

**A Response to "Demography, Human Rights and Diversity Management,
American-Style" by Peter Schuck**
By Tally Kritzman*

In the last decades, there is growing scholarly concern about the tension between the goal of protecting human rights and the need of societies to recognize, accept, and nurture a plurality of cultures and lifestyles belonging to individuals and groups (especially minority groups). Among the prominent scholars who have published extensively on these issues are Charles Taylor and Will Kymlicka.¹ These scholars and others discuss various aspects of this dilemma including the tension between liberalism and individualism and the protection of cultures; the content of citizenship in a multi-cultural society; the meaning of authenticity; the politics of identity; and the level of tolerance that liberalism should adopt toward different cultural groups. This body of work presents moral arguments and policy recommendations.

Prof. Peter Schuck's paper, titled "Demography, Human Rights, and Diversity Management, American-Style", which is based on his book "Diversity in America: Keeping Government at a Safe Distance",² contributes to this discussion by recommending policies for managing diversity. Prof. Schuck's discussion is deeply-rooted in the American context, in which the term "diversity" has been sanctified and serves as a focal point for important, albeit controversial, policy decisions.

In this response, I will focus on Prof. Schuck's argument that states should not protect diversity but should rather promote it. I will also compare the diversity management policies in the United States to the situation in Israel.

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¹ See, for example, Charles Taylor *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, New Jersey, 1994); Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford : Clarendon Press, 1995).

² The Belknap Press of Harvard University Press, Cambridge MA and London England, 2003.

Prof. Schuck begins with a thorough examination of the meaning of the term "diversity",³ a term which is often misused or used to mean very different things, depending on the speaker and the context. Schuck maps the different meanings of the word, with the goal of improving the accuracy of the term and in the robust discussion of it. Schuck points to the fact that diversity can be understood *normatively*, as having a social value, or *descriptively*, as a characteristic of a society; that diversity could refer to *individuals* as well as to *groups* – and within the context of group diversity could refer to *inter-group* or *intra-group* diversity; and that it is possible to talk not only of *demographic* diversity but also of *substantive* diversity. Schuck points out the fact that the size of the community in which diversity is discussed matters (*large-scale* or *enclave* diversity). He draws additional distinctions about the role of the law with respect to diversity, saying that the law can *protect existing diversities, promote diversities, exploit them or empower them*.

Following the comprehensive discussion of diversity, Prof. Schuck turns to two test cases which illustrate, in his view, how diversity was managed in a problematic manner. The first example is that of the United States Census categories of race, which classify many persons into categories that do not match the way they perceive themselves. More specifically, Schuck notes that the Census's arbitrary categories classify many multi-racial persons as belonging to racial minority groups.⁴ The second example Schuck uses is the rather problematic efforts to control racial-profiling by police officers by collecting data on the race, ethnicity or national origin of the individuals they stop.⁵

From these examples, Prof. Schuck offers a number of thought-provoking insights about the shape which diversity management should bear. *First*, he argues that governments should not try to promote specific diversities. Schuck argues that diversity's value depends on its provenance, and that by defining and promoting a category of diversity, the state would actually diminish its value. This is so because in order to promote diversity, a state must define and certify identities in ways that it is ill-equipped to do. Law by its nature is unable to create values and experiences that

³ Pp. 4-12.

⁴ Pp. 12-14.

⁵ P. 15.

successfully imitate diversity, and therefore it can only produce artificial-looking diversities which in turn seem unworthy of promotion. The more law tries to promote diversity, the less legitimate diversity seems.⁶

Second, Schuck argues, governments should protect existing diversities and emerging ones from suppression in the form of discrimination and monopoly. The first goal should be achieved by restrained non-discrimination norms, rather than by affirmative action. Additionally, the government should refrain from imposing its own point of view and from allowing a situation of monopolization that disables new forms of diversity to emerge. Finally, the government should allow individuals to self-identify as they wish, rather than impose a certain identity on them.

Protecting Diversity vs. Promoting Diversity

My first point refers to Prof. Schuck's argument that the state should manage diversity by *protecting* diversity but by refraining from *promoting* it. He argues that promoting diversity creates a risk of promoting injustice. Additionally, Prof. Schuck expresses his view that the government should maintain conditions which allow new diversities to emerge.

