The Ashgate Research Companion to Feminist Legal Theory

Edited by

MARGARET DAVIES
Flinders University, Australia

VANESSA E. MUNRO
University of Nottingham, UK

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Feminists Rethink Multiculturalism: Resisting Essentialism and Cross-Cultural Hypocrisy

Sarah Song

'Multiculturalism' is sometimes used as a descriptive term to refer to culturally pluralistic societies. This chapter examines the idea of multiculturalism in its normative sense – as a set of moral, political and legal claims about the proper way to respond to cultural diversity. A basic premise of theories of multiculturalism is that mere toleration of group differences falls short of treating members of minority cultural groups as equal citizens. What is required instead is recognition or positive accommodation of group differences.

The philosopher Will Kymlicka (1995), a leading theorist of multiculturalism, coined the term 'group-differentiated rights' to refer to a range of legal and political exemptions, accommodations, and forms of assistance to cultural minorities. Some group-differentiated rights are held by individual members of minority groups, as in the case of individuals who are granted exemptions from generally applicable laws in virtue of their religious beliefs or individuals who seek language accommodations in voting or education. Other group-differentiated rights are held by the group qua group rather than by its members severally; such rights are properly called 'group rights', as in the case of limited self-government rights extended to indigenous groups and minority nations who claim the right of self-determination. In the latter respect, multiculturalism is closely allied with nationalism.

While multiculturalism has been used as an umbrella term to characterize the claims of a wide range of disadvantaged groups, including women, racial minorities, LGBT persons, and the disabled (see, for example, Taylor 1992), most theorists of multiculturalism tend to focus their arguments on immigrants who are ethnic and religious minorities (for example, Mexican Americans, Jews and Muslims in Western Europe and North America), minority nations (for example, Catalans, Basque, Welsh, Québécois), and indigenous peoples (for example, Native peoples in North America, the Maori in New Zealand).

Feminist scholars have turned their attention to the theory and practice of multiculturalism with an eye toward its effects on women and other vulnerable members of minority groups. This chapter explores feminist engagement with multiculturalism. It begins with a discussion of what claims of ‘culture’ consist of and how multiculturalism

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1 For helpful comments on this chapter, I am very grateful to Sara Ludin and the editors of this volume, Margaret Davies and Vanessa Munro.
has been defended before turning to examine feminist critiques. Particular legal cases and political controversies will be discussed along the way.

Claims of Culture

Multiculturalism is closely associated with 'the politics of difference' (Young 1990), 'the politics of recognition' (Taylor 1992, Fraser and Honneth 2003), and 'identity politics' (Gutmann 2003), all of which share a commitment to revaluing disrespected identities and transforming dominant patterns of representation and communication that marginalize certain groups. Contemporary theorizing about multiculturalism largely takes for granted that it is 'culture' and 'cultural groups' that are to be recognized and accommodated. If we look closely at the range of claims made in the name of 'culture', we see a broad range of claims involving religion, language, ethnicity, nationality and race. Culture is a notoriously overbroad concept, and all of these categories have been subsumed by or equated with the concept of culture (Song 2008).

Examples of cultural accommodations or 'group-differentiated rights' include exemptions from generally applicable laws (for example, religious exemptions); assistance to do things that the majority can do unassisted (for example, multilingual ballots, funding for minority language schools and ethnic associations, affirmative action); representation of minorities in government bodies (for example, ethnic quotas for party lists or legislative seats, minority-majority Congressional districts); recognition of traditional legal codes by the dominant legal system (for example, granting jurisdiction over family law to religious courts); or limited self-government rights (for example, qualified recognition of tribal sovereignty and federal arrangements recognizing the political autonomy of Quebec) (for a helpful classification, see Levy 1997).

Much scholarly discourse on multiculturalism revolves around religious examples: religious exemptions from generally applicable laws, the recognition of the traditional legal codes of religious communities, and limited self-government rights for territorially concentrated religious minorities. Familiar examples of religious exemptions include the Amish who want to be exempt from schooling requirements, Sikhs who wish to be exempt from helmet laws, and Muslim girls and women who seek to wear the headscarf or burqa in public spaces. Following John Locke, contemporary liberal theorists tend to privilege a particular understanding of religion – as a matter of inner belief and conscience, which serve as a source of normative authority and are regarded by believers as binding ethical commitments (Cohen 1998, Scheffler 2007). Because religion, understood as inner belief and conscience, has this normative authority, liberal theorists privilege religion over more

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2 The tendency to conflate culture and religion is not surprising. First, religious observance is shaped by local and national culture, as suggested by the great differences between, for example, the Indonesian, Indian, and Iranian forms of Islam. Influence also runs in the other direction: religious practice shapes local and national cultures. For example, Amish religion shapes the Amish way of life, and Christianity has deeply shaped the modern cultural norms and practices in the West. Second, individuals and groups seeking legal accommodations may have incentives to blur the distinction between religion and culture. Most Western liberal states have strong legal protections for religious freedom, so individuals or groups seeking accommodation of particular practices may be compelled to present those practices as 'religious' rather than merely 'cultural'.

