lead to misframing. Many individuals who live as members of the group, understand themselves as members of the group, and are subject to harms because of their membership in the group would be excluded from official recognition of their group membership because of their lack of a necessary criterion.

This approach is also liable to lead to reification. If a set list of characteristics is taken to define membership, and particularly if this is then used in policy, it will potentially delegitimize attempts at reconceptualizing or reinterpreting the group. To take but one example, if we were to posit some objective list to characterize the social group Muslim, we would presumably need to make at least some reference to a shared set of beliefs (assuming we do not take membership to be defined in terms of kinship or ancestry). Yet this creates a barrier to the attempts of women (and others) who identify as Muslim in challenging core interpretations of the sacred texts. These types of challenges are necessary to ensure that religious and cultural groups remain relevant and viable in a changing world.15

We might respond to this dilemma by suggesting that objectivity can be gained by thinking of membership in a group as a family resemblance rather than a set list. So rather than claiming that an individual should be excluded from membership because she is missing one feature of our objective list, we might take a more holistic perspective that considers whether there is sufficient overlap between the individual and our conception of the group. This might avoid—or at least minimize—the problems of misframing or reification outlined above. Whilst it is theoretically appealing, such a move has limited applicability in practice. Given that the membership criteria are intended to solve the problem of determining precisely which individuals are to be entitled to particular goods and benefits, a framework that favors indeterminacy cannot fulfill its function. Once determinacy is a requirement, however, we return to the

15It is worth noting, however, that objectivity cannot be entirely abandoned. As I shall go on to explore below, a presumption that there are no conceptual boundaries around a group can be equally problematic.
problems outlined above.

There is one further problem with the objective list method that must also be attended to, since it holds even if the problems of misframing and reification can be overcome. Insofar as the state is responsible for determining membership, the objective list method grants the state excessive control over individuals’ identities. Some opponents of group rights raise the specter of Apartheid in this context, arguing that officially assigning individuals to social groups will create deep social divisions.\footnote{See, e.g., Nathan Glazer, “Individual Rights against Group Rights.”} Given that the purpose of such assignment is to distribute goods and benefits, I believe that the invocation of Apartheid is somewhat overblown. Nonetheless, the problem of state control remains. The objective list method empowers the state to make intrusive decisions about individual identity. For many group-differentiated rights, their justification stems from claims regarding the centrality of certain practices to the individual’s sense of self. We might think here of the pacifism of a Quaker, or the smoking of peyote for a practitioner of the Native American Church. If reference is to be made to an objective list, however, the state will be called upon to make intrusive judgments: it will be forced to decide whether the individual in question has the right kinds of beliefs, and the right strength of belief, to be considered a group member.

A further complexity with the objective list model is encountered if we look to countries such as Australia and Canada, with their historical policies of removing indigenous children from their families and communities and placing them in either missions or white families. As a direct result of such policies, many people will have virtually no way of proving their membership in an indigenous group on an objective list model—they cannot appeal to language, since they were denied the freedom to speak it from an early age; they cannot appeal to culture, for the same reasons; and they cannot appeal to ancestry, since in most cases they were denied information about their birth parents. There is a double injustice in refusing such individuals access to the benefits that are offered to remediate some of these harms, on the grounds that the harms themselves have rendered them ineligible. On both theoretical and practical grounds, then, the objective list criterion is deeply flawed.

2.2. Self-identification

In stark contrast to the objective list model for determining group membership, self-identification demands no correspondence with a set of features, but rather relies solely on the personal nomination of the individual. If the individual takes herself to be a member of a particular group,
then she is. Because the purpose of self-identification would be as a means of determining membership in order to distribute goods and benefits, what this means in practice is that I am a Hindu (for the purposes of rights extended to Hindus) if I see myself as Hindu, and likewise, I am Aboriginal (for the purposes of rights extended to Aborigines) if I see myself as Aboriginal.

Of course, taking oneself to be a member of a group rarely happens in complete abstraction from widely shared beliefs about the group—to see myself as, say, homosexual, would presumably require some understanding of what it means to be homosexual. Nonetheless, advocates of this model press the point that the final judge of one’s membership is oneself: there is no clause here for an individual to be mistaken. While we might think it unlikely that an individual would proclaim membership in a social group such as ethnicity or gender without a solid grasp of what these terms mean, it is not so far-fetched for religious or cultural groups (one need only note the numbers of people who proclaim themselves Buddhist, seemingly aligning this with a vague belief in Karma and a penchant for meditation).

Less trivially, there can also be much contestation over the social meaning of an identity group. What it means to be Aboriginal, for example, is widely contested, making it possible for individuals to proclaim their membership with only the remotest connection to Aboriginal customs. On the self-identification model, such individuals would be eligible for any benefits allocated to Aborigines.

In its favor, though, the self-identification model avoids all of the problems associated with the objective list model outlined above. There is no essentialism, because there is no feature that I must instantiate to count as a member; there is no threat of reification, because even those whose views are starkly opposed to the views of the majority will qualify as group members; and there is no state intrusion, since the state would merely be ratifying the chosen identity of the individual. It is for these reasons, amongst others, that the self-identification criterion of group membership is favored by feminist theorists such as Seyla Benhabib. On the basis that persons are self-defining and self-interpreting, Benhabib claims that individuals must have the freedom to determine their own membership in particular groups yet retain the freedom to challenge the norms and tenets of that group.\footnote{“An individual’s group membership must permit the most extensive form of self-ascription and self-identification.” Benhabib, \textit{The Claims of Culture}, p. 131.}

The arguments that Benhabib raises are important ones, and illuminate the normative benefits of the self-identification model of group membership. Nonetheless, there are reasons to approach this view with
caution. The first of these is practical. Allowing individuals to assert any group identity they wish, where this carries with it the promise that they will receive additional goods and benefits from the state, raises the distinct possibility of identity fraud. This is particularly the case for benefits such as affirmative action, which do not carry with them any presupposition that the individual will act in any way associated with the group. (We might compare this to, say, the exemption on uniform codes to enable Sikhs to wear the turban. The temptation to commit identity fraud here would appear minimal, since anyone other than a Sikh would have little to gain from the exemption.)