I confess to finding it difficult to distinguish between the protection of diversity and its promotion. It seems to me that the protection of diversity is also its promotion, and vice-versa. When the state refrains from promoting a certain minority, it perpetuates the status quo balance of powers among diversities, which has the effect of promoting values favored by the majority or dominant group. Therefore, it is impossible to protect diversity without promoting it. Additionally, without promoting diversity it seems likely that its emergence will often be impossible, or at least difficult and dependent on arbitrary factors which bear impact on the group's ability to organize.

I would therefore like to ask Prof. Schuck to clarify where he draws the line between promotion and protection of diversity, taking into account that the existing

⁶ Pp. 16-22.

balance between diverse groups is not neutral but rather reflects, at least in part, previous governmental policies that promoted particular groups and/or a particular kind of diversity.

Diversity and Its Authenticity

My second point relates to Prof. Schuck's use of the term "authentic diversity". Prof. Schuck argues that "we value diversity only if and to the extent that we think it arises from a legitimate source and perceive it as authentic, uncontrived. [...] We value diversity that seems to reflect human spontaneity, personality and achievement [...] more highly than diversity that government designs, manufactures, certifies and mandates [...]. Although law has many strengths, the ability to create the values and experiences we associate with genuine diversity is not one of them".⁷ Moreover, he argues that "government and law are natural enemies of diversity, especially when they are most eager to create it".⁸ Prof. Schuck views "authentic diversity" as an authentic collection of diverse "authentic identities". He seems to define authenticity as behaving in a way that conforms to an identity which is self-made, given and static, as well as spontaneous, inherent and perhaps primordial.⁹ Schuck argues that the law provides incentives for people to do "unauthentic" things; for example, the law offers Native Americans incentives to define themselves as Indians even if they would otherwise view themselves as White.¹⁰

I would like to suggest considering other perceptions of the term "authenticity" and "authentic identity". On my reading, on an ongoing basis, individuals and groups negotiate and struggle with other individuals and groups in society, in order to form their own original and exceptional identity in a diverse

⁷ P. 19. See also P. 9 on a similar point ("[O]fficial definition and certification of an identity or diversity tend to impair its authenticity, legitimacy and diversity-value, to deform its meanings, and to skew peoples' incentives for self-identifying in particular ways").

⁸ P. 20.

⁹ This conception of authenticity does not conform to the fact that Schuck believes that forming a self-identity is a choice (p. 26 ff.) and that there is no "scientific" meaning to some identity-creating factors (p. 12). On the last point, it is important to note that whether or not race can be proven scientifically, it does, in fact, matter to many people.

¹⁰ This is but one of many examples provided by Prof. Schuck, on p. 13 and 18.

society.¹¹ On this understanding of authenticity, "identity" is formed not as a result of the detached decision or cultural affinity of an individual or a group but rather, among other things, identity is shaped by the affirmation and recognition of other groups and individuals in society.

Although law, by its nature, must address gross categories and is unable to capture many nuances, it cannot refrain from participating, along with many other social institutions, in the process of shaping people's identity, because law is never neutral toward identity.¹² People are "authentic" if they behave according to their understanding of identity which they create in the context of society and its formative forces – and law is necessarily a prominent formative societal force.

Additionally, I believe that since law has such a significant role in shaping identities, it should not be viewed as the enemy of diversity. There are some examples of states in which law is utilized to promote diversity and help maintain multi-cultural societies, for example the United State's northern Neighbor, Canada. These examples demonstrate that law is not necessarily the enemy of diversity but rather is sometimes diversity's supporter.

To take Schuck's example of Native Americans, it would be more accurate to say that as Native Americans form their "identity", they run into numerous contradictory incentives to define themselves in various ways, incentives whose roots are in law and in other social forces. This "identity" is necessarily formed in response to the law in some way, irrespective of what legal policy has been chosen, and notwithstanding attempts at "neutrality". It can therefore be argued that when the law does not provide affirmation for being Native American, it creates a risk that people or groups would be reluctant to identify themselves as Native American and would be inclined to identify themselves as members of the group which is promoted by the law (namely the majority group of whites). I would welcome Prof. Schuck's response to this critique and would ask him to elaborate on his definition of "authentic diversity"

¹¹ See, for example, Charles Taylor's discussion of the authentic ideal and the origins thereof in *The Ethics of Authenticity* (Harvard Univeristy Press, Cambridge MA and London, 1991); Charles Taylor *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, New Jersey, 1994), pp. 28-36.