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purely ‘cultural’ claims. Expressions such as ‘cultural norms’ or ‘cultural values’ are viewed as descriptions of convention, what people already do, not a source of normative authority in the way religious beliefs are.

Along with religion, language is at the centre of cultural claims-making (Kymlicka and Patten 2003). Each nation state typically establishes a common language in which to conduct its affairs. In the course of liberalization, Western states relinquished the notion that a common religion was integral to national integration, but the opposite occurred with respect to language, which moved to the fore as the single most important element in the construction of national identity. Nation-building has been fuelled by more malignant motives than the mere need for a lingua franca (not least racism and xenophobia) such that forging a common language has sometimes involved the domination and suppression of minority languages and identities. Consider the ethnolinguistic conflict in Eastern Europe after the fall of communism in 1989; the debate over official multilingualism in Canada and Spain; and the debate over bilingual education in the US.

In addition to religion and language, ‘culture’ also signifies the different rituals and customs involving food, dress, family roles, and musical and other artistic practices that constitute a way of life for a group. Ethnic minorities have sought exemptions from general rules that penalize or constrain their customs, as well as positive assistance from the state to pursue and preserve their group traditions (for example, funding for ethnic associations) and symbolic recognition measures (for example, national holidays, school curricula).

The cultural claims of immigrants and ethnic minorities comprise only a part of leading theories of multiculturalism. Another central claim of ‘culture’ has been the claim of self-determination by minority nations and aboriginal groups. It is no accident that many of the leading theorists of multiculturalism (Kymlicka (1989) and (1995), Taylor (1992) and (1995), Tully (1995)) are writing in the context of Canada where the cultural claims that loom large are those of Quebec and First Nations. In contrast to ethnic and racial minorities, minority nations have sought some measure of political autonomy through secession (for example, Slovenia) and federal arrangements (for example, Quebec, Catalonia, Native tribes).

Race has had a more limited role in multicultural discourse, and most theorists of multiculturalism have provided little guidance for thinking about the relationship between race and culture. For instance, Kymlicka (2001: 198) has written that his theory of multiculturalism is not intended to address the concerns of racial minorities, emphasizing that a sui generis approach is needed to overcome the racial exclusion of black minorities, ‘the group which is most in need’ among visible minorities in Canada and the US. In contrast, Charles Taylor includes African Americans in his discussion of multiculturalism when he discusses the ‘canon wars’ in the university and the issue of self-respect among racial minorities in light of demeaning images projected in the wider society (Taylor 1994: 26, 65). Antiracism and multiculturalism are distinct but related ideas: the former highlights ‘victimization and resistance’, whereas the latter highlights ‘cultural life, cultural expression, achievements, and the like’ (Blum 1992: 14). Claims for recognition in the context of multicultural education are demands not just for recognition of aspects of a group’s cultural traditions and practices (for example, African American art and literature) but also for acknowledgment of the history of group subordination and its concomitant experience (Gooding-Williams 1998).

With these myriad claims of ‘culture’ in mind, let us turn to consider normative justifications and critiques of multiculturalism.
Leading Theories of Multiculturalism

There are at least three prominent justifications for multiculturalism in the existing scholarly literature.

Communitarian

One justification for multiculturalism arises out of the so-called 'communitarian' critique of liberalism. Liberal theorists have typically been committed to ethical individualism; they insist that individuals should be free to choose and pursue their own conceptions of the good life. They have tended to give primacy to individual rights and liberties over community life and collective goods. Some liberals are also individualists when it comes to social ontology, holding a view that some call methodological individualism or atomism. Atomists believe that you can and should account for social actions and social goods in terms of properties of the constituent individuals and individual goods. The target of the communitarian critique of liberalism is not so much liberal ethics as liberal social ontology. Communitarians reject the idea that the individual is prior to the community, and that the value of social goods can be reduced to their contribution to individual well-being. They instead embrace ontological holism, which views social goods as 'irreducibly social' (Taylor 1995). It is this holistic view of collective identities and cultures that underlies Charles Taylor's argument for a multicultural 'politics of recognition' (1992). Diverse cultural identities and languages are irreducibly social goods, which should be presumed to be of equal worth. Recognition of the equal worth of diverse cultures requires replacing the traditional liberal regime of identical liberties and opportunities for all citizens with a scheme of special rights for minority cultural groups.

Liberal Egalitarian

A second justification for multiculturalism comes from within contemporary liberalism. Partly as a response to the charge that liberalism cannot adequately account for the value of cultural membership and identity, Kymlicka has developed the most influential theory of multiculturalism based on the liberal values of autonomy and equality (Kymlicka 1989; 1995, 2001). In contrast to communitarian accounts of multiculturalism, Kymlicka's account is based on an instrumental defence of culture. Culture is instrumentally valuable to individuals for two reasons. First, it enables individual autonomy. One important condition of autonomy is having an adequate range of options from which to choose. Cultures provide contexts of choice, which provide and make meaningful the social scripts and narratives from which people fashion their lives (see Appiah 2005). Second, culture is instrumentally valuable for individual self-respect. Drawing on theorists of communitarianism and nationalism, Kymlicka argues that there is a deep and general connection between a person's self-respect and the respect accorded to the cultural group of which she is a part. It is not simply membership in any culture but one's own culture that must be secured because of the great difficulty of giving it up.

