Majority Norms, Multiculturalism, and Gender Equality

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Although many scholars have discussed the conflict that can arise between multiculturalism and gender equality, both critics and defenders of multiculturalism have largely overlooked a variety of interactive dynamics between majority and minority cultures that have important implications for the theory and practice of multiculturalism. Examining cases in the U.S. context, this essay argues for an interactive view of the dilemmas of gender and culture that is attentive to interconnections between majority and minority cultures. What is of particular concern for debates on multiculturalism is that the mainstream legal and normative frameworks within which minority claims for accommodation are evaluated have themselves been informed by patriarchal norms, which in turn have offered support for gender hierarchies within minority cultures. The interactive view defended here suggests the need to scrutinize both minority and majority norms and practices in evaluating the claims of minority cultures.

In 1975, Julia and Audrey Martinez filed suit against the Santa Clara Pueblo. Julia Martinez was a Pueblo woman who had married a man outside the tribe, and although her daughter Audrey had been raised within the Pueblo community, she was denied membership in the tribe. According to tribal membership rules, instituted in 1939, women who married out of the tribe could not transmit their membership to their children, whereas men who married out could pass their membership to their children. At stake for Audrey Martinez was not only recognition as a tribal member but also the political rights and material benefits of tribal membership, including health care, education, and housing assistance from the federal government. On appeal, the U.S. Supreme Court ruled that it could not hear the equal protection claim on the grounds that it did not have jurisdiction over matters of tribal membership. If the federal courts were to intervene in tribal decisions, the Court added, they would interfere with the "tribe's ability to maintain itself as a culturally and politically distinct entity" (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 [1978], 123–24).

In 1988, a Chinese immigrant, Dong Lu Chen, who had lived in New York City for 1 year, discovered that his wife was having an affair. A few weeks later he beat and killed her. Chen confessed that he killed his wife because she had committed adultery. An anthropologist testified that violence against unfaithful spouses was commonplace in Chinese culture. Chen was found guilty of second-degree manslaughter. Relying heavily on cultural evidence, the judge sentenced him to 5 years' probation with no jail time, a much lighter punishment than that usually associated with a second-degree manslaughter conviction (*People v. Chen*, No. 87-7774, Supreme Court, NY County [Dec. 2, 1988]).

These two cases illustrate the conflict that can arise between multiculturalism and gender equality—that is, between granting special accommodations to cultural minorities and pursuing equality between the sexes. Multiculturalism has been defended on a number of grounds. According to the prominent "liberal culturalist" position developed by Will Kymlicka (1989, 166; 1995, 83), cultures are an important good; they serve as "contexts of choice." Individual freedom requires having options from which to choose, and it is cultures that provide and give meaning to these options. But members of minority cultural communities face special disadvantages with regard to cultural membership because states tend to establish one language and culture, usually the majority's, as the public norm. Kymlicka (1989, 1995, 2001) argues that treating members of minority cultural groups as equals requires special accommodations to protect their contexts of choice. Although group-differentiated treatment has been defended for women and racial minority groups, *cultural* groups—including immigrants, religious minorities, and indigenous peoples—have been the primary focus of recent debates about group-differentiated citizenship. Different types of cultural accommodations include consideration of one's group membership in the application of the law, exemptions to generally applicable laws, group-specific family law, and self-government rights (Levy 1997).[1]

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Earlier versions of this paper were presented at the 2004 meeting of the Democracy Collaborative at the University of Maryland, the 2004 meeting of the American Political Science Association in Chicago, the Brandeis Colloquium on Democracy and Cultural Pluralism, and the Harvard Political Theory Colloquium. I am grateful to all participants at those meetings, especially Stephen Elkin, Mark Graber, Jane Mansbridge, Nancy Rosenblum, Ayelet Shachar, Marion Smiley, Robin West, and Bernard Yack. I am also grateful for comments from Seyla Benhabib, Suzanne Berger, Kanchan Chandra, Joshua Cohen, Sally Haslanger, Vicki Hsueh, Theresa Lee, Tamara Metz, Melissa Nobles, Susan Okin, Jennifer Pitts, Ian Shapiro, Lee Sigelman, Rogers Smith, Verity Smith, and three anonymous reviewers.

[1] I use the terms *multiculturalism* and *cultural accommodation* over *cultural rights* because the former terms encompass both rights-based and non-rights-based accounts of special protections for cultural minorities. Non-rights-based accounts aim to protect what are taken to be important interests and values of cultural minorities without expressing those interests and values in terms of rights. The question of whether cultural protections should be understood as rights is an important question, but one I do not seek to resolve here.

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

Yet, as many political theorists starting with Susan Okin have emphasized, multiculturalism can have the effect of reinforcing gender inequality within the minority groups being accommodated (e.g., Deveaux 2000, 2003; Okin 1998, 1999; Shachar 2001). The idea here is that by granting accommodations to a minority cultural group, states permit some members—usually the group's more powerful members—to oppress more vulnerable members within the group. The problem of vulnerable members within minority groups, or "internal minorities," may apply not only to women but also to religious, linguistic, and sexual minorities (Green 1995). Feminists have been most concerned with the effects of cultural accommodation on women. For instance, Okin focuses on "cultural defense" cases involving immigrants and religious communities in Western societies, and Ayelet Shachar examines legal pluralist institutional arrangements that grant religious groups autonomy over family law, as in Israel and India, to illustrate how cultural accommodation can work to the detriment of women.

But there is another dimension to the practice of cultural accommodation that may be, in Okin's (1999) words, "bad for women" that both defenders and critics of multiculturalism have largely overlooked. Debates about multiculturalism seem largely to have assumed that the obstacles to improving the status of minority women have to do with the gender norms and practices of minority cultures. Call this the *internal view*. To be sure, the problem of gender inequality within minority communities stems in part from struggles internal to the culture, but this internal view overlooks the ways in which gender statuses are shaped by intercultural interactions.

This essay examines a range of cases in the U.S. context with two aims in mind: first, to propose an alternative *interactive view* of the dilemmas of gender and culture that is attentive to how majority and minority cultures interact in hierarchy-reinforcing ways, sometimes through the practice of multiculturalism, and second, to discuss some of the implications of adopting this interactive view for the theory and practice of multiculturalism. Minority norms and practices can threaten the pursuit of gender equality within the majority culture, but influence also runs in the other direction. Majority norms and practices also pose obstacles to the pursuit of gender equality within minority cultures. What is of particular concern for the debate on multiculturalism is that the mainstream legal and normative frameworks within which minority claims for accommodation are evaluated have themselves been informed by patriarchal norms, which in turn have offered support for gender hierarchies within minority cultures. This suggests the need to be attentive to both minority and majority norms and practices in evaluating the claims of minority cultures.

CONCEPTUALIZING CULTURE

Before turning to the cases, I want to consider the way culture has been conceptualized in the debate on multiculturalism, which I believe prevents us from adequately capturing the complexity of cultural conflicts. Much of the debate on multiculturalism has focused on normative claims about culture, including whether cultural minorities are entitled to special treatment and to what types of treatment. Much less explicit attention has been given to the way culture gets conceptualized. Take Kymlicka's influential defense of multiculturalism. It rests on a view of cultures as well-integrated, well-bounded, and largely self-generated entities, defined by a set of key attributes, including a shared language, history, and values. These key attributes are institutionally embodied in schools, the media, the economy, and government. The sort of culture Kymlicka seeks to protect is what he calls "societal culture," which "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language" (Kymlicka 1995, 76). In Kymlicka's (1995, 80) view, societal cultures tend to be national cultures, which are pervasive or encompassing.

But cultures may not be as unified or well-bounded as Kymlicka's view suggests. Cultures are more realistically conceived as frameworks of meaning shaped and reshaped by the words and actions of their members (Benhabib 2002; Ortner 1984, 1996; Wedeen 2002). On this social constructivist view, cultural identity is understood as one of many socially constructed categories in which membership is based on certain publicly identifiable attributes. The criteria of ascription associated with cultural identity groups include shared ancestry (actual or mythical), a common language, and shared customs. But there is also a subjective dimension: to what extent individuals embrace the categories and what meanings individuals attach to them (Appiah 2004, 21–23). One might possess attributes associated with particular categories but not experience a strong sense of belonging or attachment to them; indeed, one may resist and seek to transform the categories themselves. Cultures and cultural identities emerge, change, and are maintained through social interactions and political struggle. To say that they are constructed in and through social interactions is not to say that they are false or weak, nor that they are always radically in flux. But neither are cultures natural facts about the world. To get at cultural differences, we need to examine the processes by which cultural identities get constructed. This requires attention to historical context and to collective discussions and struggles within a community, as well as to interactions between members and outsiders—in particular, to the role of states in shaping cultural identities.