Despite the possibilities for fraud, self-identification is in fact utilized by a number of governments, with seemingly little ill-effect. In New Zealand, eligibility for voting in the Maori electoral role is determined by self-identification. Similarly in Australia, self-identification is utilized both for the purposes of affirmative action for Aboriginals in university admission, and for differential student welfare benefits.18

Instead of the practical concern of identity fraud, I wish to concentrate instead on a theoretical problem with the self-identification criterion that has been systematically overlooked in the literature. This problem centers upon the fact that self-definition is not an act that is exclusively undertaken alone, but is rather achieved in dialogue with others.19 Such dialogue not only allows one to articulate one’s own individual identity, but also to position it within a collective identity: who I am is at least in part defined by who we are. The problem for the self-identification model arises because allowing individuals to insist on their inclusion within a group, even when they reject the features that the others see as central to that identity, potentially compromises the identity of the others in the group.

To elucidate with an example, we can consider the case of a relatively closed religious community such as the Amish. If we were to take Benhabib at her word, such groups should be obliged to accept as members individuals who reject a central tenet of faith. Under Benhabib’s theory, for example, the Amish would not only be obliged to accept as legitimate

18The welfare agency states that it will “normally accept a student’s or Australian Apprentice's declaration … as sufficient evidence of their Aboriginality or Torres Strait Islander status.” Nonetheless, they do include two further criteria of membership if doubt is cast on the applicant’s identity. These appeal to both the objective list criterion (namely proof of ancestry) and the group-endorsement criterion (in a letter of acceptance from an Aboriginal organization). See Centrelink, “Primary Eligibility for Abstudy,” http://www.dest.gov.au/sectors/Indigenous_education/publications_resources/abstudy/primary_eligibility_criteria_for_abstudy/, accessed 30/09/2009.

members those who refused to obey certain elements of the Ordnung (or rules of the Church) but also those who denied the very existence of God. To demand this, however, would be to disrupt the identity of those members of the Amish who see their identity as defined precisely through a collective belief in God and the Ordnung.  

It is important to stress that the implications of self-identification are not merely solipsistic, but are embedded in shared practices. For our example, it thus goes beyond merely allowing a nonbeliever token entry into the group—perhaps allowing her to sit unobtrusively at the back of the church. Self-identified membership is not intended to simply let individuals hover at the fringes of the group to which they wish to belong, but to be recognized as full and legitimate members. It would require, essentially, that other members of the group acknowledged nonbelief to be compatible with what it is to be Amish. But for Amish individuals to acknowledge such a thing would be to alter the way in which they viewed themselves. Their belief in God would no longer be the grounds for mutual identification with the Amish faith and with one another.

There are strong parallels here with a more contentious case: precisely the same dynamic is at play in current debates within conservative churches such as the Southern Baptist Convention regarding homosexuality. Gays who wish to be counted as members of their church would like to see that religious identity as accepting of their sexuality, whilst those who deny entry to gays are claiming that the identity of the group is incompatible with the acceptance of homosexuality. Even though at first blush we might think the problem solved if each side adopted a “don’t ask, don’t tell” attitude, this overlooks the fact that precisely what is at issue is the meaning of group membership. Many gays do not merely want to be able to receive communion, they want to be accepted as members of the community in full knowledge of their sexual identity. On both sides, what is at stake is the shared identity of all co-members.

This phenomenon is well articulated by Joseph Raz. Raz observes that principles guiding access to goods can change not only who receives the good, but also the very nature of the good. The example he uses is the good of parenting. He asks us to imagine a community in which the concept of parenting is reserved for blood relations—in other words, adoption does not involve a parenting relationship. Were this to be changed to

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20For larger and more loosely organized groups, this may not present such a problem. For Catholics or Anglicans, for example, the range of acceptable beliefs is already such as to make it difficult to point to certain beliefs or practices as being incompatible with the self-understanding of members (though we can still presumably point to some kind of belief in God).

allow adopters to be considered parents, it would not simply enable previously excluded individuals to experience a particular good, but would also change the meaning of the good in question. What it is to be a parent would have altered. Similarly in the examples given above, what it is to be Amish or what it is to be a Southern Baptist will change with the inclusion of individuals who had previously been seen as antithetical to the beliefs of the group.

This is not to imply that all such inclusions and their corresponding alterations to identity should be avoided, and indeed the parenting example (as well, I would argue, as the issue of homosexuality) are cases in which the grounds for changing the meaning of the good are strong. What it does mean, though, is that the principle of self-identification has implications that Benhabib does not acknowledge. Granting individuals membership in a group, despite their rejection of central tenets of that group, is going to alter what it means for the rest of the members to identify with that group. It will thus potentially alter their self-understanding, as well as their understanding of their relationship to the world around them. Unless we think that all social identities can be revised in this way without problematically harming the self-understanding of members, self-identification cannot be our guiding principle in determining group membership.

2.3. Group-endorsement

On the group-endorsement model, group membership is determined by looking at which individuals the group itself takes to be members. Group-endorsement avoids the problem of self-identification, since it is based exclusively on the acceptance of the individual by the group. As such, it does not carry the potential to disrupt the identities of other members. It also avoids empowering the state to interfere in the sensitive issues of identity, since, as for self-identification, the state would simply be ratifying the decision that others had made.