Relying on these premises about the instrumental value of cultural membership, Kymlicka makes the following egalitarian argument: because liberal democracies are committed to egalitarian justice and because members of minority groups are disadvantaged in terms of access to their own cultures (in contrast to members of the majority culture), they are entitled to special protection.

One might question whether this is the case for the dominant culture. If religions, for example, they may be considered a 'neutral' culture, and the state should not be required to treat members of such cultural groups in any special way. The case for equality of respect for all cultural groups is stronger when it is observed in practice. The free, neutral, at least not-discriminatory state should give respect to all cultural groups. It should not be assumed that such respect is being given to many cultural groups.

In addition to states there are cultural groups within states, such as the French case of Simcha Goldma (1986). The case of the yarmulke or some other religious practice being required to be worn by the believer is a clear case of nondiscrimination at its worst. The French case is an example of a state that has a policy of non-discrimination in its constitution. While the French state has the right to enforce its laws, it cannot require its citizens to wear a yarmulke or other religious practice as part of their membership.

3 The discussion in this section is based on Kymlicka's work, particularly Kymlicka 1989, 1995, and 2001. Kymlicka argues that multiculturalism is a means of preserving cultural diversity and preserving the rights of minority groups. The egalitarian perspective is that all cultural groups should be treated equally, without discrimination, and that the state should provide special protections for minority groups to ensure that they are able to participate fully in society. The communitarian perspective, on the other hand, argues that cultural membership is important and that the state should respect the cultural identities of its citizens. The debate between these perspectives is complex and depends on a range of factors, including the nature of the cultural group, the history of the state, and the values of the society.
communitarian' critique of ethical individualism; their own conceptions of rights and liberties over those when it comes to individualism or atomism. The target of the liberal social ontology, and that the individual well-being. They 'reducibly social' (Taylor 1992) underlies Charles Taylor's cultural identities and are to be of equal worth. The tradition of special rights scheme of special rights are entitled to special protections or group-differentiated rights. The idea of choice plays an important role here. Kymlicka suggests that inequalities stemming from membership in a minority culture are unchosen, just as inequalities stemming from one's native talents and social starting position in life are unchosen. Insofar as inequality in access to cultural membership stems from luck and not from one's own choices, members of minority groups can reasonably demand that members of the majority culture share in bearing the costs of accommodation. Minority group rights are justified, as Kymlicka argues, 'within a liberal egalitarian theory ... which emphasizes the importance of rectifying unchosen inequalities' (Kymlicka 1995: 109).

One might question whether minority cultural groups really are 'disadvantaged' or suffer a serious inequality as liberal theorists of multiculturalism suggest. Why not just enforce antidiscrimination laws, stopping short of any positive accommodations for minority groups? Egalitarian defenders of multiculturalism contend that antidiscrimination laws fall short of treating members of minority groups as equals. This is because states cannot be neutral with respect to culture. In culturally diverse societies, we can easily find patterns of state support for some cultural groups over others. Language is a paradigmatic marker of culture. While states may prohibit racial discrimination and avoid official establishment of religion, they cannot avoid establishing one language for public schooling and other state services (Kymlicka 1995: 111, Carens 2000: 77–78, Patten 2001: 693). Cultural or linguistic advantage can translate into economic and political advantage since members of the dominant cultural community have a leg up in schools, the workplace and politics. Cultural advantage also takes a symbolic form. When state action extends symbolic affirmation to some groups and not others in establishing the state language and public symbols and holidays, it has a normalizing effect, suggesting that one group's language and customs are more valued than those of other groups.

In addition to state support of certain cultures over others, state laws impose constraints on some cultural groups over others. Consider the case of dress code regulations in public schools or the workplace. A ban on religious dress burdens religious individuals, as in the case of Simcha Goldman, a US Air Force officer, who was also an ordained rabbi and wished to wear a yarmulke out of respect to an omnipresent God (Goldman v. Weinberger 475 US 503 (1986)). The case of the French government's ban on religious dress in public schools, which burdens Muslim girls who wish to wear headscarves to school, is another example (Benhabib 2002: ch. 5, Bowen 2007, Laborde 2008). Religion may command that believers dress in a certain way; this is what Peter Jones calls an 'intrinsic burden', a burden that must be born by the believers as a requirement of faith (Jones 1994). In Goldman's case or in the case of the French headscarf controversy, religion does not command that believers refrain from attending school or going to work. Yet, the burden on believers does not stem from the dictates of religion alone; the burden arises from the intersection of the demands of religion and the demands of the state (what Jones calls an 'extrinsic burden'). Intrinsic burdens are not of collective concern; bearing the burdens of the dictates of one's faith – prayer, worship, fasting – is an obligation of faith. When it comes to extrinsic burdens, liberal multiculturalists argue, egalitarian justice requires assisting cultural minorities through exemptions and accommodations.