Kymlicka's (1995) view of culture pays insufficient attention to the *politics* of cultural construction and conflict and thereby downplays the extent to which cultures are internally varied and contested (Benhabib 2002, 25, 65; Parekh 2000, 157, 175; Shachar 2001, 3). He brackets the politics of cultural construction and conflict by distinguishing between a culture's

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

"structure" and its "character"; the former consists of what is essential for the culture's survival, whereas the latter includes particular norms and practices. A culture's structure is "more fundamental" than a culture's character because it is the former that provides the "context of choice" for its members, and so it is the culture's structure, not its particular character or norms, that is defended in his account (1989, 167–68, 172; 1995, 104–105). But this distinction between structure and content is itself the product of political struggle. What is seen as essential for the survival of a culture such that it is deemed a part of the "cultural structure" is itself the result of a community's struggles over meaning and power. For instance, the leaders of a minority cultural community might argue, against Kymlicka, that their cultural community continues to exist precisely because its members continue particular patriarchal practices, and that if such practices are not protected, then the culture will become extinct. In other words, they might argue that their right to cultural context is a right to particular cultural content (Margalit and Halbertal 1994, 504–505). Kymlicka himself suggests a definition of culture that is more than the mere existence of a cultural community and includes some particular content. In his early work, he defines culture in terms of history, language, and traditions, and in his later work, he defines "societal culture" as "a meaningful way of life" based on a common language and common values (1989, 135, 165; 1995, 76). This move of defining culture in terms of particular content opens the door to its own set of challenges, not least determining which practices are indeed central for the maintenance of a culture, and how the centrality of a particular practice should be weighed against other concerns. But these are not matters that can be resolved once and for all by definitional fiat; it is a matter to be decided through the process of collective discussion and meaning-making.

In addition, Kymlicka's view of culture understates the extent to which cultures are interactive and thus overlooks the ways in which the content of a culture and its change are shaped by other cultures and not only by internal conflict. Cultures have long interacted and mutually influenced one another through relations of trade, warfare, and conquest, and cultures do not correspond in any neat way to national or societal boundaries. When it comes to minority cultures within one state, the influence of the dominant culture is undeniable. Jeremy Waldron has emphasized the interactive nature of cultures in criticizing Kymlicka's strategy of cultural preservation, which he views to be based on a flawed understanding of the nature of cultures: "To *preserve* a culture is often to take a favored 'snapshot' of it, and insist that this version must persist at all costs, in its defined purity, irrespective of the surrounding social, economic, and political circumstances." But such a strategy of preservation would "cripple the mechanisms of adaptation and compromise," which is an "inherent feature" of every culture (Waldron 1995, 109–110). In his reply to Waldron, Kymlicka does recognize the fact of cultural interchange; indeed, one might argue that Kymlicka thinks there is too much interchange from majority to minority cultures such that the latter are threatened with extinction. But he has focused primarily on one type of interaction—Western states' strategy of "benign neglect" toward minority cultures—in order to expose what he deems to be the incoherence and injustice of this strategy. In practice, however, indifference is not the only or even primary mode of interaction between Western states and minority groups. The dominant culture's own unjust norms have shaped the practice of cultural accommodation, leading in some cases to the accommodation of unjust practices within minority cultures. In addition, although we might agree with Kymlicka's (1995, 105) claim against Waldron that acknowledging cultural interchange does not mean accepting that there are no distinct cultures, we need to recognize more than Kymlicka does that the distinctness of a culture depends in part on the nature and extent of cultural interchange. Rather than assuming that cultures are distinct and largely endogenously developed wholes, we should instead be open to questioning to what extent they are.

Several recent contributions to the debate on multiculturalism have emphasized that cultural interactions—through the global economy, transnational communications networks, and migrations of people across borders—are an important source of cultural change. As Bhikhu Parekh (2000, 163) puts it, "[C]ultures are not the achievements of the relevant communities alone but also of others, who provide their context, shape some of their beliefs and practices, and remain their points of reference. In this sense almost all cultures are multiculturally constituted." Both Benhabib (2002, 7) and Deveaux (2003, 790) have emphasized the permeability of boundaries between cultures. Shachar (2001, 2, 88–92, 117–45) stresses that groups are always reacting to the effects of state power, and her "joint governance" approach, which calls for ongoing interaction between the state and minority groups in the governance of different spheres of minority group life, clearly recognizes that minority and majority cultures are interconnected.[2]

Although these theorists have stressed that cultural interactions are an important source of cultural construction and change, they stop short of examining how cultural interactions have shaped cultural identities and conflicts. A social constructivist view of

[2] Shachar defines "identity groups" or "nomoi communities" as "religiously defined groups of people" who "share a comprehensive and distinguishable worldview that extends to creating a law for the community." Identity groups are said to share "a unique history and collective memory, a distinct culture, a set of social norms, customs, and traditions" (Shachar 2001, 2, n. 5). But this definition seems to "recapitulate the mistakes of group essentialism" (Benhabib 2002, 123) because members of cultural groups may not share a comprehensive worldview and because cultures are not endogenously developed wholes as Shachar's definition of "identity groups" seems to suggest. Although Shachar develops institutional designs aimed at promoting interaction between states and minority groups in the governance of minority affairs, her analysis does not examine the role that states have played in shaping and reinforcing minority group identities and practices at the center of cultural conflicts.

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

cultures recognizes that many cultural conflicts may indeed be intracultural; for instance, conflicts over female circumcision or customary marriage may primarily be struggles within particular cultural communities over the meaning and importance of particular practices (Deveaux 2003, 784). But many cultural conflicts arise out of intercultural interactions, and what appear to be intracultural conflicts may have been fueled by intercultural interactions. In some cases, intercultural interactions may provoke hardening of hierarchies within minority groups, as in cases where group leaders shore up traditional decision-making structures within the community in the face of external challenges to those structures. In other cases, majority institutions may directly or indirectly support gender hierarchies within minority communities. Cultures vary in the degree of fluidity, contestation, and permeability, but even in relatively closed groups the content of cultures is not determined purely "from the inside." Rather, cultures have developed through interactions and struggles with other cultures. This suggests the need to examine more closely the role of interactive dynamics in shaping the identities and practices of majority and minority cultural communities.

INTERCONNECTIONS BETWEEN MAJORITY AND MINORITY CULTURES

There are a great variety of ways that cultures have interacted; my focus here is on a range of interactive dynamics that have had the effect of reinforcing gender hierarchies across cultures. To be sure, cultural interchange may push toward greater gender equality within cultures, but I limit my focus to hierarchy-reinforcing interactions because they have been given less attention in debates on multiculturalism.

Majority cultures have long shaped the gender practices of minority cultures. For instance, majority institutions directly imposed mainstream gender biases onto minority cultural communities, as in the case of 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 and of greater concern for contemporary debates on multiculturalism 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 cases of the Santa Clara Pueblo and the "cultural defense." I call this type of interaction the *congruence effect*. Influence can also run in the other direction with minority norms shaping the gender practices of majority cultural communities: the accommodation of patriarchal practices within minority cultural communities may feed back and reinforce gender inequality within the wider society (*boomerang effect*), and even in cases where minority claims for accommodation are denied, as in the case of Mormon polygamy or female circumcision, the focus on the patriarchal practices of minority cultures can have the effect of diverting attention from gender hierarchies within the majority culture (*diversionary effect*).

Majority → Minority: Congruence Effect and the Case of the Santa Clara Pueblo

Consider first the majority culture's influence on minority cultures. The struggle toward gender equality in the majority culture is incomplete and ongoing, and in some cases, sexist practices in minority cultures have been congruent with and received support from the majority culture's own gender-biased traditions. The Santa Clara Pueblo case I briefly discussed at the outset is a good example. Julia Martinez and her daughter tried to persuade the tribe to change its gender-biased membership rules, and when their efforts met without success, they filed a lawsuit under the Indian Civil Rights Act of 1968. The core issue in this case was not whether the Pueblo had denied equal protection for out-marrying women (this was recognized to be the case), but rather, what the limits of tribal sovereignty should be—that is, whether a minority group's right to define its own membership rules should be allowed to take priority over ensuring equal protection for women.

The U.S. District Court for the District of New Mexico ruled in favor of the tribal government, arguing that the membership rule reflected deep-seated patriarchal traditions of the tribe and that undermining tribal decisions over membership rules would destroy Pueblo culture. The District Court argued that the male–female distinction was "rooted in certain traditional values," the Pueblo's patrilineal and patrilocal traditions, and concluded, "To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it" (*Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5 [1975], 16, 19). On appeal, the Court of Appeals for the Tenth Circuit overturned the District Court ruling in part because it rejected the view of Pueblo culture as homogenous and generally patriarchal. The court acknowledged that the tribe had an interest in retaining its culture: "[W]here the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be and have been reluctant to order the tribal authority to give way" (*Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 [1976], 1047). But rather than taking the cultural claim at face value, the appellate court scrutinized the cultural traditions of the Pueblo, questioning to what extent the gender-biased membership rule was integral to Pueblo culture. The court ruled that the tribal interest in upholding the membership rule was not substantial enough to justify its discriminatory effect on the grounds that the membership rule was not a part of long-standing Pueblo tradition but motivated by "economics and pragmatics," and that it did not rationally identify those persons who were culturally Santa Clarans—the Martinez children had grown up with the Pueblo, spoke the language of the Pueblo, and practiced the Pueblo's religion and customs (1048). The Santa Clara Pueblo appealed to the Supreme Court.