Group-endorsement is most familiar in the context of religious affiliations. Churches operate on the basis that a shared set of beliefs is required for membership, but since these beliefs evolve and adapt over time, it is the consensus around the current beliefs that is used to include or exclude potential members. The degree of consistency with the official creed required for eligibility to marry in a particular church, receive sacraments, or be buried on sacred ground will differ depending on the denomination and even perhaps the congregation in question.

Two key problems with group-endorsement become evident when we consider its application. First, given that the criterion of membership is to be used to determine which individuals are eligible for goods and benefits, group-endorsement empowers the group to suppress internal dissent.
Members (and in particular their leaders) are in a position to threaten individuals with the denial of goods and benefits that they would otherwise be entitled to, if they refuse to toe the line. If we think of benefits such as entitlement to a percentage of the profits of mining on traditional lands, or labor laws protecting the rights of individuals to pray multiple times a day, allowing the group itself to determine who will receive these benefits enables it to present its members with an ultimatum: accept the given definition of the group and all its practices, or lose the benefit. It should be noted here that it will often be women who suffer from this predicament, as the most vulnerable members of the group and often with the most at stake in changing internal norms of the group.

Second, there is also a problem of circularity threatening with group-endorsement. In order to consult the group as to who qualifies for legitimate membership, we must first know the boundaries of the group, and this is precisely the issue at stake. The group-endorsement model gives us no starting point for establishing the boundaries of the group, necessary for knowing who is entitled to speak on the group’s behalf. In practice, it seems that group-endorsement would only be applicable to groups with a clear internal hierarchy, such as the Catholic Church, or to relatively small and homogeneous groups. It is only in these cases that we would know with whom to consult about group membership, and from whom we could expect a unified response. For many other groups, such as ethnic minorities, indigenous communities, or sexual orientation, there is potentially no authority to which we can defer.

For all groups, moreover, we are left with no answer to the question of what to do when ostensible group members themselves disagree on membership criteria, and likewise the question of who is authorized to speak on behalf of the group. The issue of who gets to speak for the group is a fraught one, and one which by and large disadvantages women.

It seems, then, that we have reached a stalemate. Each of the models for determining group membership encounters problems of either a theoretical or practical nature. Does this mean that the critics were right, and that group-differentiated rights fail on the grounds that we cannot unproblematically individuate who is to benefit from them? I hold that such a conclusion is overly hasty. While none of the models is capable of generalizing over the full range of group rights, there are ways that we can fruitfully differentiate their uses.

The problem of group membership can be solved, I argue, by reframing the question. We can do this by rejecting the initial premise that for any given group there will be a single set of individuals who constitute it, with our task being to determine who they are. Instead, we can change the focus to consider the kinds of harms that rights are protecting against. I claim that the nature of these harms will determine who the particular
right is to apply to. At the heart of this argument is the idea that different kinds of rights claims invoke different criteria of membership, and thus individuate different sets of individuals.

3. A Typology of Group Membership

In order to explicate this claim, we will need to take a temporary diversion from the problem of individuating group members. In this section, I put forward a typology that differentiates between the types of interests that individuals have in group membership. I identify three different models for understanding how group membership might matter: the nominal model, according to which groups are no more than a semantic fiction useful for advocating fulfillment of universal human needs; the relational model, according to which the group is seen as a set of mutual identification relations that impact upon self-respect; and the participatory model, according to which individuals coalesce around a set of shared practices that give meaning to their lives. With this typology in place, we can return in section 4 to the challenge of overcoming the limitations inherent in each of the membership criteria presented above.

3.1. The nominal model

The nominal model picks up a claim that I take to underpin much of the skepticism towards group-differentiated rights, and which is made explicit by David Miller. According to Miller, group rights do no more than extend the protection of individual rights to those who have been unjustly denied them on the basis of their membership in an oppressed group. He writes:

Belonging to [group] E is not a condition for having the right; all that belonging to E does is make securing the right of immediate and pressing importance, since as it happens it is only in the case of members of E that the state is preventing the right from being exercised.23

In other words, group-differentiated rights identify individuals whose rights are routinely violated, and articulate the demand to meet their needs. The interest that the individual has in her group membership, then, is purely contingent on political circumstances—it can be a source of harm insofar as the group is discriminated against.

While there is some truth in Miller’s claim, particularly when we look at the ways in which the language of group rights is used at the international level (the Declaration of Rights for Indigenous Peoples, for example, specifies rights such as freedom from discrimination, life, liberty, and security of person), I do not take this model to exhaust the interests that individuals have in group membership. The individualistic perspective that it offers overlooks the multiple ways in which individuals see themselves as part of groups, and the corresponding ways in which this identification makes them vulnerable.

3.2. The relational model

The relational model takes as central the fact that members of a group share an identity, and so enter into a relationship of mutual identification with one another. What this means in practice is that actions directed towards a particular individual on the basis of her membership in a social group not only harm her directly, as the nominal model picks up on, but also harm all of those who self-identify with the targeted group.

If individuals are targeted because of their membership in a particular group—for example, if certain people are sexually harassed because they are women, or physically assaulted because they are gay—the attackers are communicating an attitude towards all members of that group. They are declaring that members of that group are unworthy of respect, of equal treatment, and in some cases of basic human rights. This denial of moral worth extends to all who take themselves to be members of the group, and not just the immediate targets of the attack.