While offered as a general normative argument for minority cultural groups, liberal multiculturalists distinguish among different types of groups. For instance, Kymlicka's

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3 The discussion in this section draws on Song 2007: ch. 3.
theory of liberal multiculturalism offers the strongest form of group-differentiated rights (self-government rights) to indigenous peoples and minority nations because their minority status is unchosen; they were coercively incorporated into the larger state. In contrast, immigrants are viewed as voluntary economic migrants who chose to relinquish access to their native culture by migrating. Immigrant multiculturalism — what Kymlicka calls ‘polyethnic rights’ — is understood as a demand for fairer terms of integration through exemptions and assistance, not a rejection of integration (Kymlicka 1995: 113–115).

Postcolonial

Some scholars have looked beyond liberalism in arguing for multiculturalism. This is especially true of theorists writing from a postcolonial perspective. The case for tribal sovereignty rests not simply on premises about the value of tribal culture and membership, but also on what is owed to Native peoples for the historical injustices perpetrated against them. Reckoning with history is crucial. Proponents of indigenous sovereignty emphasize the importance of understanding indigenous claims against the historical background of the denial of equal sovereign status of indigenous groups, the dispossession of their lands, and the destruction of their cultural practices (Ivison 2006, Ivison et al. 2000, Moore 2005, Simpson 2000). This background calls into question the legitimacy of the state’s authority over aboriginal peoples and provides a *prima facie* case for special rights and protections for indigenous groups, including the right of self-government. The claim here is for restoring the right of self-government that colonial regimes took away.

A postcolonial perspective also seeks to develop models of constitutional and political dialogue that recognize culturally distinct ways of speaking and acting. Multicultural societies consist of diverse religious and moral outlooks, and if liberal societies are to take such diversity seriously, they must recognize that liberalism is just one of many substantive outlooks based on a specific view of the person and of society. Liberalism is not culture-free; it expresses a distinctive culture of its own. This observation applies not only across territorial boundaries between liberal and non-liberal states, but also within the territory of the liberal state to its relations with non-liberal minorities. The contention here is that liberal theory cannot provide an impartial or neutral framework governing relations between different cultural communities. British political theorist Bhikhu Parekh has argued instead for a more open model of intercultural dialogue in which a liberal society’s constitutional and legal values serve as the initial starting point for cross-cultural dialogue but these ‘operative public values’ are open to contestation (2000: 269). Similarly, James Tully (1995) surveys the language of historical and contemporary constitutionalism with a focus on Western states’ relations with Native peoples to uncover more inclusive bases for intercultural dialogue.

Feminist Theorizing about Culture and Multiculturalism

While they share multicultural theorists’ concern for the marginalized status of minority cultural groups, feminist theorists have cast a critical eye on multiculturalism out of a concern for its effects on women and other vulnerable members of minority cultural groups. Defenders of multiculturalism focus on inequalities between majority and minority groups in arguing for special protections for minority groups, but group-based protections sometimes have the effect of creating or reinforcing inequalities within the groups being accommodated.
Tensions between Multiculturalism and Feminism

This concern was raised by Susan Moller Okin in her provocatively titled essay, ‘Is Multiculturalism Bad for Women?’ first published in the Boston Review ([1997] 1999). Okin argued that multicultural policies may come at the price of reinforcing the oppression of women. Okin’s point about tensions between multiculturalism and feminism is part of a broader problem of ‘internal minorities’ or ‘minorities within minorities’ (Green 1994, Eisenberg and Spinner-Halev 2005). The term ‘minority’ does not necessarily refer to a group’s numerical strength in the population but to groups that are marginalized or disadvantaged. Vulnerable subgroups include not only women but also children, sexual minorities, the poor, and religious and cultural dissenters. As Ayelet Shachar puts it, ‘well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group, and may, in effect, work to reinforce some of the most hierarchical elements of a culture’, a problem she called ‘the paradox of multicultural vulnerability’ (Shachar 2001: 3).

Few feminists have rejected Okin’s central point – that multicultural policies can attenuate feminist goals – but Okin’s underlying conception of culture and her generalizations about minority cultures have generated much critical commentary among feminist theorists. Okin’s normative critique of multiculturalism was premised on two controversial claims. First, that ‘most cultures have as one of their principal aims the control of women by men’. She pointed to the ‘founding myths’ of Judaism, Christianity and Islam as examples ‘rife with attempts to justify the control and subordination of women’ (1999: 13). Second, she posited that ‘many (though not all) of the cultural minorities that claim group rights are more patriarchal than the surrounding cultures’ in the West (17). To illustrate the latter, Okin pointed to cases involving immigrants in the West engaged in practices from polygamy and child marriage to clitoridectomy, kidnapping and rape, and ‘wife murder by immigrants from Asian and Middle Eastern countries’ (18). Okin thus concludes that members of minority cultures ‘might be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women – at least to the degree to which this value is upheld in the majority culture’ (22–23).

