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The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation: The Lieberman Plan to Exchange Populated Territories in Cisjordan

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The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation: The Lieberman Plan to Exchange Populated Territories in Cisjordan*

Timothy William Waters

Abstract

What limits ought there be on a state's ability to create a homogeneous society, to increase or perpetuate non-diversity, or to create hierarchies within existing diversity? This article examines those questions with reference to the Lieberman Plan—which proposes to transfer populated territories from Israel to the Palestine in exchange for Jewish settlements on the West Bank—as an abstract exercise in demographic transformation by the state. First the article considers if the Lieberman plan would “work”: Would it create the alterations it proposes, and would those changes achieve a stable, peaceful, perhaps even just settlement? It finds that though there is debate about the range of effect, there is little doubt that transfer would alter the state's demography. It then turns to the international standards that might govern the transfer of territory and the denaturalization of citizens, to see how they would characterize such a plan. It finds that comparisons to ethnic cleansing are inapposite, and that norms protecting citizenship are considerably more complex than they first appear—even allowing ethnically targeted denaturalization in some cases.

The article then analyzes the loyalty provisions of the Lieberman Plan, and notes that, contrary to the usual normative assumption that citizenship is tied to the state, the foundations of citizenship are actually a habitual or formative link to a given territory, which in turn creates a right to citizenship not in any particular state, but in the one that incidentally is sovereign over that territory. This interaction of citizenship and territory, when considered together with norms requiring equal protection for all citizens, suggests that the polity has an interest in defining its own territorial scope, and thereby its membership. The legal regime is ambiguous, and therefore deliberations about this question are in the realm of politics. The article demonstrates how transfer's assimilation to existing norms suggests a novel interpretation of selfdetermination with far-reaching consequences for

*Thanks to Dr. Moshe Cohen-Eliya—who suggested I write about the Lieberman Plan—Dr. Gila Stopler and participants of the “Demography and Human Rights Conference”—especially Prof. Seyla Benhabib, Prof. Peter Schuck, and Doubi Schwartz—as well as Prof. Andrew Arato, Yael Ronen, Michael Waters, and Rachel Guglielmo for their comments. Special thanks to Prof. Yuval Shany, whose thoughtful engagement with this paper, both at the conference and in his written response, provided invaluable impetus for me to reconsider and revise my arguments. Comments to tiwaters@indiana.edu.

both sides of the conflict.

Finally, the article notes that international law, though it polices excesses, is largely silent on the principal determinant of demography: the fact of state control over territory.

THE BLESSING OF DEPARTURE:
ACCEPTABLE AND UNACCEPTABLE STATE
SUPPORT FOR DEMOGRAPHIC TRANSFORMATION:
THE LIEBERMAN PLAN TO EXCHANGE POPULATED
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*Timothy William Waters**

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First the article considers if the Lieberman plan would “work”: Would it create the alterations it proposes, and would those changes achieve a stable, peaceful, perhaps even just settlement? It finds that though there is debate about the range of effect, there is little doubt that transfer would alter the state's demography. It then turns to the international standards that might govern the transfer of territory and the denaturalization of citizens, to see how they would characterize such a plan. It finds that comparisons to ethnic cleansing are inapposite, and that norms protecting citizenship are considerably more complex than they first appear—even allowing ethnically targeted denaturalization in some cases.

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Finally, the article notes that international law, though it polices excesses, is largely silent on the principal determinant of demography: the fact of state control over territory.

The government denied that “it sought to displace the [existing] population...and settle another in its stead.” Its goal was modernity and civilization, not ethnic engineering. Yet the two were not incompatible and...those entrusted with the plan...assumed that its impact on the ethnic balance of the city was not a secondary consideration.

Mark Mazower, Salonica¹

INTRODUCTION—THE IDEA OF DEMOGRAPHIC CHANGE

Constructing an incontestable analysis of international law—or almost anything—pertaining to the Israeli-Palestinian conflict is a thankless task.² This is no less true of the Lieberman Plan, the most prominent proposal to swap Arab territories in Israel for Jewish settlements in the West Bank. So let us approach the problem somewhat more obliquely—abstractly, even: Let us consider, not necessarily the Lieberman Plan as such—for it is too wrapped up with origins and outcomes, identities and positions, to be thought of in neutral terms—but its general form, its ideal type. What do we think, not of it, but of such a thing?

¹ MARK MAZOWER, SALONICA, CITY OF GHOSTS: CHRISTIANS, MUSLIMS AND JEWS, 1430-1950 306 (2004).

² Compare the range of views on how to characterize the conflict's military aspects, *available at* <http://www.crimesofwar.org/expert/arab-israel.html> (last visited Dec. 23, 2007).

Thus we consider the Plan as an instance of the more general category of actions states take to alter their demography. There are many things states do, from ethnic cleansing to curricular reform; some, like ethnic cleansing, violate our norms and our laws, while others, like curricular reform, do not. But regardless of the type of action, those who undertake them share the desire, or at least awareness, that what they do changes the balance of groups, collective categories, and identities in the state and its polity.

The common factor all these measures share is the aim (or effect) of entrenching the hegemony of one group—usually by homogenizing a polity's population, but also, in certain cases, by establishing a hierarchy of dominance between parts of the population, or by separating them. And the object of interest is the majority or favored group: expulsion, for example, does not aim to homogenize the expelled population, but rather the community that remains; genocide is really about ensuring the purity and integrity of the perpetrators. And so it is, in a lesser way, with the lesser means by which states alter their demography.

The balance of this article discusses: *first*, the Lieberman Plan itself, asking if it would achieve its goals; *second*, various ways which international law might assess or characterize the Plan, such as its relationship to ethnic cleansing, citizenship norms, or human rights; *third*, the certain logical, normative underpinnings of ideas about citizenship and the polity, and the implications of these for characterizing the Plan either as an exercise of sovereign democracy or as something else entirely different; finally, in light of these arguments, a return to the question of the state's role in defining demography. One note: I advance my argument in both a legal and a moral mode—by which I mean both a descriptive and prescriptive mode. In many cases, I argue what I think the law should be, but sometimes this includes interpretations which I believe are already available, and logically, morally compelling, if one considers both the texts and the rationales of the *lex lata*. And this implies nothing about approving or disapproving of the Lieberman Plan itself, since, as I say, my argument is actually about something else.

A. THE CONTOURS OF THE LIEBERMAN PLAN

We have established what you are, madam.
We are now merely haggling over the price.

*George Bernard Shaw*³

To consider the relationship of an exchange or transfer⁴ to broader categories of demographic change, we first must be clear about what this particular transfer actually proposes and what it would do. The Lieberman Plan—named for its principal proponent, Avigdor Lieberman, head of the Yisrael Beytenu party, which was part of a coalition government from 2006 to 2008⁵ in which Lieberman was a deputy prime minister and minister for strategic affairs—calls for exchange of populated territories between Israel and the Palestinian entity, as a means to achieve a sustainable peace and ensure Israel’s continuation as a Jewish and democratic state. Three Arab-populated areas of Israel adjacent to the West Bank would be transferred to Palestine, while significant Jewish-populated areas of the West Bank would be transferred to Israel; residents of transferred territories would take citizenship in their new state.⁶ All citizens of Israel in its new borders, Jewish and Arab, would have to swear loyalty to the state. As one analysis critical of the proposal describes the aim of the dual transfers, “these ‘two birds’ will, ‘with one stone,’ bring about a

³ Sometimes attributed to Winston Churchill.

⁴ I use “transfer” rather than “exchange” to refer to the cession of sovereignty over a territory or its population or both. Exchange implies multiple parties in a mutual transaction, whereas transfer can encompass mutual or unilateral acts. In addition, the phrase “exchange of populations” has semantic connections to events, such as the Greek-Turkish exchanges, which, I argue below, are inapposite and unhelpful. I do not use transfer in the sense of the forced expulsion or deportation of human beings.

⁵ See Mazal Mualem, *Lieberman Blasts Arab MKs, Pulls Party out of Government*, HAARETZ.COM, Jan. 16, 2008, available at haaretz.com/hasen/spages/945299.html (last visited Feb. 14, 2008).

⁶ The Plan does not preclude unilateral implementation, but for most of this analysis, I assume that it would only be implemented with the agreement of the Palestinian entity, which, at present, opposes the Plan.

situation in which the Jewish state will have a larger Jewish majority, as well as benefiting from a larger piece of land for Jewish settlement in *Eretz Yisrael*.”⁷

The Plan (like Lieberman and his party) has been subject to broad-ranging criticisms—that it is racist, that it constitutes ethnic cleansing, that it is a form of apartheid⁸—but it has not been universally reviled. On the contrary, many prominent Israelis have floated the idea of denationalization or population transfers with or without territory swaps (the “without” version being simply a form of expulsion), and these appear at all points on the otherwise fractious Israeli political

⁷ SHAUL ARIELI & DOUBI SCHWARTZ (WITH HADAS TAGARI), INJUSTICE AND FOLLY: ON THE PROPOSALS TO CEDE ARAB LOCALITIES FROM ISRAEL TO PALESTINE 87 (2006) [hereinafter ARIELI & SCHWARTZ], available at http://www.fips.org.il/Site/p_home/home_en.asp (last visited Nov. 18, 2007). “Eretz Yisrael” seems as problematic a term for the land west of the Jordan River as “Palestine.” For convenience, I refer to “Cisjordan”; no political program is preferred or assumed by this. Palestine refers to a Palestinian entity or state while “Israel” refers to the state of Israel, whether in their present borders or not; neither necessarily refers to all of Cisjordan.

⁸ See, e.g., Greg Myre, *A Hard-Line Israeli Official, Avigdor Lieberman, Stakes Out Extreme Positions*, INT’L HER. TRIB., Dec. 7, 2006, available at <http://www.iht.com/articles/2006/12/07/news/mideast.php> (last visited Jan. 29, 2008) (discussing Lieberman’s “radical plan to divide Jews and Arabs into two homogenous states, a proposal his Arab critics often describe as racist.”); Uri Avnery, *Ehud von Olmert—When a Fascist Joins the Government*, TIKKUN, available at http://www.tikkun.org/rabbi_lerner/News_Item.2006-10-23.5046 (last visited Nov. 18, 2007) (implicitly comparing Lieberman to Hitler); Akiva Eldar, *Let’s Hear It for the Haiders*, HAARETZ, Nov. 12, 2006, available at <http://www.haaretz.com/hasen/spages/780996.html> (last visited Nov. 18, 2007) (comparing Lieberman, unfavorably, to Jörg Haider); Arthur Neslen, *Ring the Alarms*, GUARDIAN, Oct. 25, 2006, available at http://commentisfree.guardian.co.uk/arthur_neslen/2006/10/post_539.html (last visited Nov. 18, 2007) (discussing “[t]he authoritarianism and racism of Lieberman’s party, especially its tub-thumping rhetoric of ‘transfer,’ a euphemism for the ethnic cleansing of Arabs from Israel”); Joseph Lelyveld, *Jimmy Carter and Apartheid*, 54 N.Y. REV. BOOKS Mar. 29, 2007, at 15 n.4, available at <http://www.nybooks.com/articles/19993> (last visited Jan. 25, 2008) (“This aspect of what was called ‘grand apartheid’ [transfer to Bantustans] is echoed in the plan of Avigdor Lieberman....”). You may decide for yourself: Lieberman posts blogs at blogcentral.jpost.com.

spectrum;⁹ polls suggest broad, if inchoate, support for some form of the idea.¹⁰ Indeed, one other thing we must observe about the Plan, whatever we may think of it or its author: it is entirely consonant with the recent shift in thinking towards a two-state solution, and consistent, too, with the often anguished debate about how, if at all, it is possible to keep Israel both democratic and Jewish.

B. WOULD TRANSFER “WORK”?

[T]he Jews, once settled in their own State, would probably have no more enemies.

*Theodor Herzl*¹¹

Quite apart from the legal or moral aspects we will consider, would the Lieberman Plan work? “Work” in this sense consists of

⁹ See, e.g., Neslen, *supra* note 8, at 3: (“The most worrying thing about Lieberman is not that his ideas exist on a plane outside Israel’s political continuum but that, in many ways, they are close to its dead centre.” Noting that proposals to transfer the Triangle had been made in 2000 at the Herzliya conference and in 2004 by Prime Minister Sharon, and quoting Prime Minister Olmert in June 2006 saying “Europeans knew from historical memory that ‘territories were exchanged, that populations even moved sometimes, that territorial adjustments were made in order to create better circumstances for a peaceful solution’”). See also Scott Wilson, *Israel Revisited*, WASHINGTON POST, Mar. 11, 2007, at D1 (discussing “new historian” Benny Morris’ support for a decisive demographic resolution to the Israeli-Palestinian conflict); Akiva Eldar, Barak Ravid, & Avi Issacharoff, *Peres’ Aides Confirm Plan for PA State on Land Equal to 100% of West Bank*, HAARETZ, Aug. 9, 2007, available at <http://www.haaretz.com/hasen/spages/890566.html> (last visited Nov. 18, 2007) (reporting that “Olmert has not yet decided on his position regarding all the [Lieberman] plan’s clauses, but apparently has not dismissed its main ideas.”).

¹⁰ See ARIELI & SCHWARTZ, *supra* note 7. Support among Israeli Jews, that is; Israeli Arabs are generally strongly opposed to the Plan. See, e.g., Ali Haider, *Arabs Here to Stay: ‘Population Exchange’ Notion Leaves Arab-Israelis No Choice but to Seek World’s Help*, YNETNEWS.COM, Aug. 24, 2007, available at <http://www.ynetnews.com/articles/0,7340,L-3441007,00.html> (last visited Nov. 18, 2007).

¹¹ THEODOR HERZL, *THE JEWISH STATE* (1896), available at <http://www.jewishvirtuallibrary.org/jsource/Zionism/herzl2f.html> (last visited Nov. 18, 2007).

two parts: 1) would it create the demographic alterations it proposes? and 2) would those changes (or whatever effects it in fact had) in turn achieve a sustainable, peaceful, even just settlement and preserve a Jewish democracy?

Some analysis will not reach these questions—or only reaches them as an afterthought—because it finds the Plan offensive as well as illegal. But let us be pragmatic, rational, cool-headed if not cold-blooded: we should consider the Plan—imagine its workings and implications—before we condemn (or approve) it.

1. WOULD TRANSFER ACHIEVE ITS STATED DEMOGRAPHIC GOALS?

Lieberman proposes to ensure that Israel has at least an 80 percent Jewish majority.¹² He claims that the transfer of areas along the 1967 Green Line—in particular Wadi Ara and the Triangle—to Palestine would reduce the Arab population of Israel by up to ninety percent, while transferring very few Jews to Palestine.¹³ In exchange, Israel would annex most Jewish settlements on the West Bank; since the West Bank's Jews and Arabs live in a complex but highly segregated pattern, annexation could bring territories with an almost exclusively Jewish population of several hundred thousand into Israel.¹⁴

¹² Ronny Sofer, *Lieberman Demands Population Exchange*, YNETNEWS.COM, Oct. 28, 2007, available at <http://www.ynetnews.com/articles/0,7340,L-3464689,00.html> (last visited Nov. 18, 2007).

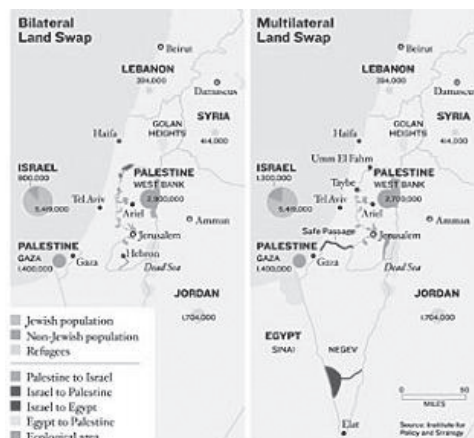
¹³ See Avigdor Lieberman, *Israel May Have to Act Alone*, SPIEGEL ONLINE INTERNATIONAL, Feb. 12, 2007, available at <http://www.spiegel.de/international/spiegel/0,1518,465769,00.html> (last visited Nov. 18, 2007) (interview with Lieberman).