Writing for the majority, Justice Thurgood Marshall did not address the equal protection issue involving the charge of gender discrimination, limiting the Court's consideration to the question of federal review

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

of tribal policy (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 [1978]). Although he acknowledged that Indian nations possess separate sovereignty that preexisted the U.S. Constitution and thus fall beyond its constraints, Marshall reasoned that the traditional powers of Indian self-government could be modified or eliminated by congressional enactment. Congress then, through its plenary power, could lawfully pass the Indian Civil Rights Act (ICRA) imposing certain restraints on tribal governments. However, the ICRA imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment"; the only express appeal remedy that Congress provided in the ICRA was the writ of habeas corpus, which did not help the Martinez children because their case did not involve detention by the tribe (63). Although the Court focused on the procedural question of federal review of tribal policy, it went beyond purely procedural considerations by linking the question of tribal jurisdiction with a substantive concern for the maintenance of tribal identity. It argued that if the federal courts were to intervene in tribal decisions they "may substantially interfere with the tribe's ability to maintain itself as a culturally and politically distinct entity" (72). The Court concluded that no cause of action existed for equal protection claims, such as the one raised by Julia and Audrey Martinez, and therefore, the federal courts could not hear the discrimination charge.

Feminist critics have pointed to this case as an example illustrating the conflict between multiculturalism and gender equality, but what they have overlooked is the role the U.S. government played in the creation of the Santa Clara Pueblo membership rule. Far from being foreign or different, the Pueblo's gender-biased amendment to the membership rule was congruent with the majority culture's own norms and policies on membership. In 1935, the U.S. Secretary of Interior approved the Santa Clara Pueblo's Constitution and Bylaws, which extended membership to four groups of people: those "of Indian blood" whose names appeared on the 1935 census roll; all persons born of parents who are both members of the tribe; all "children of mixed marriages between members of the Santa Clara Pueblo and nonmembers, provided such children have been recognized and adopted by the council"; and all "persons naturalized as members of the Pueblo" (Brief of the Petitioners, *Santa Clara Pueblo v. Martinez*, No. 76-682 Appendix 1). In 1939, the Pueblo amended its membership rules, stating: "[C]hildren born of marriages between female members of the Santa Clara Pueblo and nonmembers shall not be members," and "[p]ersons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances" (18). Only two groups were eligible for membership: children born of marriages between members of the Santa Clara Pueblo, and children born of marriages between male members of the Santa Clara Pueblo and female nonmembers.

It does not appear that the U.S. government directly mandated or suggested membership restrictions along gender lines to the Santa Clara Pueblo. Although the kinship systems of the Pueblos had traditionally been organized along matrilineal lines, by the turn of the twentieth century, the Eastern Pueblos, including the Santa Clara Pueblo, were no longer organized straightforwardly in matrilineal terms. Partly as a result of the efforts of Spanish colonists and Franciscan friars to break down the Pueblos' matrilineal kinship patterns, by the late nineteenth century, the Eastern Pueblos no longer organized matrilineally (Jacobs 1999, 7). At trial, one anthropologist testified that the Pueblo had a patrilineal kinship system, suggesting that the 1939 membership restriction grew out of Pueblo traditions (Brief of the Respondents, *Santa Clara Pueblo v. Martinez*, 540 F.2d 1039 [1976], 36–37). Anthropologist and Santa Clara Pueblo member, Edward Dozier (1970, 133–34, 145–48, 163–66), also maintained that the Santa Clara Pueblo no longer organized matrilineally at the time of the 1939 membership rule change, though he argued that the Eastern Pueblos had bilateral kinship systems in which lineage was determined by both parents.[3]

What the U.S. government did do was to pressure the Pueblo and other tribes to adopt more restrictive membership rules, and it reviewed and approved the Pueblo membership restriction along gender lines. As Audra Simpson has observed in the context of studying narratives of citizenship among Kahnawake Mohawks, Native peoples "witness the forced cultural transformation of native culture through the bounding of people and bounding space" (Simpson 2000, 118; see also Resnik 1989, 719). State efforts at boundedness are represented in the creation of reservations and compulsion to restrict membership. The idea of "membership" was itself imposed by the U.S. government in order to count Native peoples and regulate the resources it distributed to tribes (Resnik 1989, 719–22). The Pueblo tribal authority moved to restrict its membership in direct response to a federal government circular. On November 18, 1935, in a circular titled "Membership in Indian Tribes," the U.S. Department of Interior made

[3] It is important to note that there is no straightforward relationship between mother/father-based lineage systems and male/female power in a society. Anthropological accounts of this relationship among the Pueblo may say more about the ideology and concepts of anthropologists than they do about Pueblo norms and practices (Green 1980). One anthropologist finds that the pattern of house inheritance among the Santa Clara Pueblo was "prevailingly patrilineal," and argues women were considered "second-class citizens at Santa Clara Pueblo," suggesting a strong connection between patrilineality and patriarchy (Hill 1982, 20, 169). In contrast, another anthropologist, Elsie Clew Parsons, detailed a less rigid sexual division of labor among the Pueblo in which men and women reversed roles on some occasions, leading her to conclude that sex-based role differentiation "appear[ed] to count very little if at all in their personal relations, but in their occupations it is all controlling" (quoted in Jacobs 1999, 6). Parson's account of the Pueblo must be read in light of her attempts to use her study of the Pueblo as a way to articulate an alternative ideal of gender relations for the dominant culture—one in which sex differentiation counted for very little and in which there was a healthy attitude toward sexuality (Jacobs, 74, 78). Although the revised Pueblo membership rule may not have reflected deeply rooted patriarchal traditions among the Pueblo, it did reflect a gender bias, which one Pueblo woman and her daughter sought to contest.

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

a "declaration" to all "engaged in Indian Reorganization Act" that "Congress [has] a definite policy to limit the application of Indian benefits" (Circular No. 3123 (Office of Indian Affairs, Nov. 18, 1935), in *Opinions of the Solicitor General* [April 12, 1938]). The Department planned "to urge and insist that any constitutional provision conferring automatic tribal membership upon children hereafter born, should limit such membership to persons who reasonably can be expected to participate in tribal relations and affairs." The government suggested ways to restrict membership, which reflected its own views about the proper bases of political membership—in particular, that both parents be recognized as tribal members or that an individual possess a "certain degree of Indian blood," as opposed to a shared language or history.

Although the U.S. government did not impose gender-biased membership restrictions onto the Pueblo, America's own tradition of gendered citizenship laws helped legitimate gendered membership rules among the Pueblo. Into the 1930s, American women endangered their citizenship status by marrying foreign men, whereas American men who married foreign women automatically made their wives into U.S. citizens. In 1855, Congress passed a statute that made married women's citizenship dependent on their husbands' citizenship. The 1855 Naturalization Act declared, "Any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized shall be deemed a citizen" (10 Stat. 604, as reenacted in *Revised Statutes of the U.S.* [1878], sect. 1994). Politicians and judges tended to interpret this act as a mandate to assign married women, whether foreign or American, the citizenship of their husbands. Foreign women who married American men automatically became citizens, making such women the first group of adults to receive U.S. citizenship derivatively. The 1855 law also granted American citizenship to children born abroad to American fathers and foreign mothers, but not to children born abroad to American mothers and foreign fathers. By making wives' and children's nationality dependent on the male citizen's, this law affirmed male headship of the family as a political norm and enhanced the citizenship privileges of American men (Bredbenner 1998; Cott 1998).

In contrast, under the 1855 law, American women who married foreign men were largely seen as forfeiting their U.S. citizenship; such outmarrying women were expected to take up the nationality of their husbands. Some federal judges, as well as the State Department, had generally agreed that a female citizen who married an alien resident did not endanger her American citizenship unless she moved permanently to her husband's country. But other federal judges maintained that American women lost their citizenship simply by marrying foreign men (*Leonard v. Grant*, 5 F. 11 [1880]; *Pequignot v. Detroit*, 16 F. 211 [1883]; see Bredbenner 1998, 57–60; Smith 1997, 389–90). This ambiguity over whether an American woman forfeited her citizenship by marrying a foreign man was clarified by the Expatriation Act of 1907, which made this gender-biased policy official: "Any American woman who marries a foreigner shall take the nationality of her husband" (Expatriation Act of 1907, 34 Stat. 1228). American women who married foreign men were expatriated, regardless of residency. This law discouraged American women from marrying immigrants and prevented the wives of immigrant couples from being naturalized on their own.