Rejecting Essentialist Notions of Culture

Okin’s critique of multiculturalism seems to have provoked as much criticism by feminist scholars as multicultural policies themselves. In particular, many feminist theorists have taken issue with Okin’s static, monolithic conception of culture. As Bonnie Honig (1999: 36) put it in her response essay: ‘contra Okin, culture is something rather more complicated than patriarchal permission for powerful men to subordinate vulnerable women. There are brutal men (and women) everywhere. Is it their Jewish, Christian, or Muslim identity that makes them brutal … or is it their brutality?’ Cultures are not monolithically patriarchal in the way Okin suggests, and the practices she labels as sexist are more complicated than that label allows.

Take the example of veiling. Veiling might be a sign of women’s subordination, as Okin contends, or it may be part of a broader effort aimed at both sexes to manage a community’s personal and sexual relations. We need to know something about the meaning of veiling
in a particular context before making a judgment about its being good or bad for women. Many Muslim feminists see veiling as an empowering practice. Veiling permits upwardly mobile professional women to, in Leila Ahmed’s words, ‘emerge socially into a sexually integrated’ world that is ‘still an alien, uncomfortable social reality for both women and men’ (Ahmed 1992: 223–224). In the case of the headscarf controversy in France, Seyla Benhabib emphasizes the importance of asking the girls wearing the headscarf about their own understandings of the practice. Had their voices been listened to, it would have become clear that the meaning of wearing the headscarf itself was, in Benhabib’s words, ‘changing from a religious act to one of cultural defiance and increasing politicization’ (2002: 117). These alternative interpretations of veiling emphasize its emancipatory potential for women and suggest the polyvocal nature of particular practices. While these interpretations are important challenges to Okin, it is also important to avoid a binary framework in which veiling is either an oppressive imposition or a form of emancipatory resistance. Saba Mahmood (2005: 9) frames this conundrum well: ‘Does the category of resistance impose a teleology of progressive politics on the analytics of power—a teleology that makes it hard for us to see and understand forms of veiling and action that are not necessarily encapsulated by the narrative of subversion and reinscription of norms?’

Feminists have also taken issue with the ‘enlightened West vs barbaric East’ binary implied by Okin’s discussion. Leti Volpp has argued that Okin’s failure to view cultures as hybrid and contested leads Okin to view feminism and multiculturalism as intrinsically opposed. Volpp brings the often neglected concept of race into theorizing about multiculturalism, and she identifies Okin’s analysis as part of a larger tendency to assume that people from racialized minority groups are motivated by their culture whereas members of the dominant racial groups are motivated by choice (Volpp 2001). In comparing virtually identical acts by white Americans versus non-white immigrants, Volpp observes that behaviour we consider ‘bad’ is ‘conceptualized only as culturally canonical for cultures assumed to lag behind the United States’ (2000: 96). Volpp’s critique forms part of a broader feminist critique of essentialism. While her focus is on cross-national discourses comparing dowry-murders in India and domestic-violence murders in the US, Uma Narayan (1997: 87) observes a similar dynamic at work within the boundaries of Western nation states: ‘To put it bluntly, there is a marked tendency to proffer “cultural explanations” for problems within communities of color within Western contexts more readily than there is to proffer “cultural explanations” for similar problems within mainstream Western communities.’

Guarding against this ‘us vs. them’ binary is especially important if feminists are to be allies in the struggle against racism and ethnocentrism. In the current context of backlash against immigration and multiculturalism, feminist critique of minority cultural practices can play into the hands of those who deploy the rhetoric of gender equality in ways that demonize and exclude minority groups. As Anne Phillips has remarked: ‘People not previously marked by their ardent support for women’s rights seemed to rely on claims about the maltreatment of women to justify their distaste for minority cultural groups, and in these claims, cultural stereotypes were rife’ (2007: 2).

Cultures as Hybrid, Contested and Overlapping

Contra Okin, many feminist theorists writing on multiculturalism explicitly defend multicultural accommodations on grounds of equality and justice for minority groups (Shachar 2001, Deveaux 2006, Phillips 2007, Song 2007). Yet, they suggest the need for a
multiculturalism premised on a more nuanced understanding of culture – one that is hybrid, contested and overlapping. Phillips articulates this need by calling for a ‘multiculturalism without culture’, which ‘dispenses with the reified notions of culture that feed those stereotypes to which so many feminists have objected, yet retains enough robustness to address inequalities between cultural groups’ (2007: 8). Phillips is right that many defenders and critics of multiculturalism have exaggerated the unity of cultures, but rather than remove or minimize the role of culture in debates about multiculturalism, I think feminist scholars ought to develop and defend more nuanced understandings of culture. Phillips’ analysis actually suggests a more complex understanding of culture that might be identified as social constructivist.

A social constructivist account of cultures views cultures as the outcome of historical processes of internal contestation and intercultural interaction (Benhabib 2002, Song 2007). This approach takes what Benhabib calls a ‘narrative view of actions and culture’: analyses of culture begin by distinguishing the standpoint of the social observer from the social agent. It is the observer ‘who imposes, together with local elites, unity and coherence on cultures as observed entities’; by contrast participants in the culture experience their traditions through ‘shared, albeit contested and contestable, narrative accounts’ (Benhabib 2002: 5). Some conflicts over cultural practices originate primarily within a group as a result of internal disagreement over the meaning and significance of particular practices.