The relational model thus sheds light on the scope of harms associated with various forms of discrimination. When an individual is harassed on account of her sexuality, denied a promotion because of her skin color, or her concerns are dismissed because of her gender, the perpetrator is expressing disdain for all who take themselves to belong to those social groups. She is thus inflicting a harm on all who self-identify with that group.\(^{24}\)

One implication of this observation is that such harms are going to

\(^{24}\)We might worry here about the burden that could be placed on individuals’ freedom of speech if the relational model is taken to imply a right not to be offended. The precise boundaries of obligations that can be derived from the relational model are beyond the scope of this paper, but I would concede that on my account both hate speech and pornography would be clear relational harms, and much stereotypical depiction of minority groups would also be rendered problematic. This may not call for a legal solution, but it would imply that there was a moral obligation on all individuals not to communicate such messages. If we accept the basic premise that relational harms are real, though, this should be no more problematic in principle than restricting people’s freedoms to physically harm one another. This issue is discussed in more detail in “Why Group Membership Matters.”
extend even to individuals who find themselves personally able to avoid harassment and discrimination. They too are suffering disrespect, because one of the sources of their self-understanding is being publicly disparaged. For example, if an individual were to pass as other than how she self-identified (as some African-Americans did in the time of slavery, and as some gay people do today), she would be able to access the material benefits that were denied to others of her group, but would still be suffering the identity harm that accompanies the institutional disrespect directed at her group. Individual well-being is thus connected to group membership by virtue of the fact that self-esteem and a sense of belonging in the broader community can be undermined by disrespect directed at the group.

From the perspective of the nominal and the relational models, the significance of group membership lies primarily in its potential to be a site of disadvantage. There is, however, one final model to consider, which points to the benefit that individuals gain through their membership in (at least some) social groups.

3.3. The participatory model

What the participatory model draws attention to is the way in which practices such as language, ritual, and history provide the context within which the self is understood, supplying the scaffolding upon which personal identity is built. Importantly, such practices cannot be undertaken by isolated individuals, but gain their meaning from the fact that they are shared. The practices I am concerned with would fall under Denise Réaume’s label of “participatory goods.”25 The notion of participatory goods articulates the difference between a group of individuals simultaneously partaking in an activity, and a group of individuals sharing an activity. While the former refers to an activity that two people happen to be pursuing at the same time, though perhaps in separate locations, the latter refers to an activity that two people are undertaking in partnership. Participatory goods are shared in this way, reflecting the fact that they are cooperative endeavors.

The participatory model is concerned with goods that gain their meaning through being shared by the social group. Language would be the most obvious example, but we can also think of other cultural practices such as initiation. Such practices are meaningless without the context of the other participants. Were I to independently go through the motions of an initiation rite alone in my bedroom, for example, I would not

have actually participated in an initiation, since what it is to be initiated is to play a determined role in a shared practice. It is simply not something that can be enjoyed alone.

A similar point can be made with regard to other cultural practices. Many rituals require mutual recognition within the group of the various roles that individuals play. In some cases, these roles extend beyond the act itself and become definitive of the self. Without the mutual recognition that the fellow members of the community offer, the identity is in some important respects lost. For example, we can imagine a medicine man whose entire community has been assimilated into the broader society. While he could still go through the motions of his position, the structures of meaning from which his self-understanding is derived are absent. In all but the most trivial sense, he would cease to be a medicine man.26

This example may seem somewhat exaggerated. After all, most group-differentiated rights do not revolve around the needs of medicine men. Nonetheless, it casts light on a phenomenon that is more diffuse, but no less important. Many aspects of the self—how we understand what it is to be a son or daughter, what social meanings different occupations carry, or how the notion of romantic love fits into a life narrative—are derived from the communities within which we live. While these self-understandings are by no means inescapable, they are nonetheless constitutive of the self insofar as we do not choose to renounce or redefine them.27 What this means is that I can only stay true to myself insofar as I also stay true to those participatory goods that contribute to my self-understanding. It is for this reason that group-differentiated rights directed at protecting cultural practices are necessary.

4. An Alternative Framework

With the three models in place, it is time now to return to the main problem of determining group membership. Before laying out my argument, however, a brief caveat is necessary. The matrix I develop in this section is intended as a practical solution to a practical problem, namely, how we individuate which individuals are to benefit from particular group-differentiated rights. As such, it is definitively not intended as a way of answering once and for all the question of who “really” counts as a member of any given group. The approach I am taking to the issue of

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26Thanks to Clair Morrissey for this example.
27My position is considerably weaker than the communitarianism of Michael Sandel or Alasdair MacIntyre, in that I do not take the self to be fixed by its social circumstances. Instead, I take it that the self develops in response to the frameworks provided by social circumstances.
group membership presupposes that there is no answer to that question; groups do not exist in the necessary form for such a question to be coherent. Nonetheless, the way in which individuals identify with groups is a social reality, for the three reasons outlined above. Consequently, we have normative grounds from which to defend group-differentiated claims, thus returning us to the problem of determining membership.

The problems involved with group membership can be at least partially addressed, I argue, by reframing the question. The problems will not therefore be dissolved, but they will become tractable to the degree that the practical application of group rights is not undermined. We can do this by rejecting the initial premise that for any given group there will be a single set of individuals who constitute it, with our task being to determine who they are.

The most fruitful way to approach the question of group membership, then, is to change the focus. Instead of looking for criteria to determine membership of a given group that will hold under all circumstances, I argue that for any group right for which the question of group membership arises (and for some it may simply never arise) we must consider the kinds of harms the right is protecting against. I claim that the nature of these harms will help determine to whom the particular right is to apply.