These gender asymmetries in naturalization and citizenship policy were only partially overturned by the Cable Act, or Married Women's Independent Nationality Act of 1922. An American woman who married a foreigner and remained in the United States would now remain a U.S. citizen, but she would lose her citizenship if she lived in her husband's country for 2 years or if she married a man "ineligible for citizenship"—an Asian, a polygamist, or an anarchist. In contrast, an American man did not suffer such consequences for similar actions. There was a similar asymmetry for married immigrant couples seeking naturalization in the United States: an immigrant woman's ability to pursue naturalization or maintain U.S. citizenship continued to depend on her spouse's eligibility for naturalization. As Nancy Cott puts it, the Cable Act reflected "the reluctance of Congress to give up its long-term priority for the male citizen as family head" (Cott 2000, 165; see also Bredbenner 1998, 97–100). Women's citizenship continued to depend on their husbands' citizenship status until legislative reforms in the 1930s. By 1934, American women no longer were seen to forfeit their citizenship by marrying foreigners, both sexes gained the same naturalization benefits for their foreign-born spouses, and mothers gained the same rights as fathers to pass down citizenship to their children born abroad (Cott 1998, 1469). But these acts did not amount to the attainment of full citizenship for married women. By 1934, women had won suffrage and access to political parties and officeholding, but they had not attained full access to the rights of citizenship.[4]

Seen in this larger context—that is, in light of the majority culture's own traditions in which married women's political membership was seen to depend on their husbands'—the Santa Clara Pueblo's gender-biased membership rule appears not foreign but very familiar to the majority culture's own gender norms at the time. In reviewing and approving the Pueblo membership rule in 1939, the U.S. Secretary of Interior endorsed a gender-biased rule that was congruent with the majority culture's own gendered traditions of

[4] For example, from the 1920s to 1975, many states resisted equal admission of women to juries. Citizenship law continues to remain gendered in certain respects. See, for example, *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001), which held that the federal law providing different citizenship rules for children born abroad and out of wedlock depending on whether the citizen parent is the mother or father is consistent with the equal protection guarantee in the Fifth Amendment's Due Process Clause. The ruling seems to reflect the notion that mothers must care for "illegitimate" children, whereas fathers may ignore them. In addition, as Okin has argued (1989), longstanding gendered division of labor within families continues to hinder women's full inclusion in economic and political life.

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

membership. This congruence suggests that accommodation was based not so much on respect for cultural differences and concerns about tribal sovereignty but on the congruence of gender-biased traditions across cultures. Tribal sovereignty is not absolute; the federal government has intervened in tribal affairs when it perceives that tribal decisions may undermine concerns that the government deems to be urgent. For example, in the early 1980s, the Secretary of Interior rescinded a tribal ordinance of the Moapa Band of Paiute Indians that would have permitted houses of prostitution on the Moapa Reservation in Nevada. Although the Department of Interior had approved the Moapa Constitution that included provisions for prostitution, the Secretary of Interior retracted the approval on the grounds that such practices were "frowned upon by federal policy" (*Moapa Band of Paiute Indians v. U.S. Department of Interior*, 747 F.2d 563 [1984]; see MacKinnon 1987 and Resnik 1989). In contrast, the gender-biased membership rule of the Santa Clara Pueblo was not "frowned upon by federal policy" in part because the Pueblo rule was congruent with the dominant culture's own gendered understandings of membership. Adequately capturing and addressing the problems raised by the Pueblo case requires recognizing this intercultural congruence and the state's role in underwriting the Pueblo's gender-biased membership practices

Majority → Minority: Congruence Effect and the Case of the "Cultural Defense"

The "cultural defense" has been raised in many areas of American law in both civil and criminal cases. In civil cases, individuals ask judges to consider cultural traditions in custody battles, in decisions over medical treatment for children, and in employment discrimination cases. In criminal cases, cultural evidence is presented in order to provide insight into the defendant's state of mind. Cultural evidence in criminal cases has been introduced at various stages: before trial to determine whether to arrest and prosecute; during trial to negate an element of a crime or support an established defense, such as consent or provocation; during sentencing to mitigate punishment; or on appeal to overturn convictions on the grounds that the judge improperly excluded cultural evidence or failed to instruct juries properly on the consideration of cultural evidence (see Renteln 2004). If successful, "cultural defenses" may reduce or eliminate criminal charges, as well as mitigate punishment. In some cases, they have been used by immigrant men in defense against charges of violent crimes against women.

In 1984, a 23-year-old Hmong refugee, Kong Pheng Moua, who had lived in the United States for 6 years, abducted a 19-year-old Hmong woman and forced her to have sex with him. The woman, Xeng Xiong, later called the police and accused the defendant of kidnapping and rape (*People v. Moua*, No. 315972-0, Fresno County Superior Court [Feb. 7, 1985]). In his defense, Moua claimed that he was performing a traditional Hmong practice of matrimony called "marriage by capture" in which even a woman who is willing to get married should resist in order to establish her virtue. Moua did not present cultural evidence to claim that he did not know that rape was illegal in the United States, nor did he argue that rape was not a category of offense in Hmong culture. Instead, he claimed that he did not understand Xiong's resistance as expressing nonconsent. Moua's lawyer stressed that a Hmong woman's resistance is an important part of the Hmong courtship custom: "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 virtuous enough to the man, and he would not appear strong enough to her" (Sherman 1986, 36). The court dismissed the rape and kidnapping charges, and Moua was charged with false imprisonment and sentenced to 120 days in jail and a $1,000 fine, $900 of which was paid to the victim as a form of restitution.

In another case, a Chinese immigrant, Dong Lu Chen, killed his wife after discovering she was having an affair (*People v. Chen*, No. 87-7774, Supreme Court, NY County [Dec. 2, 1988]). In his defense, 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. Asked to compare the defendant's reaction to that of a "reasonable" American husband, the anthropologist stated, "In general terms, I think that one could expect a Chinese to react in a much more volatile, violent way to those circumstances than someone from our own society." The anthropologist did not cite any cases where Chinese men had killed adulterous wives, nor did he present any evidence showing that such killings would go unpunished under Chinese law. The prosecution thought the court would deny the use of cultural evidence, and thus neither challenged the expert about the cultural evidence nor raised competing evidence (Sherman 1989, 28). The judge noted that Chen's cultural background 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" (cited in Volpp 1994, 73). Chen was convicted of second-degree manslaughter and received a sentence of 5 years probation with no jail time.

Such "cultural defense" cases can have the effect of denying equal protection of the laws to women, but do they really illustrate tensions between multiculturalism and gender equality? Would not most defenders of multiculturalism reject the use of the "cultural defense"? Indeed, most theorists of multiculturalism have not explicitly argued for the "cultural defense," and many "cultural defense" cases involve immigrants, who are not granted a substantial set of accommodations by some defenders of multiculturalism

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

because they are seen to have chosen to relinquish their cultural ties by immigrating (Kymlicka 1995, 30–31, 113–15; Spinner-Halev 2001, 87). But simply rejecting the "cultural defense" would deny immigrant defendants equal access to existing criminal defenses. Many "cultural defenses," like the cases considered above, are not claims for complete exoneration or exemption from criminal laws; rather, they are requests for the consideration of cultural evidence in the application of existing criminal defenses, such as "mistake of fact" and "provocation." What is being asked here is not special or differential treatment, but rather, similar treatment: minority defendants, like mainstream defendants, want to be judged in light of considerations about what, for example, it would be reasonable to be provoked by or what it would be reasonable to take as constituting consent. Because such factors depend on and may vary across cultural contexts, cultural evidence is needed to raise a "mistake of fact" or "provocation" defense. As Alison Dundes Renteln (2004, 32) has argued in defending the "cultural defense," the "reasonable man" standard assumes the persona of the dominant culture and is thus "grossly unfair because it means that the provocation defense, which is supposed to be available to all is a defense only for those who belong to the dominant culture." Simply jettisoning cultural evidence from the courtroom would deny minority defendants equal access to existing criminal defenses and may, therefore, jeopardize their rights to due process and equality before the law.[5] So, although most defenders of multiculturalism have not explicitly defended the "cultural defense," a general case for multiculturalism that is based on the idea of equal treatment for cultural minorities provides a rationale for the "cultural defense."