In my own work, I have emphasized the role of intercultural interactions in shaping the identities and practices of minority cultural groups, not only ordinary social interactions between groups but also state action that imposes the dominant culture’s gender norms and practices onto minority communities (Song 2005, 2007). Sometimes intercultural interactions have fuelled movements towards greater gender equality, but in other cases, intercultural interactions have reinforced unequal and oppressive norms and practices across cultures.

State institutions reflecting the dominant culture’s gender norms have long shaped the gender practices of minority cultures. For instance, majority institutions directly imposed mainstream gender biases onto minority communities, such as the 1887 Dawes Act, which subverted Native American women’s roles in agricultural work by making Native American men heads of household, landowners and farmers (Cott 2000: 123). More common today are the indirect ways in which mainstream gender norms have resonated with and offered support for gender hierarchies in minority cultural communities, as in the ‘cultural defences’ in criminal law.

To demonstrate these interactive dynamics, let us consider in greater depth two cases that Okin mentions in passing.4 In one case, a 23-year-old Hmong refugee, Kong Pheng Moua, abducted a 19-year-old Hmong woman, Xeng Xiong, and forced her to have sex with him. In his defence, Moua claimed that he was performing a traditional Hmong practice of matrimony called ‘marriage by capture’ in which a woman, even one who is willing to get married, should resist in order to establish her virtue.5 Moua did not present cultural evidence to claim that he did not know rape was illegal in the US, nor did he argue that rape was not a category of offence in Hmong culture. Instead, he claimed that he did not understand Xiong’s resistance as expressing non-consent. As Moua’s lawyer put it, ‘At the last minute the girl must say, “No, no, I’m not ready”, and the boy must say, “Baloney, you’ll be mine tonight.” If those attitudes were not expressed, the girl would not appear

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4 The following discussion draws on Song 2007: ch. 5.
5 People v. Moua, No. 315972-0, Fresno County Superior Court (February 2, 1985).
strong enough to the man, and he would not appear strong enough to her' (Song 2005: 479). The court dismissed the rape and kidnapping charges, and Moua was charged with false imprisonment and sentenced to 120 days in jail and a $1000 fine.

In another case, a Chinese immigrant, Dong Lu Chen, killed his wife after he discovered she was having an affair. In his defence, an anthropologist testified that 'in traditional Chinese culture, a wife's adultery is considered proof that a husband has a weak character, making him undesirable even after a divorce', and because of this stigma, a cuckolded man who reacts violently is behaving reasonably. The judge noted that Chen's cultural defence was integral to the reduction in criminal charges: 'Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court would have been constrained to find the defendant guilty of manslaughter in the first degree.' Chen was convicted of second-degree manslaughter and received a sentence of five years' probation with no jail time.⁶

Okin discusses these two cases to illustrate the tensions between feminism and multiculturalism and to cast doubt on the latter. She is right to be critical of the use of 'cultural defences' in ways that reinforce women's subordination, but she overlooks the ways in which the dominant culture's gender norms enable the accommodation of patriarchal practices within minority communities. Although the defence lawyers in both these cases emphasized cultural differences between immigrant and mainstream defendants, there is a striking congruence in the norms of the dominant culture and minority cultures when it comes to intimate relations between the sexes.

Consider the Chen case in light of the provocation defence in Anglo-American common law. American men who kill their wives or girlfriends have recourse to a criminal defence that, if successful, provides reduced charges and punishment. They are not called 'cultural defences', but they rely on deeply rooted cultural understandings about what constitutes reasonable behaviour between intimate partners. In her study of 15 years of American cases in which defendants invoked the provocation defence, Victoria Nourse found that courts have extended the provocation doctrine to include not only a wife's adultery but also the 'infidelity of a fiancée who danced with another, a girlfriend who decided to date someone else, and of the divorcée found pursuing a new relationship months after the final decree' (1997: 1333). Juries have returned manslaughter, instead of murder, verdicts in cases where the defendant kills his wife and claims 'passion' because she left him, moved the furniture out, planned a divorce, or sought a protective order. As Nourse puts it, 'one is as likely, if not more likely, to find a relationship that has ended, was ending, or in which the victim sought to leave, as one is to find an affair or sexual infidelity alone' (1343). The provocation defence continues to operate in ways that reinforce the possessive norms rooted in a code of male honour: a woman's infidelity, which in some jurisdictions includes her attempts to leave a relationship, betrays a loyalty expected of her. American courts have deemed such betrayal to be worthy of compassion by the law. This was precisely the logic at work in the Chen case.

We can see a similar intercultural dynamic of congruence at work if we consider the 'wife capture' case in the context of rape law. Not so long ago in the US, unless there was obvious evidence of coercion, a woman charging rape had to convince the court that she had resisted the defendant's advances 'to the utmost'. In the absence of such resistance, the defendant could claim that he had rewritten their laws in future to be sufficient to non-consent after the willing, than in the past two elements: force on victim. In most states, which allows him to claim reasonable. Most rape state define the threshold of the giving meaning to their on and accommodate with passivity.