At the heart of this argument is the idea that different kinds of rights claims invoke different criteria of membership, and thus individuate different sets of group members. Utilizing the distinction developed in the previous section between nominal, relational, and participatory harms, I argue that each of these models corresponds to a different method of determining membership, and furthermore that when each method is restricted to its appropriate model, the objections towards it can for the most part be overcome. To support this claim, let us return to each of these models in turn.

4.1. The nominal model

The nominal model was presented as a way of understanding individual interests whereby the interests at stake did not make reference to the group itself, except tangentially. In these cases, the individual is being denied something she is entitled to, but the good itself does not gain its value through reference to the group. The good is universal, and only the denial of it is particular. We might think here of certain classes of people being denied the vote, or receiving inadequate healthcare.

For these types of cases, the question of to whom the right should apply is relatively straightforward. All we need to ask is whether the individual is being denied the good in question—whether she is also connected in the appropriate way with a certain group would be irrelevant.
The argument would be structurally analogous to the issue of welfare. While welfare is closely associated with class, there is no need to ask in these circumstances whether an individual is historically associated with a particular class, or whether she is accepted as such by other members of the class. Eligibility for welfare benefits should be determined solely by income, which we can comfortably accommodate on an objective list model. Similarly, while the denial of suffrage can be traced to membership of particular groups, when we are considering to whom suffrage should be extended, the question can be answered with reference to an objective list—all those individuals who fulfill the requirements of rational capacity (and perhaps, more contentiously, abstention from criminal activity). For at least some goods, then, the objective list model will be the appropriate method of determining eligibility. These will be goods that all are entitled to, but that are denied to some individuals because of their membership in a particular social group.

The objective list method will not, however, be functional for all goods, even amongst those we take to be tracking universal interests. Whilst more contentious than the welfare example, I hold that many rights relating to freedom of religion are also understandable on the nominal model. Labor laws that entitle Muslims to pray five times a day, or exemptions from military duties for Quakers, are tracking interests individuals have qua individuals, rather than qua group members. The relevant relationship is a vertical one, between the individuals and how they conceive their God, and not a horizontal one between the individuals and how they conceive other believers.28

Unlike the example of welfare given above, however, there is no ready matrix such as income that we can appeal to in order to determine eligibility. Essentially, we would be trying to track the authenticity or strength of the belief. Given the epistemological problems with this approach, as well as the potential for state intrusion discussed above, eligibility for such rights would need to be determined through self-identification.

While this leaves such rights open to the practical problem of identity fraud, I suggest that for many of the rights in question the benefit to be distributed would be of little value to anyone who did not in fact hold the belief—the exemption from uniform requirements to accommodate religious headwear being a prime example. For an individual who did not believe she was under a religious or cultural obligation to perform certain duties, or dress in a particular way, there would be little (if anything) to gain from pretending to be of that social group.

28This is not to say that there is no aspect of participatory good in religious worship. Insofar as this is the case, rights to religious freedoms will be tracking two separate interests with separate eligibility requirements. Such complexities are discussed below.
This is not to say the potential for fraud would be absent. A fake Muslim may pretend to pray five times a day to avoid tedious work; a fake Christian may refuse to work on Sundays to spend time with her family; a fake Quaker may refuse to serve in the military to avoid physical danger; and so forth. There are two ways to respond to this problem. The first is simply to point out that the damage of such fraud is not significant enough to discredit the approach—the benefits of ensuring that all are able to realize freedom of conscience far outweigh the minor loss of productivity that would accompany such identity fraud. Second, and more importantly, we can also question whether some of the examples given above should actually qualify as fraud.

I have assumed that freedom of conscience is a universal right, and it is on these grounds that a Muslim should be granted time off work to pray, or a Christian excused from working on a Sunday. If we inquire into the justification for a right to freedom of conscience, however, we discover that religion is only contingently involved. Religion is a clear and simple example of a fundamental commitment that an individual might hold such that her identity is entwined with it, meaning that to deny her the ability to remain true to the commitment would undermine her identity in some way. However, religion is not the only commitment that might fulfill this role. An individual who identified very strongly with her commitments as a parent might have parallel justifications for refusing to work on a Sunday—there is no a priori reason to justify extending such an opportunity to an individual because of her religious identity, but not because of her secular identity. Similarly, an individual might have ethical commitments that preclude participation in an aggressive war but do not derive from religious commitments. Again, there is no a priori reason to grant an exemption on religious grounds but not on secular grounds. Reconfigured in this way, exemptions extending from freedom of conscience would still be subject to self-identification, and would still in principle be open to fraud, but the pool of fraudulent cases would be narrower still, since many who would have claimed under a false religious title could now claim under their actual identity.

We might now worry that in overcoming the problem of fraud we have created a problem of workability. If any identity commitment were sufficient to grant an individual exemption from legislation, or protection under labor laws, the stability of basic institutions might appear to be at stake. It is here that theory and practice potentially bifurcate. While the normative principle guiding policy should be that self-identification is the appropriate method of determining eligibility for certain benefits, further considerations may also have to come into play. If, for example, key economic institutions are threatened because all individuals have conflicting fundamental commitments that preclude them from satisfying
their terms of employment, we would be faced with a choice: either introduce a notion of reasonability, whereby only certain classes of commitment were deemed sufficiently fundamental; or alternatively, consider dismantling an institution that is so at odds with so many individuals’ fundamental commitments. The precise nature of the institution, and its role in other considerations of justice, would have to be brought to bear on this question. Nonetheless, the problem of workability is not intractable. While self-identification may need to be modified or constrained under certain conditions, these modifications do not undermine the principle at stake, which is that self-identification is the appropriate method of determining eligibility for a narrow range of benefits, namely, those that are captured by the nominal model, but are not amenable to an objective list.