¹² Prof. Schuck confirms this with respect to allocation rules, on p. 13.

and how he believes that it is formed – given the non-neutrality of historical and social forces that have created a non-neutral balance between societal groups.

The Success of Diversity Management in the United States and in Israel

My third and final point has to do with Prof. Schuck's evaluation of the success of the diversity management efforts in the United States. Prof. Schuck is content that the "United States has been *relatively* successful in managing its diversity in recent decades" despite the fact that "serious, long-lasting problems in integration of certain minorities in the U.S. remain, most notably with respect to three groups: Native-Americans, 'underclass' black men, and unskilled, often undocumented, immigrants".¹³ Prof. Schuck does not mention whether he believes that this problem in integration of the above-mentioned groups is a structural problem in the American society or whether it is changeable.

This description of American society – as mostly successful in managing diversity with a few unfortunate exceptions – grossly understates the significance of American failures in managing race relations, failures which are historical in origin but continue to the present time. The three groups mentioned represent significant groups within American society. According to the 2005 U.S. Census, there are over 34 million African Americans and over 2 million Native Americans living in the U.S.¹⁴ Although Schuck's findings rightly conclude that the Census is highly inaccurate, it does give a pretty good approximation of the diversity in American society. Together with over 11 million undocumented immigrants,¹⁵ these three groups constitute a significant portion of the American population. The fact that the members of these large social groups are still marginalized, have not yet been integrated into society and continue to suffer from discrimination sheds a gloomy light on the success of the diversity management. Rather than characterize American management of diversity as generally successful with some notable exceptions, I

¹³ Pp. 2-3.

¹⁴ http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2005_EST_G00_&-lang=en&-caller=geoselect&-format= (last visited January 3, 2007).

¹⁵ Pew Hispanic Center "Size and Characteristics of the Unauthorized Migrant Population in the U.S. Estimates Based on the March 2005 Current Population Survey" (July 3rd, 2006) on: <http://pewhispanic.org/reports/report.php?ReportID=61> (last visited January 3, 2007)

would argue that the failure of the United States to integrate significant societal groups is a dominant feature of the American model that raises serious questions about its coherence and desirability.

Turning to Israeli society, I must say that an optimistic conclusion cannot yet be reached. In the Israeli context, diversity management is an emerging subject in the Israeli demography debate. Although descriptively speaking, as an immigrant society, Israel is extremely diverse, diversity in the normative sense of the word was not perceived as a value worth promoting during the first years of the state's existence. Discussions of demography were dominated by voices seeking to promote and preserve the Jewish majority and to create a "melting pot" to assimilate Jewish immigrants into the Israeli society. *De facto*, Israeli society promoted Ashkenazi middle/upper-class straight Jewish men over Sephardic or non-Jewish (or unorthodox) or female or gay or lower-class or disabled members of society. This left little room for policy-makers and scholars to explore the value of diversity and its desirability.

In Israel's early days, to some extent, the only form of diversity that was promoted was a limited form of gender diversity. Anti-discrimination norms and privileges for women, especially in labor law,¹⁶ can be traced back to the first years of Israel's independence.¹⁷

Only recently did the diversity debate recognize the need to promote diversity management both to protect the rights of non-Jewish populations in Israel as well as diverse groups within the Jewish population.¹⁸ Israel diversity management still needs to deal with diversity along the lines of religion, disability status, ethnicity, status and

¹⁶ Although most of the legislation focused on women's rights in the labor market, some other diversity management efforts were invested in other fronts, including the general Equal Rights for Women Law, 1951 – 5711. Other examples can be found in regulations made by political parties to insure representation of women in their lists of candidates for the Israeli Parliament.

¹⁷ Traces of the desire to protect gender diversity in the labor market can be found starting from The Women's Labor law, 1954 – 5714. A more recent example is The Equal Salary for Male-Employees and Female-Employees Law, 1996 – 5756. On the adverse effect that such protections and privileges had on the social status of women see: Pnina Lahav "The Status of Women in Israel: Myth and Reality" 22 *American Journal of Company Law* (1974) 107, 124-125, 128.