¹⁴ Israel has already annexed areas around Jerusalem, and Jewish residents both there and in the settlements are already Israeli citizens, but majority opinion views Israel's actions, and their presence, as illegal under international law. See, e.g., S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979), at 1 (determining “that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity”). The Lieberman Plan would normalize the status of this territory and the Israeli citizens on it.

Naturally, these claims are contested. Lieberman has not supplied detailed maps of his proposal. The Florsheimer Institute for Policy Studies (FIPS) analysis, which does include a map,¹⁵ estimates the affected population to be at most 228,000, or 16.3 percent of Israel’s Arab citizens—a number it terms “*prima facie*, a significant drop in the relative number of Arab citizens”¹⁶—but argues that (because of likely negotiating outcomes) the actual affected population would be as little as 11.8 percent of Arab citizens, or only 2.3 percent of Israel’s population.¹⁷ The FIPS analysis does not consider the effects of more

¹⁵ Here are two maps indicating possible transfer areas:

<p>A. ARIELI & SCHWARTZ, <i>supra</i> note 7, at 83: Map 2 Territory Populated by Arabs Proposed to be Ceded from Israel to Palestine</p>	<p>B. Uzi Arad, <i>Trading Land for Peace: Swap Meet</i>, THE NEW REPUBLIC, NOV. 18, 2005 (also describing a multilateral transfer involving Egypt).</p>
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¹⁶ ARIELI & SCHWARTZ, *supra* note 7, at 82.

¹⁷ *Id.* at 82, 86.

expansive transfers in the North District¹⁸ or the Negev, nor Arab areas annexed to Jerusalem.¹⁹ Still, even if a modified Plan included these areas, it is difficult to see how any variant could reduce the Arab population of Israel by ninety percent—Lieberman’s figure—without also transferring significant Jewish settlements, although an eighty percent Jewish majority—not very far from the present figure—is presumably more achievable.

We should be clear about one thing: Neither the Plan nor any other transfer plan proposes a complete separation. No one could discover a line that would put all Jews in Israel and all Arabs in Palestine; even the most artfully drawn border would leave some members of the “wrong” group behind. The Plan does not contemplate transfer for Arab suburbs of Israeli cities, so these communities would be left behind—left, that is, in Israel. Nor does the Plan put every West Bank Jewish settlement in Israel.²⁰ Thus some populations would face the

¹⁸ Most Israeli Arabs live in the North District, where they also constitute a slight majority. CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL 2006, Sec. 2.7, available at http://www1.cbs.gov.il/shnaton57/st02_07x.pdf. (last visited Nov. 18, 2007). Central Galilee has a strong Arab majority. See Gil Sedan, *30 Settlements Planned for Negev and Galilee*, THE JEWISH NEWS WEEKLY OF NORTHERN CALIFORNIA, Aug. 8, 2003, available at http://www.jewishsf.com/content/2-0-/module/displaystory/story_id/20778/edition_id/426/format/html/displaystory.html (last visited Nov. 18, 2007) (giving the figure as 78 percent and referring to Galilee as “a region awash with Arabs”).

¹⁹ See *The Moslem Population in Israel on the Occasion of the ‘Festival of the Sacrifice,’* Feb. 1, 2004, available at http://www.cbs.gov.il/hodaot2004/01_04_27e.pdf (last visited Nov. 18, 2007) (giving statistics on the distribution of Muslims in Israel). See also AP, *Israel Signals Possible Shift on Split Jerusalem*, USA TODAY, Oct. 9, 2007, at 8A. (Noting Israel officials’ suggestion to transfer parts of eastern Jerusalem to Palestine, and Lieberman’s conditional support).

²⁰ Lieberman has declared his willingness to evacuate his own home in the Nokdim settlement as part of a transfer agreement. See Myre, *supra* note 8. Nokdim was recently connected to the East Jerusalem suburb of Har Homa by a new road, popularly styled the “Lieberman Road.” See *Settlements in Focus*, The Jerusalem

choice between being left behind—in a state dominated by the other group—or moving.²¹

But that is not a particularly interesting objection: it is a typical example of the maxim that “the perfect is the enemy of the good,” or here, of the possible. Claims regarding the impossibility of drawing a line that separates all Arabs and Jews simply distract from the possibility of separating sizable populations. Even its critics acknowledge that the Plan would render both states ethnically more homogeneous. The demarcation of a new frontier could assign considerable, homogenous populations to Palestine or Israel respectively without the need for significant—or in theory any—population movements; these are precisely the kinds of areas which the Lieberman Plan contemplates transferring.²²

Times, Nov. 15, 2003, *available at* <http://www.jerusalem-times.net/article/news/details/detail.asp?id=4213&edition=597> (last visited Jan. 29, 2008); Jonathan Cook, *The Dismantling Game*, AL-AHRAM, July 2, 2003, *available at* <http://www.countercurrents.org/pa-cook020703.htm> (last visited Jan. 29, 2008).

²¹ Not *expelled* of course. There are groups that have called for expulsion of all Arabs across the Jordan—including parties that have been represented in the Knesset (such as Kach, while other parties, such as Moledet have encouraged voluntary transfer or denationalization of resident Arabs—see *The Israeli Initiative*, *available at* <http://www.hayozma.org/PrinciplesSub3.aspx?lng=Eng> (last visited January 30, 2008))—but that is different from the kind of territorial transfer we consider. Still, the incentives to move could amount to coercion, and it is entirely plausible that “informal violence” might encourage the departure of Arabs and Jews living outside the transfer zones.

²² The Plan does not call for any populations to move. Still, a common objection to territorial revision is that populations are too inextricably inter-settled to separate, and that when new borders are drawn, individuals on the “wrong” side of the line will be subjected to violence and will must ultimately flee. But we know this is not the case for the West Bank, because of the barrier Israel is constructing, which shows it is possible to separate the great majority of Jewish settlers from the great majority of local Arabs. Cf. Alistair Lyon, *Near Neighbors Worlds Apart in West Bank*, REUTERS, Mar. 26, 2007, *available at* http://www.reuters.com/article/inDepthNews/idUSL2149717920070326?src=032607_0755 (last visited Nov. 18, 2007). The resulting line may be critiqued on other grounds, but its partly completed route already describes a nearly total separation and a functional frontier. Settlement patterns in Israel are much

One may also question the demographic prediction that underlies much support for transfer, which is the idea of an inevitable Palestinian majority, not only in Cisjordan, but in present-day Israel. The FIPS analysis concludes that, while there might soon be a Palestinian majority in Cisjordan, “political separation from the Palestinians in the West Bank, including East Jerusalem, will ensure a solid Jewish majority in the State of Israel even in another fifty years[,]”²³ while another recent study anticipates a Jewish majority in all of Cisjordan except the Gaza Strip even without separation for at least two decades.²⁴

Still, I do not think we need to decide between these claims. Perhaps there is not a demographic shift underway, but many Israelis believe there is, and their proposed response is transfer.²⁵ As for effect, the issue is clear enough: transfer would increase the absolute number and relative proportion of Jews in Israel and Arabs in Palestine, respectively, perhaps by a little, perhaps by a lot. And simply imagine that Lieberman’s claims were accurate, or that some other scenario

more mixed, but substantial numbers of Arabs live in areas as segregated as the West Bank, areas presumably as amenable to a similar line-drawing exercise.

²³ ARIELI & SCHWARTZ, *supra* note 7, at 81.

²⁴ See Bennett Zimmerman, Roberta Seid, & Michael L. Wise, *Population Forecast for Israel and West Bank 2025*, 6th Herzliya Conference, Jan. 23, 2006, available at <http://www.pademographics.com> (last visited Nov. 18, 2007) (identifying a significant overcount of Arabs, and predicting Jewish majorities in Israel-plus-West Bank beyond 2025). This estimate does not include Palestinian refugees. If they and their descendants—roughly 4.3 million people registered with the UN—were counted as part of the relevant population—Palestinians would already constitute a majority in Cisjordan. The existence of the refugees may account, in part, for recurrent predictions that Jews will become a minority.

²⁵ See, e.g., Yair Sheleg, *The Demographics Point to a Binational State*, HAARETZ.COM, May 27, 2004, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=432222> (last visited Nov. 18, 2007) (discussing demographic studies and transfer proposals by Sergio DellaPergola of The Hebrew University). Concern with demography is not new: the 1976 Koenig Report discussed “thinning out” the Arab population of northern Israel; *Pogrom at Home?* TIME, Oct. 11, 1976, available at <http://www.time.com/time/magazine/article/0,9171,946659,00.html> (last visited Nov. 18, 2007).

(one that sacrificed more Jewish settlements to include more Arab ones) would achieve significantly higher numbers.²⁶ Accepting FIPS' argument that the demographic impact would be minimal simply begs the question: would one's conclusions about the Plan's legality or morality be any different if the impact were greater?²⁷

Leave aside, for the moment, whether the Plan is good or not in a moral sense—here we deal with its effectiveness. And there seems no question that—while one cannot achieve a total separation—one can alter the percentages quite readily. And that is all the Plan purports to do—indeed, all it needs to do to achieve its own goals. The Plan as a particular proposal may capture too much or too little—Lieberman is a Jewish chauvinist, and his proposal implicitly relies on Israel's greater bargaining strength—but that in general it is *possible* to do such things, given the right demographic matrix and political will, is I think uncontestable.

There are many pragmatic objections to the Plan's feasibility, but many of them are the incidents of politics, and politics may change. Better to consider the Plan's underlying characteristics and their relationship to the legal and moral landscape, to see how *an idea like this* might be understood. Objections about feasibility are really not based on a belief that transfer is impossible, but a conviction that it is undesirable. That is a moral judgment which elides the question: "Could you do it?" And I think, with the caveats noted, clearly it could be done. Indeed, any Israeli Jew who has ever said, "There

²⁶ FIPS analysis' assumes Israel would not cede major Jewish settlements. That may be a good prediction—see, e.g., Alex Stein, *Power Without Vision*, THE GUARDIAN, Oct. 24, 2006, available at http://commentisfree.guardian.co.uk/alex_stein/2006/10/alex_stein.html (last visited Nov. 18, 2007) ("there is absolutely no chance of [Lieberman's plan] being implemented, and in his heart of hearts he must know that."), but it conflates the preferential and the possible; the question is, if Israel did commit to such a transfer, what effect might it have? If Israel adopted a logic similar to disengagement from Gaza, then more Arab settlements could be transferred.

²⁷ Since their report is called "Injustice and Folly," one assumes their conclusions would not.

ought to be a Palestinian state,” but has *also* said, “We will never give up the Jerusalem suburbs,” must think it can be done.

2. WOULD TRANSFER CONTRIBUTE TO RESOLUTION OF THE ISRAELI-PALESTINIAN CONFLICT?

The answer to this seems far less certain than to the first question. Even if transfer achieved a significant level of separation, it might not actually create a more stable framework conducive to final settlement and preservation of a Jewish democracy.²⁸ The unilateral aspects of the Plan (though not essential) share the same defect as other unilateral proposals: they fail to draw Palestinians into a reciprocal relationship that addresses grievances. And transfer might be so painful that it would enflame sectarian tensions: The spectacle of thousands of Israeli Arabs—who uniformly oppose the Plan (if for complicated reasons²⁹)—leaving the transfer zones, or of Jewish settlers rejecting Palestinian authority, might be too much for others to bear. At a minimum, the Plan could increase tensions (as well as serious dialogue) between Jews and Arabs. And perhaps this is what Lieberman secretly desires.

²⁸ Lieberman demands that a final settlement preserve Israel’s “Jewish, Zionist and democratic nature” and that it bring a definitive end to the conflict. Yisrael Beytenu, *The Strategic Threats—The Red Lines— Principles for the Permanent Agreement— Introduction*, available at <http://www.beytenu.org/121/1252/article.html> (last visited Jan. 25, 2008). For some, a Jewish state is clearly seen as more central a goal than peace. Cf. Ruthie Blum, *One on One: It’s the Demography Stupid!*, JERUSALEM POST, May 20, 2004 (interview with Arnon Soffer, saying “‘Unilateral separation doesn’t guarantee ‘peace’—it guarantees a Zionist-Jewish state with an overwhelming majority of Jews.... ’”).

²⁹ See, e.g., Uri Orbach, *The Right to Annoy*, YNETNEWS.COM, Aug. 11, 2007, available at <http://www.ynetnews.com/articles/0,7340,L-3436008,00.html> (last visited Nov. 18, 2007); Nazir Majali, *Arabs in Distress*, HAARETZ, Aug. 17, 2007, available at <http://www.haaretz.com/hasen/spages/894494.html> (last visited Nov. 18, 2007) (discussing Israeli Arab identity and affinity with Palestinian Arabs).

But these objections, though serious, are also peripheral. They might happen—perhaps their probability is enough to raise doubts about the Plan—but they are not the Plan itself, only side-effects and not even necessary ones. Such objections have more to do with the desirability of transfer than its efficacy: They are objections to the idea of separation, considering it a catastrophe in its own right—but precisely because of the strength of this conviction, it is hard to know how reliable concerns about the effects of separation are.

What is of note, I think, is that the Plan aims precisely at this kind of separation – one that creates a solid, secure majority of each group with a minimum of untrustworthy, unwanted, destabilizing, disruptive, or simply different members of the other community within each of two sovereign states. If one objects to just such a separation, well, there is little more to be said; but if one does not, if one is agnostic, even enthusiastic—as anyone who favors a two-state solution in Cisjordan logically is, to some extent—it must be acknowledged that transfer would increase separation, and separation might in turn achieve other things.

Nor is it necessary to predict the Plan’s contribution in order to assess it. A reasonable prospect of success is sometimes relevant in international law (as in measuring proportionality in the laws of war), and often in morality (as in theories of just war or humanitarian intervention), but it is not always necessary. Many things states do are unwise or ultimately fail, and that risk does not make the undertaking illegal or wrong. It seems reasonable to suppose that the Plan could achieve its stated demographic goals and in turn its political goals. Of course, it might not—and it might have other, unintended or unforeseen consequences—but no action should be judged solely on such grounds.

If the aim of the Plan, the means to achieve it (which are in effect the Plan itself), and its incidental effects are not illegal, then its prospects for success do little to change the analysis; after all, what else has “worked”? And, again, it is entirely plausible that the Plan could contribute to peace, if peace could be achieved through a greater

separation of Jews and Palestinians. That is, after all, the assumption underlying all two-state solutions, including ones advocated by people who despise Lieberman and his Plan.

So we should consider whether a plan such as this is not only possible, but legal.

I. LOCATING THE IDEA OF TRANSFER IN INTERNATIONAL STANDARDS

Many things that are possible or effective are nonetheless illegal. What does existing international law say about a transfer with the qualities of the Lieberman Plan?³⁰ Are there clear views, and are there aspects whose status is contested and unpredictable?

We may identify two broad categories of effect in the Plan, two candidates for international censure or approval: transfer between sovereigns of territory with its population, and changes to that population's citizenship status. How one characterizes the Plan—its methods, effects, and intentions—greatly affects one's estimate of its legality, but I think the very possibility of characterizing the Plan in different ways may suggest why it is harder to condemn legally than morally, and why a moral judgment is also complicated. Considered together, these two categories—norms of territory and of citizenship, which the Plan may or may not violate—and their characterizations may indicate another, deeper current.

A. TRANSFERS OF POPULATED TERRITORY

The Jews were not an accidental target for they were, at any rate in their traditional pattern of settlement, an integral part of the fabric of the Ottoman city; one

³⁰ Elements of the Plan probably contravene current Israeli law. See ARIELI & SCHWARTZ, *supra* note 7. I am certainly not competent to discuss that, but I do not think it necessary to this analysis, which focuses on general and international norms. I rely on Arieli and Schwartz's analysis where reference to Israeli law is of interest.

could not Westernize Salonica without uprooting the Jews.