The self-identification method is still open to one final normative objection. I noted in section 3.2 above that self-identification is implicated in identity disruption. We might therefore worry that if I can define myself as, for example, Muslim for purposes of legal exemptions, despite rejection of central tenets of belief, and this is legally endorsed by the state, it will disrupt the identity of Muslims in just the way that my self-definition as Amish did in the earlier example.

Overcoming this objection requires us to once more refocus our attention. The objection assumes that I am still attempting to identify some metaphysical entity, the group Muslim, and then determine whether or not I am a constitutive part. Instead, what we need to ask in this case is whether I as an individual am being denied something that I am entitled to. If we believe that people are entitled to freedom of conscience, and that individuals should not be disadvantaged because of their religious beliefs, then whether I am accepted as a member of a particular religious community is irrelevant both to the determination of my right, and to the self-understanding of other believers. This is because in granting me the right, the state would not be making a statement about the group to which I belong, but rather about the goods to which I am entitled. Since prayer does not necessarily gain its meaning through being a participatory good, extending relevant legal exemptions to individuals who are not recognized as group members need make no reference to what it is to be a group member.

For rights centering upon freedom of conscience, then, it is irrelevant if the rest of the group does not consider me, for example, a Muslim (perhaps because I am attempting to challenge gender relations); or if I do not meet some objective criterion for being Muslim (perhaps because I do not wear the Hijab). What matters here is my freedom to practice the basic requirements of my religion, as I construe it.

So far I have argued that benefits that track universal interests in line
with the nominal model should refer to either the self-identification or objective list method, depending on the epistemic availability of such a list. There is, however, one more type of universal interest that must be addressed, and that does not comfortably fit either method. The universal interest in question is freedom from discrimination.

The first thing to note about discrimination is that self-identification seems an inappropriate guide. If I am denied employment because society assumes I am of a certain religion, or I am physically or verbally harassed because of an assumption about my sexuality, then I am still a victim of discrimination even if I do not take myself to be a member of the group my aggressor sees me as belonging to. While other harms to do with group persecution will not hold in these cases—the relevant ones being those involved in the relational model, to be discussed below—the discrimination itself will still place falsely identified individuals at a material disadvantage.

The objective list method also seems inappropriate. At least as it has been discussed so far, the objective list method assumes the relevant list is in fact accurate. So recipients of welfare are eligible for benefits because they fit an objective measurement of poverty, or recipients of additional healthcare receive these benefits because of an objective measure of their need. When the issue in question is something like freedom from discrimination, however, it suggests a variation to the objective list method. In these cases, it is the subjective beliefs of the aggressors that determine eligibility, rather than any metaphysical truths about the victim. Therefore it does not matter if I fit any purportedly objective definition of homosexuality—if others take me to be gay and deny me access to certain goods on those grounds, then I have been discriminated against.

This observation has some interesting implications when it comes to the tenuous category of race. It is a common observation that race as a biological designator does not exist. Yet it is undeniable that many individuals suffer because of a social perception that they belong to a particular race. Their interests are harmed by virtue of their identity in a particular group, even if that group is in fact a social fiction. This suggests a modification of the objective list criterion. When discrimination is at issue, the extension of the right to protection tracks the ascription given by other members of society, particularly those in power. Who the right to protection from a particular form of discrimination is extended to, then, is not determined by how that individual construes herself, nor how well she aligns with some objective feature(s) of the group, but by how others construe them—even when this leads to the epistemically

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uncomfortable situation of extending protections to an identity category that does not, in any objective sense, exist.

Goods that fall within the nominal model should be distributed according to either the objective list method, or a modified subjective list method, or self-identification, depending on the type of good in question. What, then, should we say about goods that fall within the other two models developed in section 3?

4.2. The relational model

Under the relational model, the interest at stake is the esteem in which a group with which I identify is held. So if I identify as a woman, I am potentially harmed if women are disparaged; if I identify as Jewish, I am potentially harmed if Jews are disparaged. Built into this model, then, is an appeal to self-identification. Given that the harm comes about through my subjective identification with the group (I interpret attacks on women as attacks on me), my self-respect will be damaged even if I do not appear to fulfill membership criteria on an objective list, and even if other members of the group do not recognize me as a fellow member. When we are considering harms such as stereotypical media depictions of social groups, or cultural hierarchies that position some social groups as inferior, the affected individuals will be all those who self-identify with the social group in question.

It is important to note, however, that in these cases it is somewhat misleading to speak of there being goods or benefits to distribute. While a goal such as recognition is appropriately considered part of an egalitarian program, it is a goal that does not require specific identification of the beneficiaries. On this issue, at least, the fourth school of thought on the problem of membership was correct: if we focus exclusively on diffuse goods such as recognition, there is no need to worry about precisely which individuals should be classified as group members. Since the rectification for misrecognition focuses on public perceptions of the social group, taken in the abstract, it does not require an identifiable set of members.

While the problems of membership dissolve from the perspective of the relational model, they are at their most persistent when viewed from the perspective of the participatory model. It is to that problem that I now turn.

4.3. The participatory model

When self-identification was discussed in section 3.2 above, it was rejected on the basis that it would involve altering the identity of the group,
and the example used to illustrate this was the case of a church needing to be free to exclude those who reject the central tenets of its faith. Why this is a problem becomes clear when we look at the nature of the right in question. Many of the rights extended to religious communities involve the ability to distribute certain goods that are intrinsic to the meaning of the church, such as communion wine, or peyote. These are what I defined above as participatory goods. One of the key features of participatory goods is that the community of practitioners is fundamental to the meaning of the good; the good cannot be enjoyed outside the context of the community, and the role that other members of the community play largely defines what the good is for me. As enjoyment of these goods is indivisible from the mutual identification that comes with membership in the group, it seems that the group itself must be free to determine that access. Access to participatory goods, then, should be restricted (if the group so desires) on the grounds of group-endorsement—only those individuals who are recognized as such by the other members are entitled to enjoy the benefits of participatory goods.