Feminist critics, including Okin (1998, 1999) and legal scholar Dorianne Lambelet Coleman (1996), have discussed these two "cultural defense" cases, among others, in order to illustrate the conflict between multiculturalism and gender equality and to argue against the former. Although feminists have rightly criticized the use of the "cultural defense" that leads to differential punishment for immigrant and American defendants, they have neglected the ways in which mainstream gender norms enable the accommodation of sexist practices within minority cultural communities. It is sometimes patriarchal mainstream norms that shape the frameworks within which minority claims are evaluated and granted or denied, and in the case of the "cultural defense," cultural arguments seem to be most successful when they resonate with such norms. For example, although the defense lawyers in both the "marriage by capture" and "wife-murder" cases emphasized cultural *differences* between immigrants and mainstream Americans, there is a striking *congruence* in the norms of majority and minority cultures regarding the realm of intimate relations between the sexes. In these cases, minority practices have found support from mainstream norms expressed in legal doctrine and practice. Thus, the problem here is not only the accommodation of cultural claims in criminal law but also mainstream gender norms.

Consider the "cultural defense" case involving Chen in light of the provocation defense for intimate homicide in mainstream law. American men who kill their wives or girlfriends have recourse to a criminal defense that, if successful, provides reduced charges and punishment. They are not called "cultural" defenses, but they rely on deeply rooted cultural understandings about what constitutes reasonable behavior between intimate partners. The "heat of passion" defense in traditional common law, or in Model Penal Code (MPC) terms the "extreme emotional disturbance" defense, is a partial excuse that mitigates murder to voluntary manslaughter. In trying to develop an objective standard of "provocation," common law jurisdictions constructed specific common law categories of "adequate provocation," including aggravated assault or battery, commission of a serious crime against a close relative of the defendant, and the observation of a spouse committing adultery (Dressler 1995, 491). What distinguishes adultery from other traditional common law categories of provoking events is that it does not involve an actual or threatened physical assault.

Today the great majority of American jurisdictions follow more open-ended provocation tests. This has led to two important related changes in provocation law, both favoring defendants: judges are much more likely to give a manslaughter instruction to juries, and juries now consider a wider variety of provoking conduct. About half of American jurisdictions still instruct in terms of "heat of passion," whereas almost 20 states have adopted the MPC's standard of "extreme emotional disturbance," promulgated in 1962 (Lee 2003, 33, 285). In her study of the development and use of the "extreme emotional disturbance" standard, Victoria Nourse finds that the MPC reforms both broadened the range of relationships that might give rise to provocation claims (not just husband–wife but also boyfriend–girlfriend) and the types of conduct that might be classified as infidelity (not only having sexual relations with another but also trying to leave the relationship). Nourse (1997, 1342) notes that many states that base their test on the MPC have amended it substantially such that the great bulk of jurisdictions fall somewhere in between the traditional common law approach and the MPC approach.

The provocation defense, which can be traced back to the seventeenth-century conception of honor, appears to be gendered in both its formulation and its impact (Horder 1992). The substance of the legal rules concerning provocation that juries are asked to apply affects the behavior of all the decision makers involved in a homicide case. The open-endedness of these rules influence judges in deciding whether to give a provocation instruction and prosecutors in deciding what to charge and what kind of plea bargain to accept. There is an ongoing debate about whether current formulations of the provocation doctrine rely on what

[5] Legal scholar Leti Volpp also argues against abolition of the "cultural defense." For her discussion of how cultural evidence might be considered in a way that is more critical than its current use, see Volpp 1996, 1611–13.

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

has been viewed as a masculine model of a sudden and temporary loss of self-control: a one-time-only encounter between two men of roughly equal size and strength (e.g., Crocker 1985; Maguigan 1991; Nourse 1997). In jurisdictions where provocation is formulated in this way, it may be less available to women subjected to long-term physical or sexual abuse who may act against their abuser sometime after his last assault or while he is sleeping. The question of explicit formulation of doctrine aside, what is harder to refute is the starkly disparate impact of the provocation defense along gender lines, which largely benefits men at the expense of women. Approximately 9% of homicides in the United States are committed by intimates, which the Department of Justice (DOJ) defines as current or former spouses, boyfriends, or girlfriends. A 1998 DOJ study found that it is increasingly the female rather than the male who is the victim in intimate homicides (Greenfeld et al. 1998, 1, 33). Men are arrested for more than 90% of all homicides, and almost three fourths of intimate homicide victims are female (Greenfeld et al., 5; Kaplan, Weisberg, and Binder 2000, 388–89; Rennison 2003, 1). The DOJ data tell us only about the incidence of intimate homicides, not about how many of these defendants claimed voluntary manslaughter or whether such claims were successful. But it also appears that men successfully utilize the provocation defense more often than do women. As the authors of one criminal law casebook put it, "Indeed, it is hard to find cases where a woman has her charge of punishment mitigated on provocation grounds when she has killed her husband or her husband's lover" (Kaplan, Weisberg, and Binder 1996, 428; see also Kadish and Schulhofer 1995, 413).

In her study of 15 years of "heat of passion" and "extreme emotional disturbance" cases, Nourse finds 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, of a girlfriend who decided to date someone else, and of the divorcée found pursuing a new relationship months after the final decree" (Nourse 1997, 1333, discussing *Dixon v. State*, 597 S.W. 2d 77 [Ark. 1980]; *Rodebaugh v. State*, No. 436, 1990 WL 254365 [Del. 1990]; *State v. Wood*, 545 A.2d 1026 [Conn. 1988]). Juries have returned manslaughter verdicts in cases where the defendant kills his wife and claims "passion" because the victim left him, moved the furniture out, planned a divorce, or sought a protective order (*State v. Little*, 462 A.2d 117 [N.H. 1983]; *State v. Reams*, 616 P.2d 498 [Or. 1980]; *Perry v. Commonwealth*, 839 S.W.2d 268 [KY 1992]; *Matthews v. Commonwealth*, 709 S.W.2d 414 [KY 1985]). According to Nourse (1343), "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." In many states, current provocation law treats defendants who kill their intimate partners for trying to leave a relationship more favorably than in the past.

Today, U.S. law no longer views wives as the property of their husbands, and current formulations of the provocation doctrine have jettisoned the language of honor in favor of "passion" or "extreme emotional disturbance." But the provocation defense continues to operate in a way that reinforces the possessive norms rooted in the code of male honor: 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 and accommodation by the law. This was precisely the logic at the heart of the *Chen* case. Although the defense stressed the cultural differences in the ways that an American and Chinese man might respond to adultery, there is an underlying intercultural congruence in the gender norms at work: a man's violent retaliation against his female partner's infidelity is a reasonable response, whether committed out of honor, passion, or emotional disturbance.

Consider also the "wife-capture" case involving Moua in light of existing defenses in rape law. Not so long ago in the United States, 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 made a "reasonable mistake" as to her consent. Many states have rewritten their laws minimizing the resistance requirement: rape laws no longer require that women resist "to the utmost"; "reasonable" resistance is supposed to be sufficient. Yet, out of a concern that defendants would have fewer clues as to nonconsent after the minimization of the resistance requirement, courts have been more willing than they have in the past to admit a "mistake of fact" defense (Kadish and Schulhofer 1995, 327). 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" defense, 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," "threats," and "consent" to define the threshold of liability—the line between criminal sex and seduction (Estrich 1986, 1184). In giving meaning to those terms at the threshold of liability, the law of rape continues to draw upon very powerful mainstream norms of male aggressiveness and female passivity.

In Moua's case, the defense lawyer did not explicitly invoke the mistake of fact defense, 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 *People v. Mayberry*, 542 P.2d 1337 [Cal. 1975] (cited in *People v. Moua* [1985], 7). This case involved a man who approached a woman at a local store, propositioned her for sex, and demanded that she go back with him to his home. When she refused, he struck her. The store personnel and other customers did not see them. Out of fear, she did not resist his demand to

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

accompany him back to his home, and during the sexual assault in his home, she did not resist. The California Supreme Court reversed Mayberry's kidnapping and rape conviction on the grounds that in the absence of resistance, it was reasonable for him to believe she had consented to sex. This case is not an exception; in nearly all states, intimidation short of physical threats, including psychological pressure used by people in positions of authority over their subordinates, is treated as if it were mere persuasion. For example, a high school principal who told a student that he would not allow her to graduate if she did not have sex with him was not held in violation of law (*State v. Thompson*, 792P.2d 1103 [Mont. 1990]). In such cases involving intimidation short of physical threats, courts usually say the victim consented. The vast majority of states have no law requiring courts to accept verbal refusal at face value (Schulhofer 1998, 11). This is because the old idea that women who say "no" to sexual advances don't really mean no is still widely accepted in the majority culture.[6] 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 practice, and the latter have offered support for the former.