– Mark Mazower, *Salonica*³¹

1. CHARACTERIZING TRANSFER

The transfer of territory between sovereigns is not *per se* objectionable in international law, and unpopulated territory in particular presents no problems.³² But the essence of the Plan is to transfer *populated* territories, and to do so precisely because of their ethnic makeup.³³ Some critics consider the Plan to be a form of ethnic cleansing or apartheid.³⁴ But is this right—or rather, what must we say about ethnic cleansing or apartheid to assimilate the Plan to them?

The component acts of ethnic cleansing are international crimes, and ethnic cleansing itself may soon be identified as a customary or conventional crime.³⁵ But this does not tell us much about the Plan or

³¹ MAZOWER, *supra* note 1, at 306.

³² Israeli law allows cession of unpopulated territory. ARIELI & SCHWARTZ, *supra* note 7, at 91 (arguing further that the seizure of land and evacuation of its population *within* Israel could be justified on national security grounds or by expropriation—with the subsequent transfer of the now empty land. This assumes affected individuals would remain citizens and move elsewhere within the state—which is precisely what the Plan seeks to circumvent).

³³ This discussion focuses on transfer of Israel’s Arab-inhabited territories. The Plan also proposes to annex Jewish-settled areas of the West Bank. These two transactions are constructed as mutually compensatory. The legality of proposals for the Jewish settlements seems linked to broader debates about the legality of Israel’s occupation; this debate is well rehearsed and utterly paralyzed. The problem of the Jewish settlements is less probative of the questions raised by territorial transfer, so I focus on the Israeli side until the final section.

³⁴ See, e.g., Michael Lerner, *Thank You, Jimmy Carter*, TOMPAINE.COM, Dec. 6, 2006, available at <http://www.geneva-accord.org/Articles.aspx?docID=1533&FolderID=43&lang=en> (last visited Jan. 25, 2008) (referring to the “pro-ethnic cleansing Israeli Cabinet member Avigdor Lieberman”); Neslen, *supra* note 8 and Lelyveld, *supra* note 8.

³⁵ Drazen Petrovic, *Ethnic Cleansing—An Attempt at a Methodology*, 5 EUR. J. INT’L L. 342 (1994), available at <http://www.ejil.org/journal/Vol15/No3/art3>.

the broader question of states' ability to effect demographic change in their territory, for to claim that the Plan is a kind of ethnic cleansing requires one to expand the definition of ethnic cleansing in very curious ways.

To the degree that “population transfer” means the *movement of people*, the Plan is not that. The transfer envisioned by the Plan is of sovereignty over territory and over the people on that territory. It should be clear that the Plan, taken at face value, is not of the same genus (at least not the same species) as the camps, demonstration killings, and house-to-house terror of the Yugoslav wars (which gave the world the phrase *etničko čišćenje*), the Greek-Turkish exchanges, or the postwar *Vertreibung* of the Germans. Those exchanges accomplished transfer of sovereignty over populations or territory (or both) *along with* the expulsion of the resident population;³⁶ the Plan, by contrast, leaves populations *in situ*. So it is a mistake to condemn the Plan as being of *that* kind: there simply is no previous, recognized instance of ethnic cleansing accomplished by the means the Plan proposes— giving up sovereignty.

Nor is apartheid a useful comparison. The criticism that the Lieberman Plan amounts to apartheid—despite *removing* Israeli control from Arab-populated areas—only makes sense if one equates apartheid with its late, declining Bantustan phase, which created semi-sovereign states to which sovereignty over Blacks was transferred, in effect outsourcing South Africa's equality problem. One of the objections to the Bantustan program—apart from its bad-faith implementation—was that even if those quasi-states had been truly independent, Blacks were herded into them, cut off from resources

html#TopOfPage (last visited Nov. 18, 2007); Roger Cohen, *Ethnic Cleansing*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 136 (Roy Gutman & David Rieff eds., 1999).

³⁶ The Greek-Turkish exchanges arguably did not involve territory at all: The Macedonian territories cleansed of Turks were already sovereign Greek territory, while the Anatolian territories cleansed of Greeks (really Orthodox Christians) were (if one ignores the Treaty of Sèvres) Ottoman and then Turkish.

and birthplaces in a kind of ghetto, (or forced to take citizenship in a Bantustan while remaining in South Africa). But the Lieberman Plan moves no one; it leaves people where they are and moves the borders around them.³⁷

High apartheid was about the social and spatial stratification of races within a single polity, and ethnic cleansing about forcible homogenization of the polity, and each is surely objectionable, but is territorial separation—transfer—always equally so? Many territorial separations have occurred in the modern era, and not all have been bad.³⁸ Historically, many legitimate separations—including

³⁷ Objecting to the Plan as a form of apartheid is, to say the least, a dangerous argument for Israeli Jews who are concerned about a demographic shift, since it is difficult to see why it would not also apply to the West Bank. Cf. JIMMY CARTER, *PALESTINE: PEACE NOT APARTHEID* (2006) (arguing that Israeli policy in the West Bank—let alone any territorial transfer—could become a form of apartheid). See also Lerner, *supra* note 34:

Carter does not claim that Israel is an apartheid state. What he does claim is that the West Bank will be a de facto apartheid situation if the current dynamics...continue. The only way to avoid Israel turning into an apartheid state is a genuine peace accord.

Carter points out that he is “not referring to racism as a basis for Israeli policy in the West Bank, but rather the desire of a minority of Israelis to occupy, confiscate and colonize Palestinian land.” To enforce that occupation...Israel has built in the West Bank separate roads for Jewish settlers and Palestinians, built separate school systems, has totally different allocations...for each population, wildly privileging the Jewish settlers and discriminating against the Palestinians....

Is it really true that this kind of moral objection operates only within existing international frontiers or cease-fire lines? (Not, of course, that agreed frontiers even exist in Cisjordan.) Any two-state solution is liable to the Bantustan objection, and the question is only where to put the line, and why.

³⁸ It is difficult to imagine that the separation of the Czech Republic and Slovakia, or Norway and Sweden, for example, should be characterized as being motivated solely by illegitimate animus, or that the mere *maintenance* of separation (between the Netherlands and Germany, say, or the United States and Canada) is illegitimate.

decolonization—have had a clear ethnic, religious, linguistic or other group-based rationale; probably almost all do, except the occasional island for which salt water provides reason enough. Unless we can ground a general objection in some sort of animus theory—claiming that no action arising out of discriminatory intent is ever legitimate—we must admit that this objection is simply its own irrational animus against separation. (Even then, we would have to satisfy ourselves that separation is *always* driven by discrimination, as opposed to a “good fences make good neighbors” rationale.)

Apartheid and ethnic cleansing are clearly illegal, but the Plan is not easily assimilable to either.³⁹ Calling the Plan, or any transfer, “ethnic cleansing” seems inflammatory and—more problematic—unhelpful to thinking about what transfer actually does.⁴⁰ Likewise, precisely because Israel’s continued occupation of the West Bank and even its treatment of its own Arab citizens are frequently compared to apartheid, the *withdrawal* of Israeli rule from Arab-populated territory—the very thing Palestinians desire in general—hardly seems like it could be the

³⁹ Customary international law may allow exceptions to the ethnic cleansing prohibition—allow, that is, certain ethnically keyed population transfers which are not counted as ethnic cleansing. See Timothy William Waters, *Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing*, 47 VA. J. INT’L L. 63 (2006) (identifying state practice allowing punitive ethnic expulsions under narrow conditions analogous to the postwar European context). The German transfers included mass deportations and denationalizations; because these particular transfers remain legitimate in international law, they might indicate a zone of permissiveness. I do not think this line takes one very far; however, the level of state practice approving the Germans expulsions is not matched for any position in the Israel-Palestine case. But if one wished to engage in population transfers, legally, then the German case is highly instructive. Cf. Jacques Rupnik, *The Other Central Europe*, 11 E. EUR. CONST. REV. 68 (2002) (reporting Czech Prime Minister Zeman’s suggestion that Israel “break the deadlock with the Palestinians by adopting the method that was so ‘successful’ for the Czechs in 1945: expulsion.”).

⁴⁰ Cf. Alex Stein, *Power without Vision*, THE GUARDIAN, Oct. 24, 2006 available at http://commentisfree.guardian.co.uk/alex_stein/2006/10/alex_stein.html (last visited Nov. 18, 2007) (“[Lieberman’s] plan is obviously illegal, immoral and anti-democratic, although perhaps not worthy of the ‘ethnic cleansing’ tag.”).

same thing.⁴¹ The Plan may be wrong, but surely not because it involves the movement of borders rather than people. It would be a radical (and radically unhelpful) inflation of ethnic cleansing's or apartheid's definition to extend either to projects that are prepared to sacrifice the territory beneath the feet of the "target population"—projects that are prepared to withdraw, rather than drive out.

2. WHOSE APPROVAL IS REQUIRED TO TRANSFER TERRITORY?

There is no absolute bar on the transfer of territory, but what obligation, if any, does a state have to consult its citizens concerning transfer? Does it have a special obligation towards the directly affected population? (The question is a narrow one: We ask only about the population's interest in territory; we turn in the next section to the question of citizenship.) If so, Israel's Arabs—who strongly oppose transfer—could veto the Plan.

There are certainly indications that an affected population ought to have some say in the disposition of its territory. The idea, which we first see in the French revolutionary context, that a state's territory cannot be alienated without the express consent of the whole people *and* the affected populace indicates a priority of the local over the general, as well as some deference to the affinities of person to place.⁴² However, although there is precedent for the practice of consulting

⁴¹ Cf. Lelyveld, *supra* note 8, at 14ff (discussing accusations of apartheid against Israel by Arabs, Israeli Jews, and others).

⁴² The French Constitution—the *locus classicus* of a sovereign parliament and the General Will, retains this particularizing element. See Constitution of France, art. 53, available at <http://www.assemblee-nationale.fr/english/8ab.asp#TITLE%20VI> (last visited Nov. 18, 2007) ("Peace treaties...those [treaties] relating to the status of persons, and those that involve the cession, exchange or addition of territory, may be ratified or approved only by virtue of an Act of Parliament...No cession, exchange or addition of territory shall be valid without the consent of the population concerned.").

an affected population, there is no actual obligation,⁴³ as even strong proponents of the view concede: “it is unclear whether, according to international law, a decision on transferring sovereignty is *conditional upon* a referendum among the population in the area slated for sovereignty transfer...”⁴⁴ Though the desire for “more law” is evident, the phrasing shows there is no prohibition—saying the law is “unclear” surely means that it *is* clear, just in the wrong direction; this is a classic case of ‘best practice’ masking mere preference.

Does the affected population have a right of veto over transfer of territory it inhabits? The answer is clearly no: A sovereign has the right to transfer territory even against the population’s wishes, provided doing so does not violate some other right (a question to which we shall turn shortly). But what if the sovereign wants to do more? What if—precisely as the Lieberman Plan contemplates and desires—the purpose is to transfer the people too?

⁴³ The United Kingdom has indicated it will not cede the Falklands to Argentina unless the islands’ population wishes. Of course, the Falklands are an administratively separate unit, not integral territory of the U.K., and one can read this deference as an act of grace or comity. The United Kingdom does not necessarily feel it is *legally obliged* to consult them. There are numerous instances of territorial transfer without consent: the entire WWI dispensation (apart from the plebiscites), the post-WWII border changes Czechoslovakia, some parts of the USSR. In addition, in many cases consensual changes to borders were majoritarian, and thus significant numbers of individuals were transferred against their will (as in Bosnia, where the Serb minority boycotted the independence vote). In many colonial cases, there was no consultation. Of course, states are not in the habit of ceding territory; more common, by far, is the desire of a population to secede *against* the metropole’s wishes—and on this score states’ supposed obligation to consult the affected population is even less clear.

⁴⁴ ARIELI & SCHWARTZ, *supra* note 7, at 75 (emphasis in original). *See also infra* note 55.

B. TRANSFER OF CITIZENSHIP

Wäre es da
Nicht doch einfacher, die Regierung
Löste das Volk auf und
Wähle ein anderes?

*Bertolt Brecht*⁴⁵

The other principal effect of transfer concerns citizenship. For while the land may be transferable, the Lieberman Plan also strips Israelis in those areas—at least Israeli Arabs—of their citizenship. Is this a problem?

Whatever we may say about territory, the transfer of sovereign authority over the *population* of that territory presents a more complex case.⁴⁶ The Arabs of Israel have been citizens since 1952;⁴⁷ not surprisingly the principal doctrinal objection to the Plan—and all such proposals—grounds itself in claims about the equal rights of citizens. So, is denationalization a question of equal protection? Is there a human right not to be deprived of one's citizenship?

This is not a question of statelessness. There are clear incentives in the international system to avoid and reduce statelessness,⁴⁸ but

⁴⁵ BERTOLT BRECHT, *DIE LÖSUNG* (1953, published 1957) (“Would it not be easier/In that case for the government/To dissolve the people/And elect another?,” translation, available at http://findarticles.com/p/articles/mi_m0JQP/is_302/ai_30324595 (last visited Nov. 18, 2007)).

⁴⁶ Territorial transfers need not imply denationalization: It would be possible to allow the population to move elsewhere in the state and retain citizenship. This might seem like a humane compromise, it might be nice to give people an option, but it is clear Lieberman does not want to be nice: He wants to reduce the number of Arabs in Israel. An option would defeat the clear purpose of the Plan, so the question is: Is an option required?

⁴⁷ Israel's citizenship law defines the relevant population in a way that excludes those Arabs who fled the territory of present-day Israel during the 1948 war. Arabs in areas of the West Bank annexed to Israel have the option to take citizenship under certain conditions; most have not done so.

⁴⁸ See Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175, *see esp.* art. 8 (Israel signed in 1961, not ratified); Convention relating to the

the Plan does not render any individuals stateless; it transfers Israeli citizens to the sovereignty of a Palestinian state.⁴⁹ So the real issue is whether or not a state can transfer responsibility for large segments of its own population to another sovereign, and if so what if any limitations or qualifications apply.

1. CHANGE OR REVOCATION OF CITIZENSHIP

States do not have absolute discretion over citizenship, and their discretion over withdrawal of citizenship is even more circumscribed.⁵⁰ they cannot withdraw it for arbitrary or discriminatory reasons.⁵¹ Yet

Status of Stateless Persons, Sep. 28, 1954, 360 U.N.T.S. 117 (Israel *ratified* Dec. 23, 1958); International Convention on Civil and Political Rights, art. 24 (3), Dec 16, 1966 [hereinafter ICCPR], (“Every child has the right to acquire a nationality.”) (Israel *signed* Dec 19, 1966, *ratified* Oct 3, 1991); Venice Commission, Declaration on the Consequences of State Succession for the Nationality of Natural Persons, art. 12, Sep. 12-14, 1996 (CDL-NAT(1996)007e-rev-restr) (adopted at the 28th Plenary Meeting, Venice), *available at* [http://www.venice.coe.int/docs/1996/CDL-NAT\(1996\)007rev-e.asp](http://www.venice.coe.int/docs/1996/CDL-NAT(1996)007rev-e.asp) (last visited Nov. 18, 2007) [hereinafter Venice Commission] (“The predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State.”).

⁴⁹ Again, I am assuming that the Palestinian entity cooperates. If applied unilaterally—that is, if Israel denationalized citizens whom Palestine refused to accept—the Plan would probably violate norms on statelessness, although we will return to this question in the context of self-determination.

⁵⁰ See James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT’L AFF. 321, 333 (2006) (“While states retain broad control over access to citizenship, the legal power to withdraw citizenship once granted is more limited[.]” and citing *Haile v. Gonzales*, 418 F.3d 798 (2005) at 4, that there is a “fundamental distinction between denying someone citizenship and divesting someone of citizenship.”). Normative theories of citizenship often rely upon a distinction between a state’s rights to regulate exit and to regulate entry.