It is important to be clear about what this entitlement amounts to. For the most part, it is entitlement to autonomy from state interference, amounting to a claim that the state should not, for example, be able to compel a church to marry a nonbeliever, or demand that a nonmember should have access to a tribal initiation rite. If, on the other hand, the state is involved with the participatory good in some way, perhaps through subsidization of a cultural practice or exemption from legislation, it is an entitlement for the group itself to oversee which individuals benefit.

Since the goods in question are internal to the group, they are not the kind of thing the state is normally in the business of being involved in: these are not goods such as welfare or education, what Rawls would call the “advantages of social cooperation.”30 Rather, they are goods that have value only for those connected in some way with the practitioners. It is for this reason that group-endorsement is the most appropriate method of determining membership.

There are difficulties with this approach that it is important to acknowledge. First, just because participatory goods are such as to only have value for those connected to the group, we cannot therefore conclude that no one could be harmed through exclusion. One of the most basic participatory goods is membership itself. Yet it is entirely possible for there to be an incongruity between who the group endorses as members, and those who take themselves to be members. For an individual who feels herself to be a member of the community, and who has a large

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psychological stake in the practices of the group, exclusion can be devast-
tating.

Exacerbating this problem is the fact that it is not uncommon for
groups to practice exclusions on grounds that seem arbitrary, or even
downright discriminatory. One of the most commented-upon examples
of this in philosophical debate is the case of Julia Martinez and her fight
for Pueblo membership for herself and her children.\footnote{See, e.g., Amy Gutmann, \textit{Identity in Democracy} (Princeton: Princeton University
Press, 1987), pp. 63-69; Shachar, \textit{Multicultural Jurisdictions}, pp. 18-20.} Martinez had mar-
mied a Navajo man, and unlike Pueblo men who intermarry, Pueblo
women lose membership rights for themselves and their children upon
marrying outside the tribe. Under the model I have presented, it would
seem we would have to concur with the District Court, who ruled that
"[t]o abrogate tribal decisions, particularly in the delicate area of mem-
bership, for whatever ‘good’ reasons, is to destroy cultural identity under
the guise of saving it."\footnote{Martinez v. Romney, 402 F. Supp. 5, 19 (D. N.M. 1975).} Given that the meaning of membership would
potentially change with the imposition of an externally enforced crite-
rion, the cultural identity of the group was arguably at stake.\footnote{This case is further complicated by the suggestion that the exclusions for intermar-
rying females are not a reflection of a cultural tradition, but rather a modern adaptation
resulting from the perception that limited tribal lands could not sustain the expansion of
members that would result from accepting all children of inter-marriages. In order to
generalize from this example, I will be proceeding as if the exclusions were culturally
significant.}

Does this mean, then, that the approach I am advocating must neces-
sarily collude with such patriarchal norms? Should a social group be en-
titled to exclude individuals who would otherwise be eligible for mem-
bership, on the basis of arbitrary or discriminatory criteria? Not necessarily. There are a number of ways in which we can respond to situations
such as the Martinez case from within the framework I have constructed.
I will discuss these in section 5 below. Nonetheless, these responses will
not be able to overcome one basic problem with the group-endorsement
model, which is that it obscures internal disagreement within the com-

Before giving consideration to such issues in the conclusion, it will be
useful to summarize in schematic form the argument so far. I have argued that the problem of group membership is best addressed by considering what the interest at stake is for any potential group right. With this interest identified, one (or more) of the models of determining membership suggests itself as most appropriate. The correspondences are as follows:

- Nominal Model  →  Objective List
- Relational Model  →  Self-Identification
- Participatory Model  →  Group-Endorsement

5. Concluding Remarks

The discussion so far has revolved around goods and benefits for which it has been relatively straightforward to identify a particular type of interest at stake. The examples considered have been paradigmatic cases, chosen to draw out the observation that how membership is determined must be contingent on the nature of the good to be distributed. If this understanding of membership is to provide practical guidance as well as conceptual clarity, however, it must be able to shed light on hard cases. In this concluding section I identify two forms of complexity that we must attend to, and suggest that while both complicate the theory I have developed, they both also provide further reasons to endorse it.

The first form of complexity lies in the fact that for most group rights claims there is no single paradigm interest that is at stake, but rather a number of overlapping interests. Exploring this issue will assist in responding to the Martinez case.

An example that casts light on the problem of multiple interests is Aboriginal land rights. It is possible to identify at least three separate interests that might be at stake here. First, there is the interest in having access to lands that hold deep personal significance for the individual’s ontological and spiritual beliefs; second, there is the interest in the participatory goods that involve geographically dependent rituals or traditions; and finally, there is the interest in compensation for past injustices. Each of these interests suggests a different method for determining group membership: the first, with its parallels to freedom of conscience, suggests self-identification; the second, with its reference to participatory goods, suggests group-endorsement; and the third, through appeal to rectifying past injustices, suggests an objective list criterion. Who, then,
should the right apply to?