In Moua's case, the but in response to the cultures getting a brea lawyer replied that 'in the courts and cited by the California Supr reasonable for the male had consented to sex. including psychologis were mere persuasion reflected in the dominant subordinate Hmong w and female passivity about congruence is the In order to understand the defence', feminists must scope of their critique alongside those of my and in which majority were argued in examining it is that it has proven the dominant culture.

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could claim that he had made a ‘reasonable mistake’ as to her consent. Many states have rewritten their laws minimizing the resistance requirement: ‘reasonable’ resistance is supposed to be sufficient. Yet, out of a concern that defendants would have fewer clues as to non-consent after the minimization of the resistance requirement, courts have been more willing than in the past to admit a ‘mistake of fact’ defence. Rape traditionally has involved two elements: force on the part of the perpetrator and lack of consent on the part of the victim. In most states, a defendant charged with rape can raise a ‘mistake of fact’ defence, which allows him to claim that his belief as to the other party’s consent was honest and reasonable. Most rape statutes still use some combination of ‘force’, ‘threat’ and ‘consent’ to define the threshold of liability – the line between criminal sex and seduction (Estrich 1986). In giving meaning to those terms at the threshold of liability, rape law continues to draw on and accommodate very powerful mainstream norms of male aggressiveness and female passivity.

In Moua’s case, the defence lawyer did not explicitly invoke the mistake of fact defence, but in response to the district attorney’s assertion that he had ‘never heard of any other cultures getting a break because they thought [rape or kidnapping] was okay’, Moua’s lawyer replied that ‘in the California culture’ defendants have been given some ‘credit’ by the courts and cited a case in which a kidnapping and rape conviction was over turned by the California Supreme Court on the grounds that in the absence of resistance, it was reasonable for the male defendant to believe the woman pressing charges against him had consented to sex. In nearly all American states, intimidation short of physical threats, including psychological pressure used by people in positions of authority, is treated as if it were mere persuasion. The old idea that women who say ‘no’ don’t really mean no is still reflected in the dominant culture. Some Hmong men may engage in cultural practices that subordinate Hmong women, but there are similarly powerful norms of male aggressiveness and female passivity at work in mainstream legal doctrine and social practice. My point about congruence is that the latter has offered support for the former.

In order to understand and adequately respond to the problems raised by the ‘cultural defence’, feminists must resist essentialist ‘us vs. them’ notions of culture by broadening the scope of their critique and interrogating the norms and practices of the dominant culture alongside those of minority cultures. It is especially important to be attentive to the ways in which majority norms shape the practice of accommodation. As Anne Phillips (2003) has argued in examining the ‘cultural defence’ in English courts, the larger problem with its use is that it has proven the most effective when it resonates with troubling gender norms of the dominant culture.

**Toward New Feminist Approaches to Multicultural Dilemmas**

**How then should feminists approach the claims of culture and multiculturalism?** Many feminist theorists seem to agree that multicultural accommodations should be permitted insofar as they enhance rather than undermine the freedom of individuals. Where the extension of a group-specific right threatens the agency of individual members of minority cultural groups, it should not be granted. Whether a particular claim for accommodation ought to be granted should be sensitive to contextual considerations. Recent feminist writing on multiculturalism emphasizes the importance of close attention to the particularities of context and the inclusion of the voices of those affected by particular dilemmas in their
resolution. To conclude, I want to highlight three different approaches developed by feminist scholars writing about culture and multiculturalism and briefly consider the future challenges these approaches must address.

The first is a legal pluralist approach developed by Ayelet Shachar, which focuses on designing institutions to enable the transformation of group norms. Her ‘transformative accommodation’ approach divides jurisdictional authority between groups and the state. Legal pluralist arrangements, such as Shachar’s, are most appropriate for groups whose members see themselves as bound by religious law, as well as groups that are territorially concentrated and already enjoy a measure of legal authority, but not for groups of immigrants or ethnic minorities who do not adhere to a comprehensive doctrine or who do not have separate jurisdictional authority. Jurisdictional authority should be divided such that neither the state nor the group has a monopoly of power over an entire ‘social arena’, such as family law, education, criminal justice or resource development. Instead, governance over each arena is divided according to different functions or ‘sub-matters’. In the arena of family law, groups have the authority to determine membership rules while states govern the distribution of rights and duties among group members (Shachar 2001: 51–55, 119–122).

In theory, this initial division of authority is not intended to be permanent; individuals can ‘opt in’ or ‘opt out’ of specific group positions by reversing jurisdictional authority in relation to a particular sub-matter. For example, if an individual member of a group dissents from some group rule or practice, she can ‘opt out’ and invite state intervention in defining group membership. This ‘opt out’ provision allows individual members to pose a credible threat of exit since groups want to avoid the reversal of jurisdiction that would bring state intervention, and this creates incentives for the group to serve its members better (122–126).