⁵¹ Universal Declaration of Human Rights, art. 15, G.A. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) (1) (“Everyone has the right to a nationality.”) (2) “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”). See, e.g., LUNG CHU CHEN, AN INTRODUCTION TO

citizenship is not an absolute right: the relevant conventions allow states to denationalize citizens under defined circumstances. The “arbitrariness” element is relatively thin, requiring only that “[i]n order to not be arbitrary, deprivation of citizenship must be prescribed by law, nondiscriminatory, and accompanied by procedural due process, including review or appeal.”⁵² And the very terms of the Statelessness Convention indicate that large-scale transfers of populations between states can in fact occur.⁵³

The most significant category of denationalizations appears in the creation or reorganization of states. When states divide, dissolve, or alter their borders, they also divide their citizenry. This has happened with all the post-Cold War successions, and although each case adopted a different formula, all assigned citizenship based on individuals’ primary ties, especially through descent or geography. In most of those cases, pre-existing internal boundaries determined the assignment of citizenship; however, where entirely novel frontiers have been drawn—as after the First World War, or in the Indian

CONTEMPORARY INTERNATIONAL LAW (2000), at 175 (“general community expectations today would appear to be moving toward curtailing such allegedly ‘unlimited’ competence [to denationalize]”).

⁵² Goldston, *supra* note 50, at 333.

⁵³ *Cf.* Convention on the Reduction of Statelessness, art. 10, *supra* note 48:

(1) Every treaty... providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result....A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party... includes such provisions. (2) In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless”.

Such provisions would make no sense if transfers of populated territory did not occur. *Cf.* Venice Commission, *supra* note 48, at art. 7 (“In matters of nationality, [States] shall respect, as far as possible, the will of the person concerned”).

partition—citizenship has generally followed those new divisions as well, directly or indirectly (through a parent’s territorial affiliation, for example).⁵⁴ Assignment has real consequences: Division terminates the rights of citizens to move freely about the territory of the former country or otherwise make claims or maintain relationships that, prior to the division, would have been a matter of right. Yet in none of the cases has assignment been subject to approval by the affected populations.⁵⁵

It might be objected that these are instances of state succession, whereas the Lieberman Plan involves the mere transfer of territory. But if the Plan transferred territory to Palestine by mutual agreement

⁵⁴ Cf. Victor Matthew Kattan, *The Nationality of Denationalized Palestinians*, 74 NORDIC J. INT’L L. 67, 83-4 (2005)

The prevailing view...is that, in the case of transfer of a portion of the territory of a State to another State, every individual and inhabitants of the ceding State becomes automatically a national of the receiving State ... If this is the case, is it possible to say that the inhabitants of part of a State which is transformed into an independent State are not ipso facto transformed into the nationals of that State?

A.B. v. M.B., 17 ILR 110 (1950). Kattan, *id.* notes at 84 that this case was overruled by Hussein v. Governor of Acre Prison (1952) 6 PD 897, 901; 17 ILR 111(1950).

⁵⁵ Some scholars argue for an international obligation to avoid mandatory denationalization. See Liav Orgad, Yoram Rabin, & Roy Peled, *Transfer of Sovereignty over Populated Territories from Israel to a Palestinian State: The International Law Perspective*, 10 MISHPAT UMIMSHAL (2007) [in Hebrew], available at <http://law.haifa.ac.il/lawgov/orgad%20et%20al%20eng%20abs.htm> (last visited Nov. 15, 2007) (abstract) (arguing that Israel can alter its borders but must give affected citizens a right of option to choose their status, including retaining Israeli citizenship); see also ARIELI & SCHWARTZ, *supra* note 7, at 75

[T]he **custom** which has developed regarding a situation of transfer of populated territory from one state to another indicates that the transferring state must allow its citizens to choose between retaining their citizenship and/or choosing to move to territory remaining under the sovereignty of the state, in order to keep the social rights they previously enjoyed.

in a treaty (as we are assuming), what distinguishes them? Positing a doctrinal distinction between, say, the new states formed by the ‘dissolution’ of Yugoslavia and the assignment of Austro-Hungarian territory to Romania seems formalistic: both cases reorganized sovereign control of territory *and* reassigned citizenship accordingly.

This means, then, that it is generally legitimate to redefine—revoke—citizenship when states change their frontiers.⁵⁶ The affected individuals cannot be left stateless, but so long as they are assigned to a new sovereign, then there is evidently no objection in principle.

(emphasis in original). However, in none of the post-Cold War dissolutions were citizens given a right of option as to which successor state’s citizenship they would take, so this view is either wrong or universally ignored. Perhaps it is more productive to ask when and why we choose to characterize a given revision of state boundaries as implicating concerns about citizenship, and when we do not.

⁵⁶ See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 657 (6th ed. 2003); Kattan, *supra* note 54, at 91 n.115 (“Kunz, Oppenheim, Keith, Lawrence, Gettys, Fauchille, Mann, McNair, Brownlie and others have all asserted that there is a rule of international law that upon a change of sovereignty the inhabitants of the territory lose the nationality of the predecessor State and become ipso facto nationals of the successor State. The Treaties of Versailles, St Germaine, Trianon, Paris and Lausanne are examples...”). Cf. International Law Commission, Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States, art. 5, 1999, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/3_4_1999.pdf (last visited Dec. 3, 2007) (“persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession”); Venice Commission, *supra* note 48:

13. a. In all cases of State succession, when the predecessor State continues to exist, the successor State(s) shall grant the right of option in favour of the nationality of the predecessor State.

...

14. The successor States may make the exercise of the right of option conditional on the existence of effective links, in particular ethnic, linguistic or religious, with the predecessor State... .

Cf. European Convention on Nationality, art. 20(1)(a), CETS No. 166, Nov. 6, 1997, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm> (last visited Jan. 30, 2008) (“nationals of a predecessor State habitually resident in the

2. DISCRIMINATORY INTENT

The Lieberman Plan would have a disparate impact on and implicitly target Israeli Arabs—its very purpose, really, is to sever the political linkage between them and the Jewish polity. Moreover, most Israeli Arabs are strongly opposed to the Plan.⁵⁷ Does that discriminatory intent (or Arabs' objection) decide the matter—does this constitute a special objection?

Expressly discriminatory denationalization is prohibited.⁵⁸ Nonetheless, ethnicity plays an accepted role in constructing

territory over which sovereignty is transferred to a successor State and who have not acquired its nationality shall have the right to remain in that State”) and (b) (“persons referred to in sub-paragraph (a) shall enjoy equality of treatment with nationals of the successor State in relation to social and economic rights).

⁵⁷ See, e.g., Mada Al-Carmel/Arab Center for Applied Social Research, *Land and Population Exchange Survey* (conducted by S. Rouhana), 2004, available at http://www.mada-research.org/sru/press_release/survey_landPop.shtml (last visited Nov. 15, 2007) (finding that 75% of Arabs in the Triangle oppose transfer under any conditions, and 91% expressed some opposition). As indicated, this article focuses on the Israeli Arabs. Jewish settlers in the West Bank are already Israeli citizens, so their status would not change, and presumably most would be delighted by annexation to Israel.

⁵⁸ Convention on the Reduction of Statelessness, *supra* note 48, at art 9 (“A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”); International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969 [hereinafter ICERD]. Israel signed Mar. 7, 1966 and ratified Jan. 3, 1979), (3)(“Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”) and art. 5:

(“...States Parties undertake...to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...:

- ...
- (i) The right to freedom of movement and residence within the border of the State;

citizenship, and states are not barred from all discrimination, let alone disparate impact, in granting, defining, and—most relevantly—revoking citizenship.

First, the general rule is that states may extend citizenship to whomever they please, and many states consciously construct their citizenry using ethnic preferences. The EU Race Directive allows states discretion in applying racial distinctions in granting citizenship,⁵⁹ and EU members such as Bulgaria, Finland, Greece, Ireland, and Germany employ ethnic preferences. Costa Rica gives preferences to Central Americans and Spaniards (a practice the Inter-American Court has approved⁶⁰). And of course Israel's Law of Return and Law of Citizenship give preference to Jews.⁶¹ Other, notionally neutral

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- (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality....");

Committee on the Elimination of All Forms of Racial Discrimination (CERD), para. 14, Gen. Rec. No. 30, (“[D]eprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality.”); UN General Assembly Resolution, Nationality of Natural Persons in Relation to the Succession of States, Oct. 12, 2000, 55/153. *Cf.* American Convention on Human Rights, San José, Nov. 22, 1969, art. 20, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *available at* http://www.hrcr.org/docs/American_Convention/oashr.html (last visited January 30, 2008) (“2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.”). (The American Convention does not cover the Middle East, but as we consider transfer in the abstract, it is of some relevance.)

⁵⁹ Goldston, *supra* note 50, at 333 (“[T]he Race Convention[] follow[s] the tendency in international law more generally, grant[ing] states discretion in applying racebased distinctions when it comes to citizenship rules, [although] there are limits...”). Neither the Directive nor member states’ practice violates international norms.

⁶⁰ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984).

⁶¹ The Law of Return, 5710-1950, 4 LSI 114 (1950) (Isr.), *available at* <http://www.knesset.gov.il/laws/special/eng/return.htm> (last visited Nov. 15, 2007). *See* Johnathan

rules—language requirements, family reunification—also privilege certain groups.

To say that a country may give preference to some implies it may disfavor others—and indeed, while non-discrimination norms prohibit the *express* denial of citizenship to any *particular* group, if a state casts the prohibition more broadly or more subtly, it can effectively (which is to say, legally) block its target group.⁶² States with *jus sanguinis* norms can discourage the naturalization of groups with long-standing ties to the area: Japan has deployed such rules to block its Korean population from naturalizing,⁶³ and Germany has long done the same with Turkish *Gastarbeiter* communities. As one prominent advocate on citizenship issues notes,

Beyond...clear-cut instances of singular, targeted exclusion, the boundaries of permissible state action

Zasloff, *Left and Right in the Middle East: Notes on the Social Construction of Race*, 47 VA. J. INT'L. L. 201, 207-10. Cf. Goldston, *supra* note 50, at 335-6 arguing that Israel's creation following the Holocaust:

[L]ent legitimacy to the aim of creating and preserving a “Jewish state,” which might not extend to analogous citizenship policies of other countries. It may reasonably be asked whether, at a certain point in time, the interest in preserving the unique character of the Jewish state will give way to the nondiscrimination norm.

This simply demonstrates what *present* norms allow—and again, this is how an advocate *against* discrimination formulates the current rule.

⁶² The Citizenship and Entry into Israel Law (Temporary Provision), 2003, S.H. 544, restricts citizenship for spouses from Palestinian Authority areas; unofficial translation *available at* http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm (last visited Nov. 15, 2007). CERD condemned the law (BBC News, *UN Blasts Israeli Marriage Law*, Aug. 15, 2003, *available at* http://news.bbc.co.uk/2/hi/middle_east/3152651.stm (last visited Jan. 30, 2008)), but it was upheld by the Israeli Supreme Court. Jonathan Cook, “Israel’s Marriage Ban Closes the Gates to Palestinians,” ZNet, May 25, 2006, *available at* <http://www.zmag.org/content/showarticle.cfm?ItemID=10321> (last visited Jan. 30, 2008).

⁶³ See, e.g., Choung Ill Chee, *Japan’s Post-War Mass Denationalization of the Korean Minority in International Law*, 10 KOREAN J. COMP. L. 19 (1982).

are not always clear. Race-based distinctions that expressly bar access to citizenship for some racial or ethnic groups should be considered presumptively invalid, *absent particular evidence* showing that they are both necessary and proportional to the specific, legitimate purpose at issue.⁶⁴

The *general* rule prohibits ethnic exclusions, but in *particular* cases it can allow them, requiring only some plausible rationale. In practice, states have considerable leeway to identify “necessary and proportional” reasons, and in the great majority of cases, it is states themselves, not some notional “international community” or international adjudicative mechanism, that determine if those reasons are acceptable.

Of course, granting citizenship is one thing, revocation quite another: Neither preference nor discrimination in the granting of citizenship necessarily implies anything about the rules on when citizenship can be revoked. They do indicate, however, that ethnicity is a recognized and legitimate factor in the construction of citizenship—and turning to withdrawal of citizenship, we find that ethnicity plays a discernible role there as well.

There have been limited instances in which ethnic denationalization has been carried out without censure—arguably, these simply constitute unpunished violations, but it is equally plausible to characterize them as data points in defining the contours of law in practice. For example, the Democratic Republic of Congo and Côte d’Ivoire stripped ethnic Banyamulenge and northern Muslims, respectively, of citizenship;

⁶⁴ Goldston, *supra* note 50, at 334 (emphasis added) (arguing, at 333, that “[t]he clearest cases of unlawful discrimination in access to citizenship involve state policies that single out particular racial or ethnic groups for invidious treatment. These should be viewed with skepticism, and, as a general rule, disfavored”). Even this formulation speaks only of “skepticism” and “disfavor as a general rule,” because state practice does not support more.

Mauritania similarly expelled black “Senegalese” in the 1980s.⁶⁵ In these cases the state claimed that the individuals had never been citizens, and thus technically they were not denationalizing them,⁶⁶ but this merely serves to indicate a particular strategy that is successful—construct a restrictive definition of citizenship to exclude the target community—and to demonstrate the pliability of general non-discrimination norms applied to particular cases.

Similarly, the peacetime denationalization of German citizens of Czechoslovakia after the Second World War has never been criticized; on the contrary, in the controversy surrounding the Czech Republic’s accession to the EU, its legality has recently been reaffirmed in court cases, demarches, and interstate negotiations.⁶⁷ Finally, in cases of state succession, there has often been an irreducible ethnic element, even when independence tracked internal boundaries; in Estonia and Latvia in the 1990s, efforts were made to base citizenship for those who had become resident during the Soviet era on language ability or knowledge of history-stratagems that effectively denationalized most Russians.⁶⁸

Indeed, there may be good reason why discriminatory intent or disparate impact standards are particularly restrained when the *actus* involves reconfiguration of frontiers: The reasons for the momentous decision to reconstitute a state are irreducibly complex—involving questions of economics, history, social psychology, politics, short and long-term calculations of an almost infinite variety—and few such changes are not marked, in some way, by ethnic difference. A disparate

⁶⁵ See JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 82 (1995).

⁶⁶ *Id.* at 82 (“The Mauritanian government denied expelling any of its nationals. It claimed that the blacks who were expelled did not qualify as Mauritians because their ancestors came from Senegal.”)

⁶⁷ See Waters, *supra* note 39, at 80-115.

⁶⁸ Proposals to expel all ethnic Russians who had arrived since the Soviet occupation were resisted by the Council of Europe and the EU, but the Baltic states were largely successful in defining most of these “new Russians” as non-citizens, and have succeeded in significantly reducing the Russian share of the citizenry.

impact standard would effectively prevent any border changes; the most cursory glance at the post-Cold War era suggests such a standard cannot possibly describe our law and practice.

There is also an evidentiary problem: The practical difficulties in pinning down intent make successful invocation of formal anti-discrimination rules problematic. It would be very easy to describe the transfers the Plan proposes in purely geographic terms—residents of areas defined by longitude x and latitude y—without any mention of Arabs. Even if one imagined anti-discrimination norms reached this far, there would still be the practical problem of making the claim stick;⁶⁹ a state that can present a plausible, facially valid alternative probably will escape censure.⁷⁰ This is little point in just hammering on doctrine—especially as, in this case, the doctrinal case is weak—without acknowledging its predictive, evidentiary limits.⁷¹ One might prefer a disparate impact threshold for invoking non-discrimination norms,⁷² but in practice such norms “serve[] primarily to place a modest

⁶⁹ For example, the FIPS analysis asserts that broad revocation of citizenship meets with universal disapproval, citing cases from Peru, East Timor, and the Czech Republic (ARIELI & SCHWARTZ, *supra* note 7, at 90, n.164, quoting “Revocation of Citizenship,” *Senate*, information page no. 187, Oct. 2002 [in Hebrew]). However, international law has actually effectively *acceded in or approved* at least two of these examples: Czech denial of citizenship to Roma and Indonesian revocation of Timorese citizenship.