One way to answer this would be to demand that only those who satisfy all three criteria are eligible—or to put things in another way, only those who have all three interests at stake qualify as members. This seems to me to be a second-best option. While it may be necessary for pragmatic reasons to occasionally fall back upon this response, the preferable course of action would go as follows. Focusing on the different interests at stake in a given right encourages us to unravel the right, attending to its different dimensions. This opens up the possibility of disaggregating the right by fulfilling each aspect separately. We could, for example, grant access to the land in question without presupposing that this incorporates access to the traditions that take place upon it. Or we could find a form of compensation that does not presuppose membership in any particular group, thus disrupting the identity of other members. While this solution is messy, it does have the benefit of forcing us to reflect on the precise nature of the goods that the right is intended to track.

This benefit can be drawn out by looking briefly at a group-differentiated right that receives virtually no attention: maternity leave. It may seem a given that who this right is to apply to is self-evident, since the right makes direct reference to the identity of the recipient, namely, the mother. Yet if we pause to consider which interest(s) maternity leave is intended to track, we see that the situation is not as straightforward as it first appears. There are in fact a number of viable contenders: Is maternity leave intended to facilitate recovery from the physical trauma of childbirth? Or allow provision of necessary care to the newborn? Or, alternatively, to provide time and space for bonding between the parent and her baby? Once the interests have been disaggregated in this way, it becomes apparent that to whom the right applies is anything but clear-cut. While the first interest applies solely to women who have given birth, the other two can only be made to apply exclusively to mothers and not fathers with the inclusion of a number of rather dubious premises.

This approach allows us to reconsider the Martinez case. While the account I have developed leans in favor of the group’s right to exclude individuals from membership, where this is understood as a participatory good, it is also possible to construe such exclusions as illegitimate by invoking the other two models. First, we could consider whether there were any nominal harms connected to exclusion. For Martinez, membership in the Pueblo entitled her and her children to welfare benefits. Since this is a nominal interest, the only relevant question is whether she is receiving sufficient resources. If not, she and her children would be entitled to receive welfare benefits. While this leaves open the question of who is responsible for providing these resources—the Pueblo or the United States government—it extracts one of the potential harms of exclusion.
We can also consider whether there are any relational interests at stake. Since the exclusion in the Martinez case was explicitly directed at women, there are grounds for arguing that such a practice violates the individual’s interest in self-respect. When we think of group membership in terms of relational interests, as opposed to the interest in participatory goods, we get a very different conclusion from that given by the courts. On these terms, the exclusion causes a distinct harm, which must be weighed against the harm involved in overriding a group’s authority to determine its own membership.

Precisely how these harms are to be weighed, however, is largely a matter of context. The way in which an exclusion is interpreted and experienced will to a significant degree depend upon the broader social background against which the exclusion plays out. Much here rests on the respective power, importance, and privilege of the groups in question, as well as the extent to which the exclusions they are implementing map onto inequalities in the wider community. It is for these reasons that women-only business networking groups are far less problematic than men-only business networking groups—the ostensible symmetry is belied by the social context within which they operate.

To return to the Martinez case, it is an open question (or at least one that I will not endeavor to answer here) whether the Pueblo are a sufficiently important or privileged group for exclusion to be problematic on relational grounds, or the extent to which the gendered exclusions they were invoking mapped sufficiently onto broader social inequalities. Likewise, I will not attempt to determine whether the relational interest such answers would illuminate would be outweighed by the participatory interest of other group members in maintaining control of group membership. Such analysis would require empirical investigation beyond the scope of this paper. Nonetheless, the framework I have developed goes some way towards suggesting how such investigation might proceed.

With respect to group rights for which there are conflicting interests at stake, we must first attempt to disaggregate the relevant interests, distributing the associated goods in accordance with the appropriate method. If this proves unworkable, for instance if the right in question is indivisible (as is ostensibly the case in Martinez’s group membership case), we must endeavor to weigh the competing interests as best we can.

A second complication that the model brings out (again, I argue, to its credit) is the impossibility of identifying a single set of members for any given social group. This impossibility can be demonstrated by focusing on a group such as Hispanics. Rather than presuming that we can delineate the constitutive members of this group, my model recommends that we consider the various ways in which individuals can be harmed by virtue of their Hispanic identity. Whichever lens we apply (the nominal,
relational, or participatory), the membership will correspondingly shift. If we consider discrimination, for example, we will arrive at one set of individuals who are potentially harmed because others take them to be Hispanic. If we consider whether any cultural practices are stigmatized, on the other hand, we would find a different set (or multiple sets, given the variety of cultural backgrounds subsumed under the category Hispanic) whose interests were affected. Finally, if we consider the interest in the participatory good of language, we would arrive at a different, though overlapping, set of individuals. Who counts as a member of any given group will thus be context-sensitive, without being indeterminate. Considering which interests are at stake provides the mechanism for specifying a determinate set of individuals for each particular right.

The theory of group membership that I have put forward does not fall prey to the concerns laid out by critics of group-differentiated rights. By abandoning the premise that social groups have a given set of members, the theory presented above avoids many of the problems that the critics have taken to be intractable. It does not presume that membership in a group is in any way static or ascriptive, but can accommodate group memberships shifting as individual interests develop and diverge; it does not require individuals to identify with one exclusive social identity; it does not require them to define themselves in opposition to others; it does not require them to be categorized by the state into one fixed social group; and finally, it can comfortably accommodate social groups such as race, by identifying their social effect rather than positing their metaphysical reality. As such, it does not raise problems of divided loyalties, social instability, exclusion, or reification. The framework I have developed thus provides a practicable way of moving from the theory of group-differentiated rights to their implementation, overcoming one of the most significant barriers to their viability.\footnote{Earlier versions of this paper were presented at the University of Melbourne and the University of North Carolina, Chapel Hill, and I am grateful to both audiences for their feedback. Thanks are also due to Tony Coady, David Ripley, and two anonymous referees for this journal for helpful comments.}

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