In sum, the problem raised by the "cultural defense" cases above has not only to do with minority practices but also with mainstream norms that offer support for those practices. One might argue for eliminating the extra reduction of charges and punishment that derives from the use of cultural evidence and leave it at that. Both Coleman and Okin argue for eliminating the "cultural defense" on the grounds that it withholds equal protection of the laws to victims from the cultures being accommodated. But even if the extra reduction in punishment based on cultural evidence were eliminated, the majority culture's own gendered understandings of agency and responsibility would remain, where men are seen as reasonably provoked to kill by the sexual behavior of their partners and where women who say "no" don't really mean no. As Anne Phillips (2003) has argued in examining the "cultural defence" in English courts, the larger problem with the use of cultural evidence is that they have proven to be most effective when they resonate with mainstream norms. So long as gender-biased norms pervade legal doctrine and practice, minority defendants can continue to find support for patriarchal practices within mainstream law. Adequately capturing and responding to the problems raised by the cultural defense, then, requires being attentive to the ways in which majority norms shape the practice of accommodation.

[6] In contrast to most states, the state of Massachusetts does not allow "mistake of fact" defenses in rape cases. Instead, it has adopted a strict liability standard under which the legal definition of rape could include cases where a person says no but does not physically resist, or where she submits in response to lies or threats. See *Commonwealth v. Ascolillo* (1989), 405 Mass. 456, 541 N.E.2d 570 (1989).

Minority → Majority: Boomerang Effect

Majority norms have influenced the gender norms of minority cultures, but influence can also run in the other direction. The legal accommodation of sexist practices within minority cultures, as in the "cultural defense" cases, may boomerang back to threaten struggles toward gender equality within the wider society. This is the one interactive dynamic that Okin (1999) and Coleman (1996) have stressed in their critique of multiculturalism. "Cultural defenses" appear to have had mixed success in criminal cases across federal and state jurisdictions, and none, to my knowledge, has been cited in cases involving defendants of the dominant culture. But when courts rule in ways that tolerate sexist practices among immigrants, as some courts have, those cases may well validate sexist norms in the majority culture. Such "cultural" cases become potential precedents, and this fact alone means that mainstream law has been reshaped. In making the case for a jury instruction of provocation, a mainstream defendant could point to "cultural" cases and argue that if immigrants can have access to the provocation defense, then he should, too. If he were denied access to the provocation defense, he could again point to "cultural" cases and argue that he is being denied protections that immigrant defendants enjoy. It is also important to be attentive to potential boomerang effects for the following reasons.

First, although several recent federal cases suggest that the boomerang effect is small, judges have left the door open to the use of culture in the courts. For instance, in a 2001 case involving a Mexican woman convicted of a drug charge, Judge Richard Posner reversed a reduction in punishment granted by a sentencing judge on the basis of the defendant's "cultural heritage." Maira Bernice Guzman sought a reduced sentence for a drug charge for which she and her boyfriend had been convicted; she sought a reduced sentence on the grounds that "Mexican cultural norms dictated submission to her boyfriend's will" (*U.S. v. Guzman*, 236 F. 3d 830 [2001], 830–31; see also *U.S. v. Contreras*, 180 F.3d 1204 [1999]; *U.S. v. Natal-Rivera*, 879 F.2d 391 [1989]). Judge Posner argued that to mitigate punishment on the basis of cultural evidence would be an "abuse of discretion" because the U.S. Sentencing Guidelines prohibits consideration of race, sex, national origin, creed, religion, and socioeconomic status in determining sentences. Although "culture" or "ethnicity" is not specified in the guideline, he suggests that the drafters thought that the stated exclusions encompassed culture and ethnicity. Giving judges leeway to consider "cultural heritage" in sentencing decisions, Judge Posner argues, "would inject enormous subjectivity and variance into a sentencing scheme designed to achieve reasonable objectivity and uniformity." But he leaves the door open to the use of cultural evidence in future sentencing cases, arguing that prohibition would "exclude all possibility of consideration of cultural factors in cases that we cannot yet foresee" (833–34).

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Second, the "cultural defense" has not been limited to cases where the parties involved are from the same culture. For instance, in *Gonzales v. State*, 689 S.W.2d 900 [Tex. 1985], the defendant was convicted of murder for fatally shooting his wife after a heated argument and sought a jury instruction that the situation be assessed from his own perspective, that of "a Hispanic farm worker who was living with a Caucasian woman on a low income." The trial judge rejected the defendant's proposed jury instruction, but this case is, nonetheless, troubling since judges exercise considerable discretion on whether and how cultural evidence gets considered, and also because the proposed jury instruction reflects the idea, increasingly made by minority defendants, that equal access to mainstream legal defenses requires consideration of cultural factors, including patriarchal traditions, in explaining a minority defendant's state of mind. This is precisely what a second-generation Japanese-American man argued in the recent unpublished California state appellate case, *People v. Kobayashi*, No. B157685 [Cal. App. 2 Dist. 2003]. Kobayashi sought to overturn his conviction for murdering Sheila Ann Randle, an African American woman with whom he had had a relationship. On appeal, he argued that the jury should have been instructed "to evaluate the sufficiency of provocation from the standpoint of a reasonable person in terms of defendant's position as a Japanese American" (10). The expert psychologist in the case linked the defendant's state of mind with his cultural background: "[I]n Japanese culture, intense shame attaches to males who lack emotional control, who are unable to meet the expectations of others, and who violate their personal standards" (9). Kobayashi argued that "equal treatment of ethnic minority defendants requires that if certain provocative acts are sufficiently offensive in mainstream American culture to reduce murder to manslaughter, then certain acts that are equally provocative in appellant's culture should be treated as equally mitigating" (11). The state appellate court upheld the conviction, sidestepping the question—whether there is an equal protection and due process right to a culturally specific evaluation of the element of provocation as it relates to the crime of manslaughter—on the grounds that it had not been raised during trial.

Third, while no "cultural defense" cases have been cited as precedents in cases involving defendants of the dominant culture, one published "cultural defense" case has been cited as a precedent in another "cultural defense" case, suggesting that "cultural" cases are not always a one-off matter and that boomerang effects can occur across minority groups. A federal appellate court held that cultural evidence may be admitted where it is relevant to the defendant's culpability for the crimes alleged (*Bains v. Cambra*, 204 F. 3d 964 [2000]). In this case, a Sikh man Bains was convicted as a co-conspirator in the murder of his sister's ex-husband Shergill. Cultural evidence was offered by the prosecution to make the case that Bains was motivated to kill Shergill in part because of his Sikh religion. Several witnesses testified that Sikh families "feel very strongly that a husband must comply with his half of the marriage contract, especially since if a husband leaves his wife, his wife is considered to be 'damaged goods' and an 'unmarketable commodity,' thereby causing the families of both spouses great hardship" (970). The *Bains* court permitted the use of cultural evidence in order to elucidate a possible motive for Bains to have Shergill killed. This case was then cited in a case involving an Indian immigrant Hundal, who had been convicted of rape and spousal abuse (*People v. Hundal*, No. F037541 [Cal. App. 5 Dist. 2002]). His wife had used cultural evidence to explain why she had been willing to agree to an arranged marriage and to stay with him despite a history of physical and sexual abuse. Hundal sought to overturn his conviction on the grounds that the prosecutor's stereotypical characterization of "Indian culture"—that "men control women" and "have a higher status than women" in "Indian culture"—had denied him a fair trial. The Court upheld the conviction on the grounds that the prosecutor's improper questioning had not affected the jury's verdict and that the use of cultural evidence had been entirely proper because the prosecutor's questions about "whether appellant himself thought of the victim as an item of property were relevant to the charges at hand" (6).

In *Bains*, a man sought the admittance of cultural evidence to overturn his conviction for avenging what he understood to be his sister's dishonored status; in *Hundal*, a woman invoked cultural evidence to explain why she did not leave an abusive relationship in bringing a rape charge against her husband. But in both cases, courts permitted juries to consider patriarchal traditions to explain people's behavior. In both cases, juries chose to convict. But prosecutors and judges exercise considerable discretion in whether and how culture gets used in the courtroom, and federal and state jurisdictions have increasingly permitted juries to consider "cultural defenses," including evidence of patriarchal cultural traditions, to explain defendants' behavior. In some locales, juries have allowed such defenses to serve as partial excuses for patriarchal behavior among immigrants, and mainstream defendants can and may well point to these "cultural" cases in raising their own criminal defense claims. Given the increasingly diverse immigrant presence in the United States and the increasing use of cultural defenses, it is important to be attentive to boomerang effects.