⁷⁰ *Cf.* Goldston, *supra* note 50, at 334-5 (“It is often hard to divine the dividing line between, on the one hand, a legitimate state interest in retaining the loyalties of and connections to emigrants to other lands, and, on the other, an illegitimate aspiration for ethnic purity.” Goldston is referring here to naturalization, not denationalization).

⁷¹ It should be clear from this that I am siding with those who say that, in international law, we cannot simply insist on rules without reference to practice. Beyond some point, it is a meaningless exercise to construe patterned, systemic, and systematic behavior as violations of some abstract norm, rather than as indications of a different, less desirable rule. The moral faculty may always object, but the legal, not.

⁷² Goldston, *supra* note 50, at 334-5:

In practice, the test should be drawn from the nondiscrimination norm.... As in the field of nondiscrimination, once a disparate

burden on the state to come forward with a plausible justification for any distinctions drawn in law or practice.”⁷³

Thus while *Israeli* law may not allow ethnic denationalization⁷⁴ (although allowing ethnically keyed naturalization and denying citizenship to Palestinian refugees), there is scope in international law for a more, shall we say, robust approach—supposing one wanted such an approach, as the Lieberman Plan does. International law may prohibit the expressly discriminatory targeting of ethnic groups for denationalization, but it does not prohibit the denationalization of the inhabitants of a given piece of territory. While one might think that the underlying discriminatory intent—so evident in the Plan—poisons and invalidates the act, there is little support for this proposition in international law.

Whatever the doctrinal claim, it seems plausible that the Plan—or something like it—is assimilable to international legal norms: There is no absolute right not to be denationalized, and formally the Plan constructs the category of candidates for denationalization on a basis which may avoid equal protection or discrimination concerns. The

impact is shown, the burden should in practice be on the government to demonstrate both a legitimate aim and a reasonable relationship of proportionality between the means employed and the aim pursued.

⁷³ David A. Martin, *The Authority and Responsibility of States*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 34-5 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).

⁷⁴ ARIELI & SCHWARTZ, *supra* note 7, at 65 (listing three grounds for denationalization in Israeli law, none relevant to the Arabs). Israel’s Supreme Court and Government have found that “revocation of citizenship is a drastic and extreme act which should be avoided” (*Id.* at 66) and would violate several Basic Laws (*Id.* at 67, citing Basic Law: Human Dignity and Liberty, 1992, S.H. 150, available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Jan. 30, 2008) and Basic Law: Freedom of Occupation 1994, S.H. 90, available at http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm (last visited Jan. 30, 2008)). But these are artifacts of municipal law, which can be amended; we concern ourselves here with the international norms in the context of which Israel’s municipal law operates.

Plan uses territory as a proxy for ethnicity, and this may be enough cover to avoid the highly general prohibitions of discrimination. And, as we shall see, the objections of Israeli Arabs may not matter either.

3. HARM AND HUMAN RIGHTS

Even if there is no foundational objection based on discriminatory animus, the Lieberman Plan might nonetheless fail the legal test if it violates the human rights of the transferred population. The analytical approach of the Plan's critics (such as the FIPS report) assumes that the opposition of Israeli Arabs to transfer measure is a decisive legal obstacle, and in particular that harm to those Arabs from loss of citizenship—decline in living standards; separation from the networks around which they have organized their lives; division of the Israeli Arab minority; and the simple, direct insult of denying their common identity as Israelis—constitutes a clear and compelling objection to transfer. Perhaps the sum of human rights creates an effective bar to involuntary change of citizenship: The very logic of harm—that these Arabs would be injured simply by being cut off from the rights of citizenship they enjoy as Israelis—presupposes the answer as to whether or not they can be cut off.

Yet harm is not so easily cabined; if being cut off from the blessings of citizenship were a *per se* harm, then many suffer for whom rights contemplate no remedy. *I* am not entitled to the rights of an Israeli citizen—I suffer that exclusion—but that is not a harm Israel intends to answer. Why not? Because *I* am not a citizen? More precisely, because *I* do not live in the confines of the state of Israel⁷⁵—oh

⁷⁵ Israel's Declaration of Independence calls on "the members of the Arab people who live in the State of Israel to keep the peace and take part in the building of the state, on the basis of full and equal citizenship" (cited in ARIELI & SCHWARTZ, *supra* note 7, at 90). Territorial and citizenship transfer is not inconsistent with that call, which is limited to those Arabs "who live in the State of Israel" (thus excluding "those who had lived in what has become the State of Israel"). Expulsion would violate that

yes, and because I am not a Jew who can claim that right. Of more relevance, Israel has never offered citizenship to any 1948 refugee willing to return despite their obvious affinities to the territory.⁷⁶ How does one combine the rock-solid solicitude for the civic rights of Israeli Arabs—to those Arabs who happen to be Israelis—with an adamant refusal to extend citizenship and its protections to others with an equal attachment to the same land? The harm to Israeli Arabs, in other words, is itself a construction of the citizenship right in a given territory, which in turn is a construction of the polity, of the people of the state of Israel exercising its rights as a sovereign.⁷⁷

covenant, but transfer of territory might not: If the state of Israel legitimately expands *or contracts*, its relationship to the populations under its authority changes. Territorial transfer is not the stripping of citizens within Israel, it is the withdrawal of Israel from control over a territory and its population—a direction many Arabs, at least in the occupied territories, have long said they desire. (Nor do I think that the exceptional, wartime circumstances of Israel's founding have any bearing on this question. The language of the Declaration, echoed in subsequent texts, is fully consistent with peacetime application—and in any event Israel's citizenship law was not drafted until 1952, after the termination of active hostilities.)

⁷⁶ Technically, Israel has never denied the possibility for refugees to return provided they meet certain criteria—loyalty criteria—but it has consistently denied that they have a *right* to return, or to citizenship; in the event, almost no Palestinian refugee has ever actually been admitted. Cf. Steven Erlanger, *Olmert Rejects Right of Return for Palestinians*, N.Y. TIMES, Mar. 31, 2007, at A1 (noting Prime Minister Ehud Olmert's declaration that Israel would not allow even a single refugee to return and denying that Israel was responsible for their flight); Sean Gannon, *Who's Afraid of Resolution 194?*, ISRAELINSIDER, Aug. 22, 2003, available at <http://web.israelinsider.com/Views/2654.htm> (last visited Jan. 30, 2008) (arguing that General Assembly Resolution 194 does not create a right of return). The private Geneva Initiative acknowledges the principle, but leaves the number to Israel's discretion: Under the Geneva formula, it would be entirely acceptable for Israel to admit no returnees.

⁷⁷ The objection that transfer would destroy Israeli Arabs' group identity seems problematic, because the construction of Israeli Arabs as an "ethnic group" is a function of (highly contested) borders. I count four classes of Palestinian with significant links to Cisjordan: Israeli Arabs, Arabs in annexed Jerusalem, residents of the West Bank and Gaza, and '48 refugees with their descendants. There are few meaningful differences between these classes other than what Israel has created—indeed, the

The entire obstacle disappears if one contests the linkage between citizenship, harm, and rights. Transfer does not harm any Israeli Arab's *human rights*, however much it may harm his interests or offend his preferences, because no one has the right to live in a *particular* state with *particular* borders. All supposed violations concern rights that either are constructed by a particular grant of citizenship, or are of universal application and thus unaffected by transfer.

Many civil and political rights (such as voting or freedom of movement) have no single universal application, but only particular civic instantiations: they are given expression within the particular territory within which one has citizenship or residency.⁷⁸ One's political rights in a given polity exist only as long as the territory to which one is affiliated belongs to that polity—today, for example, a Latvian has no right to move to Siberia, even though 20 years ago, as a Soviet citizen, he did. So long as one is a citizen one can go anywhere, live anywhere, but when territory is divided, states determine citizenship based on place of birth, parents' place of birth, current or present residence, and so forth, and redefine individuals' rights claims accordingly. When we consider a state's territorial reformation, we confront the territorial roots of citizenship.⁷⁹

classes themselves are creatures of Israeli law—and yet they have radically different status. It seems circular to say that a state's shape and identity cannot change because of the interests of an ethnic group whose identity is solely a function of that state.

⁷⁸ As I noted, I have no right to freedom of movement in Israel—or even to enter Israel—but I have those rights in the United States, in which I hold citizenship (because I was born to U.S. citizens and on its territory).

⁷⁹ Thus the Lieberman Plan would not violate freedom of movement or the right to enter or leave one's own country (such as ICCPR, *supra* note 48, at art. 12(1-2, 4); ICERD *supra* note 58, at art. 5(i-iii)), because, if the transfer were otherwise valid, then although the subject population would no longer be *in* Israel or citizens *of* it. One's right to freedom of movement is satisfied by its expression within whatever polity one belongs to; nothing in that right requires that the polity never change its territorial composition. Consider that when a state acquires territory, human rights naturally indicate that the state's citizens—old and new—have the right to move freely about the expanded state. That is the logic when land is gained; when land is lost, there is a symmetrical logic.

Human rights norms of universal application (such as general bodily integrity norms like the right not to be tortured), on the other hand, are identical in every state precisely because of their universal nature, and thus transfer is trivial with respect to them, as the same right obtains regardless of who the sovereign is. Israeli Arabs transferred to the sovereignty of a Palestinian state would have the same human rights they have now, and thus the new sovereign would have the same obligations Israel now has towards those them.⁸⁰ It is difficult to see how transfer constitutes a human rights violation in that context.⁸¹

Thus the rights violated here are civil rights, defined in the Israeli municipal context, and their possession and enjoyment is a function of citizenship. If citizenship can be terminated by any valid means, rights dependent upon citizenship terminate too; if transfer is *otherwise* valid, the claims of citizenship cannot be raised against it. It is circular to assert that citizenship can never be changed because doing so would constitute harm to citizenship rights: unless there is an external, human rights based objection, citizenship cannot be its own rationale. We have some form of right to live where we do and to claim membership in the polity controlling that land—but that does not create a veto over changes in the polity's shape.

⁸⁰ Transferees would lose access to Israel's health care and social services. But an objection based on harm to Israeli Arabs' standard of living ignores the great variation in state practice that can satisfy rights norms: Levels of services that might be deemed unacceptable in Israel would be perfectly adequate in many countries, and would not raise rights concerns. (I do not think the real risk doctrine is apposite to cases of territorial revision; I discuss why in the rebuttal.) Moreover, this objection depends on the incidental fact that conditions in Palestinian areas are worse than in Israel. There is something paternalistic in this objection, and ironic, since it implies that compelling an Israeli to live in the occupied West Bank would constitute a human rights violation.

⁸¹ Even asylum rights—which imply a right of movement across international borders—necessarily require some other violation precedent to become active; unless transfer otherwise violated human rights, it could not give rise to a right to asylum. (Thanks to Prof. Seyla Benhabib for raising this issue.)

There is a unquestionably harm: Replacing second-class citizenship in a wealthy, rights-respecting society with the poverty, violence, and degradation of the occupied West Bank is hardly a matter of indifference, which is presumably why Israeli Arabs oppose it. But that harm, while morally important, does not necessarily implicate rights. Individuals often find themselves on one side or another of a new line, and they may not have a choice, but rather have their options dictated by where they live or where they have meaningful connections.⁸²

If this were not so—if the harm arising from loss of civic connection were an absolute obstacle—then we would have to prohibit *any*

⁸² How does one determine those links? Suppose I am an Israeli who moved to Wadi Ara yesterday, and today its severance is announced; am I denationalized? What if I plan to move, but have not yet done so? Perhaps I have bought a house—and sold my old one in Tel Aviv—but I have not yet moved in (I may have stopped to visit relatives in Haifa, and I don't live anywhere yet). It would seem unjust to deprive someone of citizenship on such thin grounds. The answer, I think, is that these problems arise any time territory changes hands. The Czechoslovak divorce created all manner of complicated situations; the dissolutions of the USSR and Yugoslavia made those look simple by comparison. In none of these cases was the enormous project of denationalization—for that is what each was—delegitimated by its complexity. *Cf.* European Convention, *supra* note 56, at art. 18(2):

In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of: (a) the genuine and effective link of the person concerned with the State; (b) the habitual residence of the person concerned at the time of State succession; (c) the will of the person concerned; (d) the territorial origin of the person concerned.)

Concerns about who is affected—an infant whose mother is from Umm el Fahm and father from Netanya or a thousand other scenarios—occur in any transition, and working them out is inevitably painful, protracted, and possible. They keep lawyers occupied, but do not deflect the main enterprise. People are forever moving, marrying, divorcing, buying property, selling it, and generally creating complex identities, networks, and histories that don't fit neatly within any existing or possible political geography. The wonder is that we ever imagine they would fit, or ever design a system, such as the present one, on the assumption that they do. Our analysis must free itself from *a priori* assumptions about which is the “correct,” default constitution of citizenship for a given territory.

territorial revision, because *every* revision limits citizens' ability to exercise their civic rights in the whole territory. How then could we explain the universally admitted legality and legitimacy of the many secessions or dissolutions that have occurred since the end of the Cold War? Even in those cases in which the seceding part wished to leave (as Israeli Arabs do not), the majority in the residual state was surely harmed in exactly the same way that Israeli Arabs are harmed: their patterns of circulation and civic connection were disrupted by secession, their links as a collective community severed, their common identity denied.⁸³ Yet no one has ever objected to the reshaping of these states or to their circumscribed redefinition of citizenship on such grounds.

This does not mean human rights are subordinated to the state, or that rights have no meaning. Certainly, the *way* in which a transfer is conducted could violate human rights, and then it would be illegal. The core question, however, is whether or not a transfer *as such* is a violation, simply because it is opposed by those affected and causes them real harm. Having in mind the relevant standards and state practice, we must conclude that transfers of citizenship consequent to territorial revisions do not in and of themselves violate any human rights, which are quite simply not implicated by the transfer of territory as such.⁸⁴

⁸³ The Security Council is currently considering the partition of Serbia (which is a fair characterization of Kosovo's independence) although a discrete minority of the affected population is opposed. And under a harm analysis, the whole population of Serbia is harmed by the loss of its common space. (There is another reason for this intervention—Serbia's acts of ethnic cleansing—but the argument holds true for any secession or dissolution.)

⁸⁴ If one believed that human rights were violated by transfer, then it would perhaps make sense to engage in a balancing calculus, in which the scope of transfer and its exigent justifications would weigh against the quantum and quality of harm to rights. However, because my view is that human rights are not necessarily implicated by transfer of citizenship linked to territorial transfer, there is no need to balance. In this same light, debates about exactly how many Arabs transfer might affect are ultimately beside the point.

This much we can derive simply by observing the standards and state practice. But the rationale is, as yet, un-theorized: Why is it that citizenship is fungible in this way—that is, in relationship to territory? After all, one has citizenship in a state, not in a piece of land, so where does this idea that one’s citizenship—one’s relationship to the state, even one’s civic identity—tracks with territory, derive from? We can approach the rationale by considering the other element of the Lieberman Plan: the loyalty oath.

4. LOYALTY

On the evacuation boats was also almost the whole of the Algerian Jewish community. To many who had sympathized...their expulsion at the hands of the Muslims came as a cruel shock. “Why are you making us leave, because after all we are your friends?” the Ankaoua family asked their Muslim neighbors. “Then we locked the door, taking the key with us. We thought we might be able to return....”

Over a hundred thousand Algerian Jews, many of them impoverished, backward, and disease-ridden, poured into metropolitan France.