¹⁸ See, for example, on of the earliest projects on diversity in the Israeli society: Sami Samooha *Israel: Pluralism and Conflict* (Routledge and Kegan Paul Press, 1978). Compare with: Yaakov Kop & Robert E. Litan *Sticking Together: the Israeli experiment in pluralism* (Washington, DC: Brookings Institution Press, 2002). It should be noted that in both of these projects gender diversity is not dealt with. See also Ohad Nachtomy (ed.) *Multiculturalism in the Israeli Context* (The Hebrew University Magnes Press, Jerusalem, 2003).

nationality, as well as gender, although, as I mentioned before, some progress has been made in this last front. The Arab minority, as well as certain groups within the Jewish majority, lack access to proportional political power and consequently are allocated resources in a discriminatory fashion. Also, the integration of non-Jewish migrant workers, whose immigration is a rather recent phenomenon which poses new challenges to Israel as a Jewish state, has hardly been dealt with yet.¹⁹ All of the above-mentioned groups are often excluded from participation in institutions and feel alienated from the dominant social groups, cultures and symbols. In this context, as the normative value of diversity is slowly internalized by Israeli society, it will have to develop legal tools to protect and – I argue, in contrast to Prof. Schuck's claim – also to promote diversity.

These measures thus far have taken the form of affirmative action – and not just of anti-discriminatory norms – including, for example adequate representation in government employment and on boards of directors of government-owned companies.²⁰ These legal measures to promote diversity, paradoxically, have developed side-by-side with discriminatory measures also grounded in law, including disproportionate allocation of public resources, adherence to gender-biased religious law and nationality-specific security regulations. The limited affirmative action measures taken, though important, are insufficient to achieve the goal of genuine diversity.

In Israel, the High Court of Justice plays a significant role in promoting and protecting diversity, including, where needed, mandating affirmative action as well.²¹ Much of the progress in the diversity management in the Israeli society can also be

¹⁹ While migrant workers constitute the largest group in the non-Jewish migrant population, the same can be argued with respect to other groups of non-Jewish migrants (for example: refugees and asylum seekers). Regarding migrant workers exclusion in Israeli Society see: Adriana Kemp, Rebeca Raijman, Julia Resnik, Silvina Schammah Gesser "Contesting the limits of political participation: Latinos and black African migrant workers in Israel" 23 *Ethnic and Racial Studies* (2000), 94.

²⁰ See, for example: Article 6 to The Government Companies Law, 1993 – 5753, Article 15a to The Civil Service Law (appointments), 1959 – 5719, which mention a duty of adequate representation of diverse groups. Compare with Article 3 to The Equal Opportunities for Persons with Disabilities Law, 1998- 5758, which uses the term "affirmative action" explicitly.

²¹ The High Court of Justice was particularly active in promoting and protecting gender diversity. This was done in the most obvious way in H CJ 2671/98 Israel Women's Network (Shdulat Hanashim) v. The Minister of Labor and Welfare. However, a similar position was not taken by the court with respect to ethnic diversity. See: Meital Pinto and Hillel Somer "The Role of the Judicial Branch in Fortifying the Affirmative Action in Israel" (published in Hebrew) in Anat Maor *Affirmative Action and Equal Representation in Israel* (Ramot, Tel Aviv University, 2004), pp. 195-217.

attributed to sectorial NGOs who have brought cases before the High Court, lobbied legislators and engaged in community empowerment. A comparative look at Israel's diversity management leads me to a fourth question for Prof. Schuck, concerning a topic he doesn't explore in his paper, namely the question of which social institutions he believes should be the agents of diversity management in American society. More specifically: what is the role that courts should have in diversity management? What other social institutions should engage in diversity management?

Conclusion

To conclude, diversity management is a significant policy issue in today's multicultural societies, including Israel and the United States. Prof. Schuck's paper offers important guidelines on how diversity management should be conducted, in order to optimize our struggle to achieve substantial equality and a robust and pluralistic social atmosphere of acceptance. He rightfully warns us from the possible harmful effects of excessive government intervention in diversity management. Yet I believe that some affirmative government intervention should often be included in diversity management since law necessarily plays a part in managing diversity and is never neutral to this matter. The role of the law in diversity management should however continuously be examined and improved.