Minority → Majority: Diversionary Effect

Even in cases where minority claims for accommodation are denied, we need to be attentive to interactive dynamics between majority and minority cultures. In some cases, rejection and vilification of minority claims for accommodation can serve to divert attention from the majority culture's own practices. This diversionary effect can be seen in the case of Mormon polygamy in nineteenth-century America, as well as in contemporary debates over gay marriage and female circumcision. In the case of Mormon polygamy, even as American reformers and government officials

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

resisted the ideas of feminism, they deployed the language of feminism in the service of its efforts to dismantle polygamy. Such rhetoric not only provided them with a ready justification for intervention into Mormon communities but also helped shield mainstream gender practices—Christian-model monogamy and the traditional gender roles associated with it—from criticism.[7]

The U.S. government's efforts to dismantle Mormon polygamy spanned from 1862 to 1890. It pursued the campaign against polygamy with, as one legal historian puts it, "a zeal and concentration" that have been "unequalled in the annals of federal law enforcement" (Linford 1964, 312, 585). In 1862, Congress criminalized bigamy in the territories, and in 1879, the Supreme Court upheld this law (Morrill Anti-Bigamy Act, 12 Stat. 501 [1862]; *Reynolds v. United States,* 98 U.S. 145 [1879]). Congress followed up in 1887 with the Edmunds-Tucker Act, which repealed the incorporation of the Mormon Church, directed the U.S. attorney general to escheat its property holdings over $50,000, and disenfranchised Mormon women (Edmunds-Tucker Act, 24 Stat. 635 [1887]). The Mormons resisted and continued to practice polygamy, but in 1889, the Supreme Court upheld Congress's power to dissolve and expropriate the church's property against the church's claim that it was a protected religious body (*Late Corporation of the Church of Jesus Christ of Latter-day Saints v. U.S.*, 136 U.S. 1 [1889]). Finally, in 1890, Mormon President Wilson Woodruff issued a manifesto accepting the federal prohibition of polygamy and encouraged fellow Mormons to refrain from contracting any further polygamous marriages.

Nineteenth-century antipolygamy arguments given by politicians, judges, and activists focused on what they believed was a deeply patriarchal practice. Writing for the majority in *Reynolds v. U.S.* (1879), Chief Justice Morrison Waite expressed concern for the "pure-minded women" who were the "the innocent victims of this delusion," and argued for proscribing polygamy on the grounds that it "leads to the patriarchal principle . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy" (*Reynolds v. United States,* 98 U.S. 145 [1879], 165–68). The association between monogamy and freedom, on the one hand, and polygamy and despotism, on the other, can be traced back to Montesquieu's ([1748] 1989, 270, 316) idea that "domestic government" shaped "political government." The leading political and legal philosophers of early and antebellum America, from James Wilson to Chancellor James Kent, Supreme Court Justice Joseph Story, and Francis Lieber, all contrasted monogamy with polygamy in order to illustrate the superiority of Christian morality over "oriental despotism" (Cott 2000, 22–23). To be sure, as echoed by the *Reynolds* Court, antipolygamy activists and politicians were motivated by a concern to dismantle what they believed was a deeply patriarchal institution, but Mormon sexual practices were not their sole concern.

The association of female enfranchisement and liberal divorce laws with Mormon sexual practices fueled fears that all three were part of a plot to undermine the traditional American family and Christian civilization itself (Gordon 2002, 52–54; Smith 1997, 388). The Mormon-controlled territorial legislature in Utah had unanimously approved the enfranchisement of women in 1870, making the women of Utah among the first women to vote in America (Foster 1981, 214; Keyssar 2000, 54; Smith, 106, 110). By the time they were disenfranchised by Congress, women in Utah had had the right to vote for 17 years. Opponents of polygamy and opponents of women's suffrage found common cause when it came to Mormonism. Francis Lieber, whose antipolygamy arguments Chief Justice Waite cited in writing the *Reynolds* opinion, opposed women's suffrage on the grounds that women's suffrage, like polygamy, would undermine the American family ([1839] 1875, 124–125).

In addition to women's suffrage, the ease of divorce in Utah added fuel to antipolygamists' condemnations that Mormon polygamy would wreck the American family. To them, polygamy and divorce were linked; both treated marriage as temporary or vulnerable to whim. Antidivorce activists referred to divorce as "the polygamic principle" or "polygamy on the instalment [sic] plan" (cited in Gordon 1996, 836). Anxiety over rising divorce rates added momentum to the family law reform movement, whose supporters overlapped with supporters of the antipolygamy movement. Antidivorce and antipolygamy activists joined forces in calling for a uniform national marriage law. In 1886, Senate George Edmunds, Congress's leading antipolygamy spokesman, also attempted to get a bill through Congress which would authorize the government to collect divorce statistics as a first step toward restricting divorce (Iversen 1997, 106–107). According to these reformers who sought both to eliminate polygamy and restrict divorce, monogamous marriage and women's traditional place within it was the basis of civilized society and democratic government.

Women's rights activists joined forces with Mormon women defending polygamy, making for a doubly threatening combination in the eyes of defenders of Christian monogamy. Shortly after they were enfranchised, Mormon women established contact with leading women's rights activists, and as early as 1872, Mormon women held office in the National Woman Suffrage Association (NWSA), the suffrage

[7] The diversionary effect of focusing on "other" men's treatment of women has been used to justify intervention by states not only into minority cultures within one state but also intervention across states. In examining the conduct and rhetoric of the British colonial establishment toward Islamic societies, Leila Ahmed shows how British officials appropriated the language of feminism in the service of colonialism. The result was the fusion of the issues of women's oppression and the cultures of "other" men such that improving the status of women was thought to entail abandoning native customs. She also argues that this focus on "other" men's treatment of women helped Western colonial governors to oppose feminism within their own societies in favor of more traditional gender roles (Ahmed 1992).

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

organization led by Susan B. Anthony and Elizabeth Cady Stanton. Stanton and Anthony were invited to speak in Salt Lake City. In her lecture from the pulpit of the Mormon Tabernacle in 1871, Stanton attacked patriarchal power and the subordination of women by organized religion and argued that there was just as good reason for polyandry as there was for polygyny (Iversen 1997, 25–26). Accompanied by NWSA members, Mormon women delivered a memorial to the House Judiciary Committee on behalf of all Mormon women, defending their practice of polygamy in the name of women's rights and asking Congress to repeal the Morrill Act of 1862. They maintained that Mormon women were contented wives and mothers and that the effect of enforcing antipolygamy legislation would make 50 thousand women outcasts and their children illegitimate (Iversen, 29–30). The alliance between NWSA and Mormon women was possible in part because the NWSA members rejected the claim that it was the *form* of marriage that subordinated women.

By the time the issue of polygamy arose on the national political stage, nineteenth-century women's rights activists had already been unsettling prevailing gender norms. By the mid-nineteenth century, women's rights activists had begun criticizing women's subordination within all forms of marriage. Quaker abolitionist Angelina Grimké's examination of slavery led her to conclude that all married women endured many of the same legal and social disabilities as slaves. The Declaration of Sentiments drafted by Stanton for the Seneca Falls Convention of 1848 made legal demands for women's rights, attacking the doctrine of coverture. Starting in 1839, states passed legislation challenging coverture, including Married Women's Property Acts, which permitted women to inherit, own, and exchange property independently of their husbands. By 1865, twenty-nine states had passed some form of married women's property law (Basch 1982, 28; Kerber 1998, 38–39).

It is in this larger context of mainstream gender practices that Stanton and Anthony viewed the controversy over Mormon polygamy. Stanton herself ([1871] 1970, 70) distinguished among three kinds of polygamy: Mormon polygamy, bigamy based on fraud, and polygamy involving one man, one wife, and many mistresses "everywhere practiced in the United States." Rather than condemn Mormon polygamy and defend Christian monogamy, Stanton criticized all contracts of marriage as oppressive for women: "In entering this contract, the man gives up nothing that he before possessed—he is a man still; while the legal existence of the woman is suspended during marriage, and henceforth she is known but in and through the husband." She sought to improve women's status by arguing for greater equality within marriage and greater freedom to divorce (Stanton, Anthony, and Gage [1881–1922] 1970, 738–40; Clark 1990, 34–38). Similarly, Anthony urged suffragists to avoid "shouts of puritanic horror" against polygamy and offer a "simple, loving, sisterly clasp of hands" in order to help abolish "the whole system of woman's subjection to man in both polygamy and monogamy" (quoted in Iversen 1997, 35). The NWSA never publicly condemned polygamy in part because they rejected the claim that polygamy was inherently patriarchal and monogamy inherently egalitarian, and also because Mormons had enfranchised women and provided women with greater freedom to divorce. When the federal government moved to disenfranchise the women of Utah on the grounds that they were brainwashed by their husbands, NWSA activists argued against the use of "federal power to disenfranchise the women of Utah, who have had a more just and liberal spirit shown them by Mormon men than Gentile women in the States have yet perceived in their rulers" (Stanton, Anthony, and Gage, 128).