*Alistair Horne, A Savage War of Peace*⁸⁵

In addition to transfers of sovereignty over territory and their populations, the Plan calls for all individuals who remain in Israel after the territorial swap to take an oath of loyalty; those who refused would only have permanent resident status.⁸⁶ Though the oath would

⁸⁵ ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962* 532-3 (1977, 2006).

⁸⁶ See <http://www.yisraelbeytenu.com> (“A New Citizenship Law”); Greg Myre, *A Hard-line Israeli Official, Avigdor Lieberman, Stakes Out Extreme Positions*, INT’L HER. TRIB., Dec. 7, 2006, available at <http://www.iht.com/articles/2006/12/07/news/mideast.php> (last visited Nov. 18, 2007). Recently Yisrael Beytenu has emphasized the loyalty oath more than transfer. See Gershom Gorenberg, *The Minister for National Fears*, ATLANTIC MONTHLY, May 2007, at 84.

cover Jews as well, it is clearly intended for Arabs who remain in Israel.

This runs counter to international law's increasing tendency to view citizenship as a right automatically afforded to natural residents; whether a state adopts *jus soli* or *jus sanguinis* rules or some combination, citizenship is supposed to be an automatic right for the relevant population, not one subject to further tests. Nor does requiring the oath of everyone necessarily cure this objection: such a requirement is like Bentham's argument against evidentiary privileges, that only the guilty need them and so innocent citizens will not object to testifying;⁸⁷ in practice, Jews—like the innocent—will find it easier to take such an oath. Indeed, the rationale for assuming the loyalty of Jews but not Arabs is fairly obvious, even if one rejects it. In fact, anyone who accepts the existence of the “problem” of keeping Israel both democratic and Jewish, necessarily understands and in some form accepts the rationale: that a Jewish state cannot be certain about the loyalty of Arabs.⁸⁸

⁸⁷ JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 302-11 (1827); JOHN H. WIGMORE, 8 WIGMORE ON EVIDENCE 552, § 2291 (John T. McNaughton rev. ed. 1961).

⁸⁸ Arabs can *volunteer* to serve in the IDF but are not *required* to serve, as Jews and Druze are. Central Intelligence Agency (USA), “Israel,” THE WORLD FACTBOOK (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/print/is.html> (last visited Jan. 30, 2008). Even Israeli Arabs' opposition to transfer does not suggest an identity of interests, or anything else, with Israeli Jews. Most Israeli Arabs also oppose many things which most Israeli Jews consider essential to their state project, such as the Law of Return and the Jewish nature of the state. Most Israeli Arabs, like Arabs everywhere, refer to the events known to Jews as the Independence War as the *Nakba*. Cf. Elie Rekhess, *The Future Vision of the Palestinian-Arabs in Israel*, TEL AVIV NOTES, Dec. 19, 2006 (discussing broad support among Israeli Arabs for initiatives like the National Council of the Heads of Arab Local Council's “Future Vision of the Palestinian Arabs in Israel”); Alexander Jakobson, *Who is a Palestinian?*, HAARETZ, Aug. 18, 2007, available at <http://www.haaretz.com/hasen/spages/894493.html> (last visited Nov. 18, 2007) (“Though it could be said that the Arabs in Israel belong to the Israeli people, the “people” in this context means a civic community (that people to which we all refer when we say that the Knesset is elected by the people) and not a shared national identity.”).

International law disfavors loyalty oaths from natural citizens. But is it not problematic to pretend that loyalty is *not* an issue in constructing the polity? All citizenship is implicitly based on loyalty: In fact, despite the apparent trend towards “automatic citizenship,” mere residence does not suffice to rationalize citizenship norms without resort to some underlying concept of affinity between the individual and the state polity, of precisely the kind the Lieberman Plan and all two-state plans for Cisjordan are premised upon.

For example, efforts to reduce statelessness have centered on long-term residence—notionally a territorial standard—but have done so because residence creates connections and affinities between the individual and the state. In the *Nottebohm* case, the International Court of Justice found that the basis for citizenship was a “genuine and effective link” determined by the “habitual residence of the individual concerned but also the centre of interests, his family ties, his participation in family life, attachment shown by him for a given country and inculcated in his children, etc.”⁸⁹ *Nottebohm* is normally read as pushing states to grant citizenship to a broader class of individuals: “*Nottebohm* as refined by the developing principle of democratic participation would override the power of exclusion implicit in the community’s right of self-determination.”⁹⁰ This is a plausible reading, but taking *Nottebohm* on its own terms, the link between an individual and the state which motivates that broader claim goes beyond territoriality to include shared values or identity—a community sharing more than physical proximity.⁹¹

⁸⁹ *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 (Apr. 6), at 23; *see also* 49 AM. J. INT’L L. 396, 399-400 (1955).

⁹⁰ Goldston, *supra* note 50, at 341.

⁹¹ *Cf.* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), (“[I]t would not appear to be inconsistent with the nature and purpose of the grant of nationality to expedite the naturalization procedures for those who, viewed objectively, share much closer historical, cultural and spiritual bonds”). *See also* *Sisojeva and Others v. Latvia [GC]*, Eur. Ct. H.R. no. 60654/00 (2005) (finding applicant had a

Because states normally may not demand that natural citizens who otherwise meet the criteria for citizenship demonstrate proofs of allegiance as the price of admission, the Lieberman Plan's loyalty oath almost certainly violates international law.⁹² But the *idea* of loyalty, problematic as it is, brings us squarely before the core issue, which is the rationale for legitimated domination of a particular territory by a particular community—and the rights and claims that may create in the communities and individuals dwelling in that land.

II. TRANSFER AS SOVEREIGN DECISION OR SELF-DETERMINATION: COMMUNITY AND TERRITORY

The arrival of every individual is a source of richness
for us; and the departure of every individual is a
blessing for us!

*Turkish deputy to the Ankara assembly, during
the population exchanges*⁹³

We have seen that citizens cannot be deprived of citizenship on discriminatory grounds (with important qualifications), but also that a change affecting all citizens living on a given territory could be understood differently. The deeper, foundational question concerns the relationship of community to the disposition of territory, and therefore the international normative framework in which such dispositions

right to residence in Latvia due to long-standing ties); *Slivenko v. Latvia*, Eur. Ct. H.R. no. 48321/99, para. 95 (2003) (“some importance [is] attached in [cases of expulsion brought under Article 8 ‘private life’] to the degree of *social integration* of the persons concerned.”); *Dilicia Yean and Violeta Bosico v. Dominican Republic*, Inter-Am. Ct. H.R. (2005) (finding applicants had right to citizenship under *jus soli* norms).

⁹² It might seem strange that international law forbids loyalty oaths yet allows the state to denationalize individuals, but the difference is that transfer changes citizenship as a consequence of a change in the sovereign reach of the state. The underlying motive can be the same, of course, and to some that is all that matters.

⁹³ Quoted in MAZOWER, *supra* note 1, at 323.

are negotiated is particularly pertinent. This is especially true in the Israeli-Palestinian case.

Several points can be synthesized from the observations made so far: Taken together, they indicate both the doctrinal path by which a transfer like the Lieberman Plan might be understood, and an alternative way of understanding it that, though heterodox, may better explain and motivate what is happening in Cisjordan, or rather what is *not* happening.

A. THE CONSTITUTION OF THE POLITY

1. COMMUNITIES OF PLACE EXIST APART FROM THE STATE

The international texts on citizenship barely contemplate the territorial construction of the polity. They are largely focused on statelessness—the risk that individuals will be expelled from the state or cast adrift inside it⁹⁴—because they understandably assume that states are not usually in the business of giving up their territory. But in transfer, denationalization occurs as a consequence of territorial cession: It is precisely *because* individuals ought not be moved about *and* ought to have some say in the governance of their homes—because we believe in a *Heimatrecht*—that territorial transfer also implies transfer of citizenship. The link between individual and state is mediated through connection to place; so must this link be expressed by the existing state, or does the logic of place suggest other expressions are possible?

A claim based on habitual link draws its strength from the formative effects on identity of residence in a *particular place*.⁹⁵

⁹⁴ Cf. Partial Decision on Admissibility, *Makuc and Others v. Slovenia*, Eur. Ct. Hum. Rts. no. 26828/06 (2007); *Written Comments on the Case of Makuc and Others v. Slovenia, Application no. 26828/06*, OPEN SOCIETY JUSTICE INITIATIVE (2007) (submission to the European Court of Human Rights).

⁹⁵ A case could be made that the right attaching to one's particular locality is more fundamental than the right of free movement within a given state, or indeed all other

Affinity to place implies a community—a political community—other than the state. Might it not follow then that the individual's claim is to citizenship in whatever state claims sovereignty over that place, rather than in a particular state?⁹⁶ At the same time, the idea of pre-existing communities with interests in preserving their identities and values motivates a state interest in controlling demography, in order to preserve itself.

Thus we have a claim and an interest: The individual with a claim to citizenship in the state governing the place he lives, and the community with an interest in preserving itself and thus in the loyalty of the whole citizenry. The individual's claim we construe as a nearly automatic right so long as his habitual residence is within the state, while the community's interest is constrained by norms—about human rights, non-discrimination, loyalty oaths—and the obligation to afford citizenship to all people with genuine links to the territory, even though those links indicate bonds to communities and places, rather than to the state as such.

aspects of the citizenship right, because all those are derivative of the right derived from being (belonging) in a particular place. A child born in Umm el Fahm is a citizen of Israel because Umm el Fahm is in Israel. If it were in another country, he would be a citizen of that country. We know this because of two processes: a) the Statelessness Convention requires, when territory is transferred, that the new sovereign makes all who live there citizens, rather than expel them to the 'old country;' and b) the rationale in *Nottebohm* (*supra* note 89) grants citizenship to individuals by virtue of their formative ties to a place.

⁹⁶ This is not to suggest that an individual only has a claim in his birthplace: Once someone claims citizenship by whatever means, international law clearly protects that person's to move freely about his own country. Rather, this means that citizenship is constructed through claims about links to a particular territory, from which a more general right of citizenship applicable in the whole political space is constructed. When a state is divided, any individual's claim to citizenship in a particular part of the country is implicitly based on a version of *Nottebohm's* logic (*supra* note 89)—that the individual, through exercise of his right to move about, has put down roots in a place, and should have the citizenship of that place's new sovereign. It is the link to place that creates the claim to citizenship in the body politic to which that place belongs.

2. EQUALITY DOES NOT DICTATE THE SHAPE OF THE STATE

What this suggests is a distinction between the regulation of relationships *within* the state and regulation of the state's *formation and shape*. Human rights set a common minimum for all human beings—in effect, an equality principle—which the state internalizes as civil rights. But rights do not dictate a particular political dispensation—they do not dictate the shape of any polity. Human rights norms, like international law more broadly, treat change in territorial sovereignty as a political question;⁹⁷ indeed, the normative strength of rights comes precisely from their universality, and it follows that rights are indifferent to the particular forms states take. In that sense, international norms regarding citizenship are not constitutive of—or even terribly interested in—any given state as a territorial entity; they merely indicate what the quality of interactions within any given state must be.⁹⁸

2. THE NEED FOR A COMMON CIVIC VISION

And precisely because there is an internal equality principle and human rights (increasingly) demands citizenship for all individuals with links to the territory of the state, it is pragmatically essential that

⁹⁷ International law prohibits certain *modalities* of transfer, such as aggression, but not the act itself. In limited circumstances (colonialism, genocide) human rights justifies enforced territorial reorganization.

⁹⁸ *Cf.* art. 27, ICCPR, *supra* note 48 at art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”). This is an equality rule, not a rule constructing the polity: “In those states in which minorities exist” only requires a state to do certain things if it has minorities, but it does not require a state to retain territory that includes minorities. This is the difference we saw between territorial revision and ethnic cleansing: Article 27 clearly prohibits the killing or expulsion of a minority population, but is silent regarding the drawing of a border.

the state has some means of ensuring its inhabitants share a common civic vision. States as collective political projects will not work well, and will resist granting equal rights, if the individuals constituting those states fundamentally doubt each other's loyalty to the collective enterprise's goals.

Under most conditions, the comprehensive grant of citizenship to everyone within the territorial jurisdiction of the state seems like an unmitigated good—indeed, the very heart and expression of liberal equality principles.⁹⁹ Yet even though the rhetoric of liberalism considers states as mere protectors and service providers for the populace (and this is in many ways a very positive vision), as a practical matter the state as a political community also requires things of those citizens. Citizenship also brings obligations and costs, and it has—in many contexts—strong, emotive aspects. Citizenship affects taxation, military service; it may compel choices about membership in another jurisdiction; it encloses the individual in a web of loyalties, duties, and obligations that the non-citizen does not have.¹⁰⁰ Most poignantly, it makes claims on loyalty that, in the extreme case, are the rationale behind the punishment of treason: How could one whom the state has never embraced possibly betray it?

Citizens will not fulfill those obligations well if they do not believe in the values of the state. Liberal stratagems that organize loyalty around cosmopolitan sensibilities and commitments to non-discrimination—like claims about celebrating diversity—brunt up against the amorphous but vital need for any community to share some values in order to function—indeed in order to feel that functioning is even worth the candle. This extends to mundane matters of governance:

⁹⁹ Cf. Diane F. Orentlicher, *Citizenship and National Identity*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 323 (David Wippman, ed., 1998) (“[since] democratic values are deeply offended by the exclusion from citizenship of persons long resident in a political community ... international law has moved in the direction of establishing a presumptive right to citizenship in the state of habitual residence”).

¹⁰⁰ In many states—Australia and Switzerland, for instance—citizens are legally obliged to vote.

“A society with a weak sense of any cohesive identity will necessarily find it more difficult to organize and sustain the collective responses that are needed not just to tackle disadvantage, but the welfare state, crime and security issues that dominant today’s political agenda[.]”¹⁰¹ Salman Rushdie—no primordialist—has observed, that “No society, no matter how tolerant, can expect to thrive if its citizens don’t prize what their citizenship means.”¹⁰² The accident of territorial or descent-based citizenship cannot ensure the minimum common values or loyalty that a political community requires.

3. A PROXY FOR LOYALTY: THE POLITY’S INTEREST IN DETERMINING ITS TERRITORY

Each polity, therefore, has an interest in determining its own territory, because territory mediates the links that determines who has a claim to citizenship, and thus who must be accorded equality within the state. This implies some ability to define—include and exclude—populations on the basis of their territorial location, as a proxy for affinity or identity.

The solution to the loyalty problem—the problem that a liberal, equal-protection state cannot select its citizens by loyalty but is nonetheless necessarily and legitimately concerned with questions of loyalty and identity—is to reserve for the political community a right to construct its frontiers as a proxy for loyalty. Affinity to place creates an almost infeasible claim to citizenship in the state which governs that place; and so the state uses territory as a proxy for loyalty, withdrawing itself from territories whose population, on balance, does

¹⁰¹ John Denham, chairman of the UK Labour Party’s home affairs select committee, quoted in *The Uncomfortable Politics of Identity*, THE ECONOMIST, Oct. 19, 2006, at 68, available at http://www.economist.com/world/britain/displaystory.cfm?story_id=E1_RDVSGTT (last visited Jan. 30, 2008).

¹⁰² *Id.*

not share the broader community's values;¹⁰³ it withdraws the bond of common citizenship which territorial dominion created.¹⁰⁴

Is this objectionable? Nothing in a liberal theory of the citizen says citizenship cannot *ever* be extinguished, and since the community represented by the state has its own interests, it is important to ask if we really must assign individuals' claims an absolute privilege. Citizenship is a right, but its instantiation is not static. If we acknowledge that citizenship rests upon an *a priori* link to territory, then we discover a rationale for deciding when changes in citizenship are legitimate: when states surrender control over territory on which people live.