There are at least two feminist worries with Shachar’s approach. First, as Oonagh Reitman has argued, group leaders may become more, not less, determined in their commitment to hierarchical practices as dissenters threaten to leave the group. Drawing on the example of Orthodox Judaism, Reitman (2005: 199) observes: ‘Orthodox leaders want to ensure ideological purity and the pursuit of what is perceived to be God’s command. They may have little interest in bolstering numbers as such, preferring to soldier on with those whose commitment is beyond question.’ Second, in order for the incentive structure that Shachar envisions to have a truly transformative effect, members must be able to make credible threats of exit, and this will depend on their having real rights of exit. As feminists have long emphasized, exiting a relationship or community is incredibly difficult for vulnerable parties (see, for example, Okin 2002). Leaving means losing not just cultural or religious affiliations and the intrinsic value they hold for members but also the social relationships and material benefits associated with membership. In light of this difficulty, the state will have to intervene to ensure realistic rights of exit. The challenge is to be attentive not only to material conditions but also conditions of knowledge and psychology that enable individuals to exit. Feminists must attend to the forces that construct and constrain persons as subjects in the first place (Hirschmann 2002, Mahmood 2005, Cowan 2006).

A second approach to multicultural dilemmas is a democratic approach that gives a central role to deliberation. Liberal theorists tend to start from the question of whether and how minority cultural practices should be tolerated or accommodated in accordance with liberal principles, whereas democratic theorists foreground the role of democratic voice and ask how affected parties understand the practice at the centre of the cultural claim or dilemma. In a subsequent essay on multiculturalism, Okin argues (2005: 86–87), ‘a state that values liberalism above all would have no more need to consult with the women of [a patriarchal] group than with workers before i he liberal would stress t he outcome of democracy of conduct that harms l Mill’s. For example, Ol Church and suggests that it radically discriminates the distribution of insti

In contrast to liberalism for drawing on the models of principled norma tions, and their deference to the decision whether the nature of the interpersonal distribution of rights and duties among group members (Deveaux 2006). Deliberative instances of cr institutions of the larger and ongoing, may re groups (Song 2007: 7; best to address it is a d drawing on the voices.

One worry about of cultural groups are more conservative practices as representatives. But a deliberative app Feminist theorists will have basic rights and cultural claims. Deliberative processes and eq aspire to them may and persuasion to en conditions are not m conflicts actually envisaged.

A third approach political and legal th conceeptions of cultu legal institutions are and practices are to boundary between i shape one another. i in their introductory whether universal v women and if so, 'in local': how have par found their way into.
found their way into local struggles, and do on negotiate, local: how frames (for and if what do about it. Rather, the question is primarily and whether conflict culturally norms and introduction Rights: Perspectives, is not shape one another. As Cowan, Marie Bénédicte Dembour and Richard Wilson suggest in their introduction to Culture and Rights: Anthropological Perspectives, the question is not whether universal values conflict with culturally particular norms and practices regarding women and if so, what to do about it. Rather, the central question is primarily empirical and local: how have particular normative frames (for example, ‘feminism vs. multiculturalism’) found their way into particular local struggles, and how do actors on all sides negotiate, resist
and transform those frames? On this approach, searching for ‘a single theory that would provide definitive guidance on the relationship between culture and rights is quixotic’; all efforts at universal theory-building are local and contestable. This approach suggests that we should give more attention to empirical, contextual analysis of particular struggles and conflicts, as well as be ‘more skeptical of claims to culture, and to examine more closely the power relations and divisions they sometimes mask’ (Cowan et al. 2001: 21). One worry about this approach is that the focus on particular struggles, coupled with an abdication of articulating general principles, may not provide as rich a basis for normative critique of the practices in question. If the aim is to hold up a mirror to existing practices through the method of thick description, where does the articulation of alternative normative visions come from? To be sure, feminist scholars should heed Cowan’s call for ‘an interdisciplinary dialogue’ and more ‘empirically grounded studies of rights and culture’ (2006: 21), but we should also continue to articulate constructive normative alternatives drawing on the voices of those at the centre of multicultural dilemmas.

Feminist theorizing about culture and multiculturalism stands to benefit from greater interconnections between the normative theorizing of political and legal theorists and the local, empirical analysis of legal anthropologists and other social scientists. Just as feminist scholars have moved away from static, essentialist notions of culture, they must move more decisively away from static notions of law and legal institutions. Such interdisciplinary analysis will assist in fashioning more reflexive, critical approaches to culture and multiculturalism.

As I hope to have shown, feminist theorizing about multiculturalism has greatly enriched and advanced ongoing debates about culture and multiculturalism. The earliest feminist interventions focused on the tensions between valuing cultural membership and protecting the freedom and equality of women. More recent feminist interventions have suggested ways to get beyond the dichotomies suggested by the frame of ‘multiculturalism vs. feminism’ – through innovative reform of legal institutions, deliberative democracy and more fluid conceptions of law as well as culture. Many challenges lie ahead, especially in the context of the current political retreat from multiculturalism in the West. The retreat from multiculturalism is often justified in the name of feminism, but as many feminists have emphasized, complete rejection of multiculturalism is not in the best interests of women. If we are to pursue both feminist and multicultural goals, as I believe we should, feminist scholarship on culture and multiculturalism will continue to be indispensable.

References


Feminists Rethink Multiculturalism