Antipolygamists who sought to defend Christian monogamy in the face of attacks by women's rights activists found a convenient diversion in Mormon polygamy. As legal historian Sarah Barringer Gordon (2002, 54) puts it, "The popular appeal of antipolygamy gave legislators a convenient out—here was a form of marriage that *truly* replicated 'slavery' for white women. By enacting laws to prohibit the 'enslavement of women in Utah,' congressmen could deflect attention from domestic relations in their own states and direct it towards a rebellious territory. In this sense, Utah became a handy foil." To be sure, public officials and citizens attacked polygamy because they believed it to be a deeply patriarchal practice, but their focus on polygamy had the effect of shielding patriarchal aspects of monogamous marriage from the criticism of women's rights activists. Diverting attention from monogamy may not have been antipolygamists' primary intent, but the focus on polygamy served the cause of those who defended Christian-model monogamy and the traditional gender roles associated with it.[8]

Polygamy is no longer mandated by the Mormon Church, but the diversionary effect is not a relic of the past. Although official church doctrine condemned polygamy starting in 1890, some Mormons continue to practice it. Today about 20,000 to 50,000 Mormon fundamentalists live in polygamous families, and the government has largely taken a "don't ask, don't tell" policy toward them (Altman and Ginat 1996, 51, 54). Although gender hierarchies may indeed pervade such communities, like the nineteenth-century women's rights activists, we should be wary of concluding that polygamy is necessarily patriarchal and monogamy necessarily egalitarian. The charge that polygamy is oppressive to women is contingent and thus needs to be investigated by looking at individual relationships and their context, just as we ought to do with monogamous relationships (see Emens 2004).

The diversionary effect can also be seen beyond the case of polygamy. Consider the contemporary debate

[8] The focus on polygamy was not only a handy foil against NWSA and other women's rights activists' critiques of monogamy, but also a diversion from the federal government's attack on what was probably its bigger concern: the great political power of the Mormon Church in Utah, which, in President Rutherford B. Hayes's words, "bore no semblance to republican government." See Rosenblum 1997, 75–6.

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

on same-sex marriage in the United States. Both proponents and opponents of same-sex marriage seem to embrace the long-standing view of family as based on romantic monogamous sexual affiliation. But this embrace can serve to shield the institution of monogamous marriage from more radical challenges—for instance, that marriage is designed to privilege those inside and discipline those outside it: single people with or without dependents, unwed parents, divorcées, prostitutes, or those who do not desire legal recognition of their intimate relationships (Warner 2002, 264–65). The movement for same-sex marriage also leaves the privilege of spousal status intact, masking important issues concerning dependency and care-giving for those who are in need, including children, many elderly, the ill, and the disabled (Fineman 2004, 48). The denial of privileges to other intimate and care-giving relationships largely leaves women, who do much of the care-giving not only within but also outside marriage relations, to bear the burdens of caring for dependents. With its focus on the good of marriage and opening up access to it, the contemporary American debate on same-sex marriage, as with the nineteenth-century American debate on polygamy, may serve to deflect attention from more radical challenges to marriage and the traditional gender roles long associated with it.

Similarly, condemnation of various practices among immigrants may help divert attention from majority practices. Focusing on cases of domestic violence or rape in immigrant communities can serve to reinforce the false dichotomy of oppressive minority cultures and egalitarian majority cultures, deflecting attention from the reality of domestic violence and other patriarchal practices within majority cultures (An-Na ʻim 1999, Volpp 2001). Western feminists' criticism of female circumcision among immigrant communities can serve to divert attention from the variety of cosmetic surgeries and bodily alterations, such as breast enlargement, facelifts, and labiaplasty, as well as male circumcision, performed in Western societies (Carens and Williams 1998, 481; Navarro 2004). There may well be a good case that certain forms of female circumcision should be treated differently from other forms of bodily alterations commonly practiced in the West. The point here is that majority norms and practices should be analyzed alongside minority norms and practices, lest we overlook the diversionary effects that can reinforce gender hierarchies across cultures and also fuel discourses of cultural and racial superiority within the dominant culture.

CONCLUSION

At least two important implications follow from the interactive dynamics illustrated by the cases discussed above for the theory and practice of multiculturalism. The first has to do with how conflicts of culture are understood, which has in part to do with how culture has been conceptualized in the debate on multiculturalism. The formulation of cultures as well-integrated, well-bounded, and self-generated entities suggests an *internal view* of the dilemmas of gender and culture. For instance, in diagnosing the problems raised by multiculturalism for feminism, Okin, like Kymlicka, seems to view cultures as unified wholes, even while recognizing gender as a social cleavage. For her, cultures are, on the whole, deeply patriarchal structures. As she puts it (1999, 14, 17), "Many of the world's traditions and cultures, including those practiced within formerly conquered or colonized nation-states . . . are quite distinctly patriarchal . . . Most cultures are patriarchal, then, and many (though not all) of the cultural minorities that claim group rights are more patriarchal than the surrounding cultures." But cultures are less monolithically patriarchal than Okin suggests, and minority cultures are not straightforwardly "more patriarchal" than Western majority cultures (see Honig 1999, Narayan 1997, Volpp 2001). A view of cultures as distinct wholes encourages an internal view of the gendered conflicts of culture, overlooking sources of minority women's subordination that do not stem from within their own cultural communities but from structural forces beyond their communities. As I have tried to show, this internal view fails to capture a range of interactive dynamics that shape cultural conflicts—in particular, the state's role in encouraging the accommodation of minority practices that are congruent with the dominant culture's own norms and practices. As Okin (1989) herself demonstrates in *Justice, Gender, and the Family*, the laws and norms of the dominant culture continue to reinforce gender injustice in certain respects. In some cases, it has been the congruence of patriarchal norms and practices between majority and minority cultures that has supported accommodation. If we take a social constructivist view of cultures as not only internally contested but also interactive and mutually constitutive, then the problem for feminists is not so much "multiculturalism versus gender equality" as "patriarchy versus gender equality." Formulating the problem in this way allows for consideration of the role that mainstream norms and institutions play in shaping minority practices. It also allows for examination of non-cultural factors, such as structures of class and race, that impede struggles toward gender equality.

The second implication has to do with how to formulate responses to the dilemmas associated with culture. If we conceive of cultural conflicts as "multiculturalism versus gender equality," the only remedy appears to be either siding with multiculturalism at the expense of gender equality or siding with gender equality at the expense of multiculturalism. This either/or strategy falls short. On the one hand, as feminist theorists have stressed, simply saying yes to cultural accommodation altogether fails to protect vulnerable members within minority cultural communities. But simply saying no to accommodation and demanding assimilation (or saying no until minority cultures liberalize up to the level of majority cultures) also falls short because the majority culture is in certain respects not less patriarchal than minority cultures and because rejecting accommodation altogether may fail to accord equal respect to members of minority cultures.

https://doi.org/10.1017/S0003055405051828 Published online by Cambridge University Press

Adopting an interactive view of cultural conflicts, as I have argued for here, suggests the need to develop more context-sensitive approaches to evaluating the claims of minority cultures. Rather than relying on dichotomous generalizations about oppressive minority cultures and egalitarian Western cultures, evaluations of minority claims should be based on examination of particular practices in particular contexts with an eye toward actual and potential interconnections between minority and majority practices. Taking this interactive view does not mean accepting that majority cultures are always implicated in the maintenance of hierarchies within minority cultures. What it requires, in contrast to the internal view, is vigilance toward the ways that mainstream institutions and norms have been and could be so implicated.

If one defends special protections for minority cultural groups, on grounds of equality or autonomy, evaluation of minority claims ought to proceed with the following sorts of contextual considerations in mind: (1) What is the origin and history of the practice in question, and what is its importance to members of the cultural group? What role, if any, has the state played in its development? In the Santa Clara Pueblo case, the tribe's interest in maintaining itself as a "culturally and political distinct entity" would have to be weighed against the interests of individuals seeking to overturn the gender-biased membership rule. But, rather than taking tribal claims for the distinctness and importance of a tribal tradition at face value, consideration of the claim should include investigation of the tradition's origins and the state's role in its creation and maintenance. (2) How do mainstream laws and norms influence which minority claims get accommodated? As in the case of the "cultural defense," culture may well operate within evaluative frameworks already defined by the majority culture's own norms, which in some cases are patriarchal. This suggests the need to scrutinize mainstream legal doctrines and practices, alongside minority practices, in considering whether and how cultural evidence should be used. Arguments for limiting the use of "cultural defenses" that reinforce gender-biased norms and practices, as in the Chen and Moua cases, must be tied to critical reexamination of mainstream legal defenses implicated in these "cultural" cases. (3) What effects will granting or denying minority claims have on members of the minority groups being accommodated, as well as on members of other minority groups and the dominant culture? Will criticism or accommodation of particular minority practices reinforce gender inequality or play into cultural and racial stereotypes?

Such context-sensitive considerations would infuse evaluations of minority claims with greater cross-cultural humility. This does not mean that democratic citizens should look the other way in the face of oppressive practices. Rather, it means acknowledging the ways in which struggles toward gender equality within Western majority cultures are incomplete and ongoing, and being vigilant of the interconnections between such struggles and those within minority communities.

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