If the basis for a claim to citizenship is premised on affinity to a place, then it can be understood to run with the land, so to speak, not necessarily with the state that is currently sovereign. So long as each individual retains a civic link to the sovereign of the place upon which his claim is grounded, the incident of a particular, territorially defined polity does not preclude reassessment by that polity of its own identity and *raison d'être*, merely because doing so would alter the composition of its citizenry—of itself.

4. THE CONSTITUTION OF COMMUNITY

And, as we have seen, this may be so even if that change is opposed by the affected citizens or constitutes a harm to them. Indeed, a key mistake in analyzing transfers has been to focus on harm rather than the constitution of community—in our case, harm to Israeli Arabs, rather than the willingness of Jews to live with them. I think the mistake comes from imagining citizenship as a set of benefits enjoyed

¹⁰³ Even if one believes that cosmopolitan commitments to equality and diversity are sufficient values to ground a community, one must admit that such commitments are unevenly distributed, and so any given border would yield a polity with more or less likely to actually agree on their sufficiency.

¹⁰⁴ Note that it *withdraws*; a state cannot properly acquire territories outside itself without the approval of either the present sovereign or the population of that territory.

by atomized individuals, rather than a collective construct requiring collective acceptance—much like marriage, dancing, or sex. No one person can insist upon that acceptance; no one, no community has an absolute right to remain in union with anyone else or any other community. If the rest of Israel, acting through its democratic institutions, wished to alter its union with those territories, how could those territories alone prevent that? That would be no less illiberal than for the metropole to deny the wishes of an outer province by insisting that it stay in union against its will.¹⁰⁵ Is this not precisely the logic that moves many to say Palestinians should have their own state free of Israel's control? Surely the majority—which happens to be Jewish—has the same right, a right no less real simply because Israel has so consistently overreached the proper bounds of that claim.

Without question, realizing that claim can constitute a harm to others. Yet though such a situation may be wrenching, no one's *right* is violated, and there is nothing to say about it except that one opposes it or wishes it might not come to this—but that is politics, not an irrefutable legal claim. Because it is political, we are free to support or oppose transfer. Yet we all know places where such choices, painful as they may be, have been preferable to continued union. Perhaps, today, the land west of Jordan is such a place? Not so long ago many Israelis still desired a single state in Cisjordan, but now, I think, few dream of that, and so they have begun to ask themselves where the line between them and another people ought to be. This has required them to ask: Who are we? Which is to say, they are asking: Who are we not?

However humane the impulse, focusing on the interests of—and the harm to—Israeli Arabs misses the point: The salient question is the willingness of Israelis to live together in a single polity. If for whatever reason a population's commitment to being a polity is defective, it must have some means—some right—to reform itself, and because of our

¹⁰⁵ Illiberal, though not necessary illegal: conventional understandings of self-determination do give the majority the right to veto proposals for disunion.

commitments to equality and citizenship *within* the state, that revision can only express itself externally—that is, territorially. Everyone who accepts Palestinian statehood understands the general instance of this point; they presumably only differ on locating the line between the two communities. If Israelis no longer believe in their common bond, how can one insist that they maintain it?

B. THE SECESSION OF ISRAEL

The direction of this argument should be clear: It is the legal, majoritarian exercise of state sovereignty, but it is also something else. Lieberman talks about “disengagement from Umm el Fahm”—an opportunistic riff on disengagement from occupied Gaza—but, creatively understood, this is an exercise in Jewish self-determination: It is the secession of Israel.

1. TERRITORIAL TRANSFER OR SELF-DETERMINATION: FUNCTIONAL CONVERGENCE

This is no doctrinal trick. We should recognize, and take seriously, that the transfer of a discrete territory could equally be constructed as secession by the rest of the country: Lieberman’s disengagement is a democratic exercise of the Israeli state’s sovereign right peacefully to alter its borders, but it is also the secession of the Jewish community from the broader multiethnic state. Either way the affected areas would not have a veto over the process: International law has not recognized the right of a minority to block territorial transfers by the majority, and therefore neither has it recognized a veto over withdrawal by the majority, which is in effect what the Lieberman Plan achieves.¹⁰⁶

¹⁰⁶ The only way to defeat the majoritarian turn is to claim that there is something necessarily indivisible about the citizenry or the self-determining people. Such an appeal to the General Will sits curiously and uncomfortably with liberal cosmopolitan commitments to the individual as the subject of rights—not to mention seeming utterly inapposite to states whose populations obviously do not share a common identity.

When a democratic majority (that also happens to be an ethnic group) decides to alter the borders of its—political community (state), what functional difference is there between this and self-determination? Any democratic majority in Israel can alter the state’s borders,¹⁰⁷ so it has no need to resort to claims of self-determination, yet the majoritarian exercise of state sovereignty is functionally identical to self-determination. The mechanics are simple enough: either those parts of Israel that do not want to live in community with Umm el Fahm exercise their democratic right to cause the state to transfer territory to another sovereign, or the Jewish sections of Israel secede to form a new state (“Israel Minor”). (There is no logical reason why a transfer must be less than half the territory, nor why secession must be a smaller section from a larger.¹⁰⁸) The only difference is that, despite identical outcomes, the first method is considered doctrinally sound, while the latter is not. Yet when two doctrinal solutions (one favored, one not) reach the same functional result, we confront a moment of liquefaction, of opportunity, to re-conceive doctrinal categories.

2. A SUBSTANTIVE VIEW OF SELF-DETERMINATION

This is a heterodox view of self-determination. Conventional interpretations have moved away from the doctrine’s earlier, Wilsonian engagement with substantive claims about community.¹⁰⁹

¹⁰⁷ It would be interesting to imagine the Plan enacted in the Knesset by a majority that included Arab deputies—and, if that were acceptable, to ask why it would be objectionable if the majority were larger but all Jewish.

¹⁰⁸ When Estonia withdrew—seceded—from the Soviet Union, was it “expelling” the rest of the country? It seems ridiculous, but it is quite hard to distinguish the two interpretations except by the arbitrary claim that smaller secedes from larger (or weaker from more powerful). Size alone is no reason why the larger, Jewish section of Israel could not constitute a candidate for withdrawal.

¹⁰⁹ On self-determination generally, *see* ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* chs. 3-4 (1996);

Canonical self-determination does not recognize sub-state secession¹¹⁰ or consider anything but the whole population of an existing territory as a meaningful claimant.

But if there is one place that has resisted this doctrinal narrowing, it is Cisjordan.¹¹¹ The standard narrative of international law assumes the state is the appropriate expression of self-determination for its population, but nowhere is this assumption less plausible. The claims of Jews and Palestinians are thought comprehensible only in terms of organic communities that are separate from and predate the incident of territorial delineation.¹¹² Indeed, Israel and Palestine today are perhaps the worst possible candidates for objecting to self-determination on grounds that it illiberally divides communities on ethnic lines—this is precisely what all two-state solutions intend to do.

There is reason to suppose this substantive, pre-territorial component of political identity has never fallen entirely out of self-determination,¹¹³ and to recognize its generative value. Substantive

MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993); THE SELF-DETERMINATION OF PEOPLES: COMMUNITY, NATION AND STATE IN AN INTERDEPENDENT WORLD (Wolfgang Danspeckgruber ed., 2002); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed. 2006).

¹¹⁰ The only exceptions are a limited right for communities to secede if subjected to extreme violations of rights or denied meaningful participation in governance. *See* Reference re Secession of Québec, 2 S.C.R. 217 (1998).

¹¹¹ *Cf.* ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION 386 (2004) (justifying a Jewish state on self-defense grounds); CRAWFORD, *supra* note 109, at 433 (describing Israel as a secession from mandatory Palestine, despite arguing against ethnic self-determination).

¹¹² *But see* Alon Harel, *Whose Home Is It? Reflections on the Palestinians' Interest in Return*, 5 THEORETICAL INQ. IN L. 333 (2004) (discussing the role of territory in forming identities for Jews and Palestinians). *Cf.* *The Future Vision of the Palestinian Arabs in Israel*, Dialogue no. 6, in BITTERLEMONS-DIALOGUE.ORG, Mar. 2007 (discussion between As'ad Ghanem and Asher Susser), *available at* <http://www.bitterlemons-dialogue.org/dialogue6.html> (last visited Apr. 9, 2008) (Susser objecting to the Future Vision proposal because it would deny the Jewish nature of the state).

¹¹³ *See* G.A. Res. 1541 (XV) (Annex), 15 U.N. GAOR Supp. (No. 14), U.N. Doc. A/4864 (Dec. 15, 1960), Principle IV (defining states' obligations in respect of

self-determination would move the focus away from existing territorial units to engagement with the identities of communities that constitutes majorities in a given area—areas defined by the community itself through a process of self-organization and democratic participation. Once new borders were drawn around self-constituting communities, those bounded territories would have the same obligations towards the diversity within them that any other state has. Properly understood in light of the underlying rationales of political community, a more substantive self-determination would also be radically ahistorical, according minimal value to claims of historical justice or ancient privilege; this would be a valuable feature applied to a conflict in which historical claims are both omnipresent and utterly unhelpful.

Israeli policy long maintained that the Palestinians were part of the Arab people, and thus did not need their own separate state, since the Arabs already have several. Apart from being a heterodox reading of a “people” as an organic community—a Wilsonian view that is out of step with postwar approaches to—what a “people” is—this rather gives away the game of what, on this view, the Jews are too: a self-determining people.¹¹⁴ And this begs the question not only of what that people may legitimately do to preserve “their” state, but also what business they have ruling territories on which they do not constitute a majority—on which another—people lives—as Israel has done at every moment since its founding. Whether one casts the Lieberman Plan as an act of the sovereign will or of self-determination, it brings into focus what all two-state plans since partition have implied: If

any non-self-governing territory “which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”).

¹¹⁴ Is there a self-determining Israeli people? Under conventional international law there logically should be, but I think the most charitable thing we can say is that Israel presents perhaps one of the weakest proofs for the claim that a state’s population constitutes a meaningful people. Even the most liberal and cosmopolitan of Israelis tend to assume that the state must somehow be Jewish.

the state is to have an ethnic character, it must as much as possible withdraw from dominion over other groups.

3. DEPARTURE

For we must note the directionality of this process: self-determination means Israel withdrawing; it is Israel—the Jewish political community—that must sacrifice claim to territory. That would sound strange to a Zionist intent on building the state, but modern self-determination involves withdrawal from some broader political community. This implies two important things about the shape of a resolution.

It means, first, that Israel *as a state* cannot unilaterally take further territory. No international norm validates Israeli occupation of the West Bank, including East Jerusalem,¹¹⁵ and the logic of transfer is inapposite to the occupied territory of another people. So while it would be possible to structure a deal between two sovereigns to transfer Jewish settlements to Israel, there is no obligation on Palestine to do so. To the degree the Plan is conceived as both a reduction in Israel's Arab population *and* an increase in its Jewish population from the West Bank, it overreaches what the Israeli side can legitimately achieve on its own.

The logic of self-determination as I have described it may, on the other hand, be available to the settlers themselves. Along with overcoming doctrinal resistance from the conventional view of self-determination, this would require them to defeat claims that their presence constitutes an illegal occupation, but if self-determination is understood as a radically ahistorical doctrine, then over time past claims fade before demographic realities. The Jews are there, and perhaps they should withdraw; but if they do not, at some point their

¹¹⁵ Israel denies that the West Bank is occupied territory, styling it rather an “administered area,” (*available at* <http://www.crimesofwar.org/expert/arab-israel.html> (last visited Nov. 18, 2007)), but this view is broadly rejected.

claim to what they have taken and possessed as a majority—though no more—might be made as of right. That community could then, if it wished (as it surely would), form a common polity with Jewish Israel. Of course, this same logic would be available to Israel’s Arabs, if they wished to join Palestine.¹¹⁶

But either scenario—a (Jewish) majority in Israel democratically redefining its territory or Jews as a community exercising a right of self-determination—involves the withdrawal of (Israeli or Jewish) control from territory with whose communities they feel no common political bond. Whether one employs the conventional rationale of the *lex lata* or the interpretation I propose, there is no legitimate way to employ the language of self-determination to advance Zionism’s physical border beyond where it has already gone, beyond what it has already conquered *and* displaced.¹¹⁷

And I think the project of Zionism has reached, and reaches today, far beyond even its willingness and ability to actually make the land Jewish, though at times its ruthless ambition has been breathtaking. *Eretz Yisrael* is not a land without a people, to be filled in with immigrants as they arrive or through “natural growth”; the only legitimate Israel is one shaped by where the Jewish people already are in majority. Yet, while fearing that they might be driven into the sea,

¹¹⁶ For those Israeli Jews whose civic horror of the Plan rests, even in part, on Israeli Arabs’ opposition to transfer, it would be interesting to consider what opinion they would have if the Arabs actually did want to separate and become part of Palestine. Because, of course, some do. See, e.g., Daniel Pipes, *Palestinians Who Prefer Israel*, JERUSALEM POST, January 1, 2008, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1198517266741> (last visited Jan. 30, 2008) (reporting on surveys showing 62 percent of Israeli Arabs “want to remain Israeli citizens and 14 percent want to join a future Palestinian state. Asked, ‘Do you support transferring the Triangle...to the Palestinian Authority?’ 78 percent oppose the idea and 18 percent support it.”).

¹¹⁷ I do not wish to enter the pointless debate over the historical provenance of Palestinian Arab and Jewish settlement in Cisjordan. It should be obvious that my argument draws no conclusions about the legitimacy of either community’s presence or about contemporary governance from historical narratives.

the Jews of Israel have found themselves on the banks of Jordan and in the suburbs of Beirut.

Although abhorred by many, the Lieberman Plan is, in its way, firmly in the mainstream of Israeli opinion, sharing the premises of all two-state solutions.¹¹⁸ Indeed, it distinguishes itself most in its clarity and its willingness to surrender something Israel possesses incontrovertibly. From its founding, Israel has maintained a studied, opportunistic ambiguity about its borders.¹¹⁹ That Lieberman—whom

¹¹⁸ The Israeli left argued for a two-state solution long before the right accepted the premise. See Gershom Gorenberg, *The Minister for National Fears*, 299(4) ATLANTIC MONTHLY 84 (May 2007); Ben Lynfield, *The Rise of Avigdor Lieberman*, THE NATION, Dec. 14, 2006, available at www.thenation.com/doc/20070101/lynfield (last visited Nov. 18, 2007) (“The left wing, for its part, has for many years used the phrase ‘demographic problem’ to describe Arabs.”). Ostensibly the left was concerned with the democratic and Jewish soul of the state—and the rights of Palestinians, let us never forget them—but it never fully grappled with the ethnic logic of its position. A glance at the maps of the Geneva Initiative—a group which holds Lieberman in horrified contempt—shows that its proposed border aims to put land containing as many Jews and as few Palestinians as possible into Israel. That the Initiative would not denationalize any *Israeli* Arabs while otherwise insisting on maximum separation seems a rather thin distinction; Lieberman has stripped that away.

¹¹⁹ That ambiguity also has implications for constructing citizenship. Cf. Ilan Jonas, *A Free People in Our Land: The Status of the Arab Sector in Israel*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, available at <http://www.mfa.gov.il/MFA/Government/Facts+about+Israel+The+State/A+Free+People+in+Our+Land+The+Arab+Sector.htm> (last visited Dec. 13, 2007) (“Upon its establishment in 1948, Israel...declared its aspiration to be a free and equal society and formally extended a hand in peace to the minorities found within its borders, as well as to its Arab neighbors.”) This formulation, which mirrors the Declaration of Independence, leaves open where Israel’s borders are, and with it who is a minority “within its borders” and who a “neighbor.” Cf. J.H.H. Weiler, *Israel, The Territories and International Law: When Doves are Hawks*, in ISRAEL AMONGST THE NATIONS: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL’S 50TH ANNIVERSARY 390 (Alfred E. Kellermann, Kurt Siehr, & Talia Einhorn eds., 1998) (“You exercise control over the territory... but you are able to deny the local citizens any political rights since they do not become citizens of the occupying State—and all this with the penumbra of legality...Legally you get the land without the people”).

many view as a profoundly hateful man, and one whose very presence in Israel is a direct consequence of that expansive policy—should be the one to indicate the high-water mark within which Zionism might finally contain itself, from which it will withdraw to democratically defensible frontiers, is an indictment of the real poverty and myopia that has beset Israel’s famously vigorous political conversation. At least the Plan assumes, rightly, that a discussion of democracy and Jewishness is incomplete if territory is left out of the equation: What creates that demographic conundrum in its fullest form is the insistence on a democratic and Jewish Israel *in its present borders*, which in effect reach to the Jordan. The Jewish people may have a right to preserve their state, yet there is no reason that state must encompass as much as it does; indeed, if democracy truly endangered Israel’s Jewishness, then the right response is not more immigration, not continued occupation and new settlements and the Iron Wall, but withdrawal to a demographically defensible frontier.¹²⁰ The Lieberman Plan may be the rankest pretext for Jewish chauvinism—though are not all two-state solutions fundamentally about preserving a Jewish state?—but at

¹²⁰ Cf. Ruthie Blum, *I Didn’t Suggest We Kill Palestinians*, JERUSALEM POST, Oct. 11, 2007, available at www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1191257273616 (last visited Nov. 18, 2007) (interview with Arnon Soffer, saying, *inter alia*, “I didn’t *recommend* that we kill Palestinians. I said we’ll *have* to kill them.”) (emphasis in original). Even Israelis less hardened than Soffer assume Jews must either annex land or be evacuated; few contemplate leaving Jews under Palestinian authority. (The FIPS report, for example, assumes Israel will keep most West Bank settlements and Arab-populated land giving access to them.) Israelis assume as a matter of course that a final deal will leave a Jewish society with an Arab minority, but not the other way round. And because evacuation is so inhumane, inevitably it is prescribed for only small populations—never for the bulk of the West Bank settlers—which predetermines a final deal in favor of expanding Israel. Cf. David M. Phillips, *The Unexplored Option: Jewish Settlements in a Palestinian State*, BEPRESS LEGAL SERIES, paper 1171 (2006), available at <http://law.bepress.com/expresso/eps/1171> (last visited Jan. 25, 2008).

least it acknowledges the directionality that project must adopt.¹²¹

Has a more liberal and cosmopolitan Israel been prepared to offer more, offer anything? Has it acknowledged that the only normatively defensible Jewish democracy must seek its level in something less? Have those whom David Grossman calls “thinking people” and “the decisive majority” actually placed on the table what Israel has already embraced and said they are prepared to give it up?¹²² I think no Arab believes that Israel has ever made, in any way, a generous or a radical offer.¹²³ And if, reading this now, you think to yourself, “But when

¹²¹ Lieberman’s candor perhaps exceeds his creativity: His proposal clearly rules out any territorial withdrawal from the Old City or the “Holy Basin,” any corridor from Gaza to the West Bank, or any refugee returns into Israel. See Yisrael Beytenu, *The Strategic Threats—The Red Lines—Principles for the Permanent Agreement—Introduction*, available at <http://www.beytenu.org/121/1252/article.html> (last visited Nov. 18, 2007). And although his proposals implicitly invoke the trilemma of democracy, Jewish identity, and territory, his own politics indicate a clear prioritization. See Lynfield, *The Rise of Avigdor Lieberman*, *supra* note 118 (quoting Lieberman saying, in Sept. 2007, “I very much favor democracy, but when there is a contradiction between democratic and Jewish values, the Jewish and Zionist values are more important.”).

¹²² David Grossman, *Looking at Ourselves*, 54 N.Y. REV. BOOKS Jan. 11, 2007, at 4, (Haim Watzman, trans.), available at <http://www.nybooks.com/articles/19770> (last visited Feb. 16, 2008). (“All thinking people, in Israel and in Palestine, know deep in their hearts the difference between... their dreams and wishes, and... what they can get at the end of the negotiations”); *id.* at 6 (“The decisive majority of Israel’s citizens now understand—of course, some of them without enthusiasm—...that the land will be divided, that there will be a Palestinian state”).

¹²³ Here is an example of a radical offer—radical, at least, given the constricted nature of the debate: When Israelis discuss the ‘48 refugees that debate ranges from symbolically acknowledging suffering, to admitting a few tens of thousands, to refusing to admit even a single one. Meantime, since 1990 Israel has absorbed a million Russian Jews with no more connection to Cisjordan—or often, even to Judaism—than I have. Never have Israelis seriously contemplated significant returns, assuming that to do so would be demographic suicide. But if Israel were to enact the Lieberman Plan *and* admit into its new frontiers a number of ‘48 refugees equal to its Russian immigrants, Jews would still outnumber Arabs *three to one*. An offer to admit a million refugees might have broken the impasse at Camp David and Taba

have the Arabs been generous to Israel?”—well, you are right, but you also prove the point.

In claiming beyond itself, Israel and its Jews have encompassed but not embraced another people, and this has been, I think, the original and continuing sin of Zionism. But that origin is history; it is the continuation that requires a decision. Israel, as a Jewish state, is far more in control of its demography and its destiny than those it occupies, and so Israel—I mean the Jews—must decide if it wishes to continue to live with this other among it, and if so, decide to do those things that, as both law and reason tell us, living together requires.

III. WITHDRAWAL: THE STATE IS THE DEMOGRAPHIC THREAT

[I]t does not suffice to open your doors when the other doors are bolted. You permit our going out, but nobody allows our coming in....If it became apparent that it was impossible to come to an agreement with His Majesty the Sultan, if his unbending will shut us out of Palestine, then, still solemnly asserting our undying historical claims to the land of our fathers... we should have to be patient and wait. We can afford to wait.

*Max Nordau, Address at the Sixth Zionist Congress
(The 'Uganda' Congress), 1903*¹²⁴

while preserving a Jewish, democratic state—and Palestinians might even fail to fill the quota (see Hassan M. Fattah, *For Many Palestinians, 'Return' Is Not a Goal*, N.Y. TIMES, Mar. 26, 2007). Of course, such an idea is ludicrous—but that simply indicates the contours of Israeli opinion. That Jewish Israel would have no demographically defensible borders if *all* the refugees returned simply indicates the enormity of the displacement the Zionist project has created in Cisjordan—and consequently the need for Israel and its Jews to make enormous and profound concessions.

¹²⁴ Max Nordau, “Address at the Sixth Zionist Congress,” Basel, Aug. 24, 1903, available at <http://www.geocities.com/Vienna/6640/zion/nordau6.html> (last visited Nov. 18, 2007).

Transfer may be a terrible idea. Certainly the moral discomfort that attaches even to discussion of this kind of thing is almost visceral. I am not trying to defend the Lieberman Plan or any other transfer. As I wrote the first draft of this, I had never even been to Israel, so what do I know about it? I have sought rather to consider the broader normative framework: That framework shows transfer is probably defensible, either in law as an expression of majority will directing the policy of the state, or, logically, as an expression of the self-determining will of a self-defining community. My argument shows that the proper realm for contesting the question of transfer is the political, not the legal—at most, the international legal framework is unclear, which normally indicates, in practice, permission.

So it is best to recognize that and instead consider the underlying, conflicting norms: That means those who oppose the Plan must mobilize moral and political reasons, and likewise those who favor it. Those who are horrified by the Lieberman Plan but also advocate a two-state solution should acknowledge the deep affinities between their approaches. It is a serious thing to change the borders of a state and to reject a political community, even one as fractious and unhappy as that between Israel's Jews and its Arabs. Simply because one can, legally, pursue the Plan, does not mean that one must, or even that one should.

My argument is not about which choice to make, but about the choosing. It suggests that Jews have a legitimate claim to define their homeland, subject to important limits arising out of Palestinians' legitimate claim to define theirs; the reverse is also true. It suggests too that Israel's citizens—and Palestine's—can redefine or reject their common identity. One might hope they would choose a common future—still, it is for the Jews or Palestinians to decide about the wisdom or folly of such a future. That is perhaps the point: I think they are, each, free to choose—though for a long time now, it is the Jews who have been freer to act.

This is not a withdrawal from liberal principles or a capitulation before religious chauvinism or ethnic hatred. It is, undoubtedly,

the abandonment of an *enforced* ideal of individualism and cosmopolitanism that insists equality and non-discrimination are sufficient to motivate any political configuration regardless of the views of those actually configured. It represents, in this sense, pragmatism about what one can, and should, ask of a polity. If my argument has its own ideal, it is respect for the decisional autonomy of human beings to define their own identity and community, and to draw the political consequences—and borders—for themselves.

It is therefore also an assertion that focusing on egregious efforts to alter demography as violations of law often distracts us from the most powerful determinant of demography: the state itself, with its control of territory. International law has found no effective means to regulate the demographic effects of mere sovereignty. Rather, it engages in a reactive, *post hoc* response to symptomatic excesses of sovereign control. Human rights police the excesses of “pathological homogenization,”¹²⁵ but not the background processes which legitimate states’ power to define their demography. For all its success in limiting sovereignty, human rights has never developed a vocabulary to define, let alone delegitimate, the quotidian processes of homogenization: the use of official language, the teaching of common history, patterned bias in planning decisions and resource allocation, the construction of patriotic symbolism, and on and on. Even democracy allows the majority to define the agenda, the definitions, and the very meaning of statehood, in a way which the idea of rights neither reaches nor comprehends.¹²⁶

¹²⁵ HEATHER RAE, *STATE IDENTITIES AND THE HOMOGENISATION OF PEOPLES* (2002).

¹²⁶ Consider this analysis from FIPS, which of course is opposed to transfer as an illiberal abandonment of equality principles. In a serious dialogue, FIPS argues, Israel’s Jews:

Will have to address their responsibility for the equation of the relations between their community and the Jewish population, which perceives the Arabs as a foreign body in their own homeland and state.

The modern Jewish presence in Cisjordan is the *locus classicus* of this process: from being a minority on the eve of independence, Jews, through the instruments of the state, have systematically engineered an overwhelming Jewish majority within that state's territory.¹²⁷ The initial refugee flights—whether caused by Israel or not—are only part of that process,¹²⁸ which has involved discrimination, sponsored immigration,¹²⁹ conquest and settlement of territory, and

Our recommendation is not to fear this debate. However, it must also be understood that it is not part of the debate regarding the peace process and the borders of the state. Rather, it is part of the central debate relating to the character of the state, the relationship between its 'Jewish' and 'democratic' aspects, and the historic duality of the conduct towards the Arab minority in the state.

ARIELI & SCHWARTZ, *supra* note 7, at 94-5. This view is sympathetic to Israeli Arabs. Yet notice the presumption and preemption: why must this debate be understood as one *within* the state, and not *about* it? Such a position ensures the debate cannot reach that question even if its participants want to, and—more to the point—that the discussion will be one-sided, its outcomes circumscribed. Israeli Arabs value their citizenship, but can anyone doubt that if they were the majority, they would have a very different conversation with Israel's Jews?

¹²⁷ Jews constituted a majority within the UN partition plan's proposed Jewish state, but a minority in the territory which became Israel after the 1948 war.

¹²⁸ Cf. Scott Wilson, *Israel Revisited*, WASHINGTON POST, Mar. 11, 2007, at D1, D7 (quoting "new historian" Benny Morris: "If [Ben-Gurion] was already driving out people, maybe he should have gone the whole hog....Perhaps in the end population exchanges and transfers, although they may have caused great suffering at the time, may in the long run have been better for everyone concerned.").

¹²⁹ Israel's immigration policy is instructive: Israel has long relied on large-scale temporary workforces from the West Bank and Gaza, implying a structural employment gap Arabs are willing to fill. Yet Israel prevents individual Palestinians from immigrating, while at the same time aggressively recruiting Jewish immigrants and unskilled workers from Thailand, the Philippines, and other developing countries, to replace Palestinian workers shut out by restrictive policies in place since the second Intifada. See, e.g., Martin Asser, *Israeli Anger Over 'Nazi' Group*, BBC NEWS, Sept. 10, 2007, available at http://news.bbc.co.uk/2/hi/middle_east/6987848.stm (last

every imaginable facet of governance.¹³⁰ In such a context, the physical boundaries of state control have been critical to defining the demographic majority, which in turn defines the identity of the state.

The response of liberalism to the demographic power of the state—trusting to cosmopolitan principles and human rights to police states’ majoritarian instincts; relying on formalistic theories of civic identity to motivate citizenship; supporting territorial integrity but not means of flexible revision—too often leave no means to ameliorate repression, resolve conflicts arising out of radically different visions for a single polity or piece of land, or offer escape. Those without the means to participate are locked in; majorities are locked in too, but the prison-house of the nation is less painful if one is the warden.

Minorities are not helpless before the power of the ethnicized state; efforts to reform (or destroy) particular identities often fail or backfire. (Israel’s sustained repression of the residents of the Occupied Territories has only reinforced their identity as Palestinians.) Still, states possess, and exercise, tremendous resources for shaping demographic shifts; although it is rare to extinguish a vibrant, nationally conscious

visited Nov. 18, 2007) (discussing immigration of former Soviet Jews and that “[s]ome of the immigrants are thought to have only the most tenuous links to Judaism”); Amos Oz, *Free at Last*, YNET NEWS, May 2005, available at <http://www.ynetnews.com/articles/0,7340,L-3130842,00.html> (last visited Nov. 18, 2007). The result has been a spectacularly—if to some still insufficiently—successful demographic shift in favor of Jews in the migration pool.

¹³⁰ The ownership structure of land in Cisjordan has changed dramatically since independence: in 1947, Jews owned, at most, eight percent of the land, while Arabs owned just under half and possibly considerably more. Institute for Palestine Studies, *A SURVEY OF PALESTINE: PREPARED IN DECEMBER, 1945 AND JANUARY, 1946 FOR THE INFORMATION OF THE ANGLO-AMERICAN COMMITTEE OF INQUIRY 244 (1946)*, Table 1 (“Areas Purchased by Jews, 1920-1945,” available at <http://www.palestineremembered.com/Articles/A-Survey-of-Palestine/Story6685.html> (last visited Jan. 31, 2008); “Palestine, Land Ownership by Sub-districts,” (map) (1945), available at <http://domino.un.org/maps/m0094.jpg> (last visited Jan. 30, 2008). Today, Jewish or Israeli state control of land is the norm, and mostly this has been done through legal means, even as the demographic balance has dramatically shifted in the Jews’ favor.

community, it is rarer still that a majority culture in a state is ever seriously threatened by other identities. So when a majority *feels* threatened, withdrawal is the only ethically acceptable defense for the powerful—clearly, I mean the Jews—to ensure their continued dominance in a territory of their own; just as it is the opportunity for the weak—unquestionably, the Palestinians—to take up the tools of the state, for which they have so long waited, and define their own destiny.

See, land, that we were most wasteful.
– *Shaul Tchernichowski, 1938*¹³¹

It is not wrong to conclude that two peoples have separate identities, with different destinies. The nation is a daily plebiscite, Renan said,¹³² and we might add that, in asking each day “are we a nation,” the answer is not always yes. And so, on the day when the answer is no, we two are not one, neither is it wrong then to ask what should result, however difficult such questions are. What does seem clearly wrong, in answering, is to tell the other, “Because you are no part of me, you must go—and leave your land behind.” No, it is they who reach that conclusion who must make the sacrifice; it is they who must depart.

¹³¹ *Quoted* in Grossman, *supra* note 122, at 4.

¹³² Ernest Renan, “Qu’est-ce qu’une nation?” (lecture at the Sorbonne), Mar. 11, 1882, 1 OEUUVRES COMPLETES 887-907, *available in translation at* http://www.cooper.edu/humanities/core/hss3/e_renan.html (last visited Jan. 31, 2008).