Multicultural Jurisdictions: Cultural Differences and Women's Rights/ Ayelet Shachar, Stephen Holmes; Cambridge: Cambridge University Press, 2001. (17-44 p.)

2 The perils of multicultural accommodation

In recent years debates have raged over how best to combat cultural and religious repression, about whether and how to legally accommodate difference, and about what causes ethnocultural conflict in the first place. Little attention has been paid, however, to the actual effects that multicultural policies are leaving on the lives of members of accommodated groups. Still less consideration has been given to the complex, subtle, and often injurious impact that state accommodation policies can exert on individuals within minority groups – an impact which can be so severe as to nullify some individuals' basic citizenship rights. This represents a serious omission in the multicultural debate. The present chapter aims to address this gap in the critical discussion by exposing (and elaborating) the often unrecognized costs of multicultural accommodation.

In the multicultural context, "accommodation" refers to a wide range of state measures designed to facilitate identity groups' practices and norms. For example, group members might be exempted from certain laws, or the group's leadership might be awarded some degree of autonomous jurisdiction over the group's members. Multicultural accommodation in its various legal manifestations generally aims to provide identity groups with the option to maintain their unique cultural and legal understanding of the world, or their *nomos*. However, multiculturalism begins to present a problem whenever state accommodation policies intended to mitigate the power differential between groups end up reinforcing power hierarchies within them. This phenomenon creates the paradox of multicultural vulnerability, and it points to the troubling fact that as matters now stand, some categories of at-risk group members are being asked to shoulder a disproportionate share of the costs of multiculturalism.

To overcome this problem, a distinction has been drawn by Will Kymlicka between two kinds of multicultural accommodation: those that promote justice between groups, which he calls "external protections," and those that restrict the ability of individuals within the group to revise

or abandon traditional cultural practices, which he calls "internal restrictions."[1] Yet this distinction between external and internal aspects of accommodation fails to provide a workable solution in practice for certain real-life situations involving accommodated groups. Worse, it may even tend to reinforce injurious in-group practices in cases where the external protections that promote justice between groups uphold the very cultural traditions that sanction the routine in-group maltreatment of certain categories of historically vulnerable members, such as women. To illustrate this last point, consider the case of *Santa Clara Pueblo* v. *Martinez*.[2]

In 1941 Julia Martinez, a full-blooded member of the Santa Clara Pueblo tribe and a citizen of the United States, married an individual from outside the tribe. Their several subsequent children together included a daughter named Audrey. This daughter was raised on the Pueblo reservation, so she learned to speak the Tewa language as well as to participate in the life of the tribe. She was, for all practical purposes, a Santa Claran Indian. Yet according to Pueblo family law rules she could not be accepted by the tribe as a Santa Claran. Membership in the tribe was granted only to children whose parents were both Pueblo members or to children of male members who married outside the tribe. Membership was denied to children of *female* members who married outside the tribe. After attempts to persuade the tribe to change its gender-discriminatory membership rules proved unsuccessful, Julia and Audrey Martinez filed a lawsuit in the early 1970s, seeking declaratory and injunctive relief to grant Audrey and similarly situated children full status as tribal members.

For the Martinez family, the importance of obtaining recognition was both symbolic and pragmatic. As Julia Martinez's lawyers explained in their Supreme Court brief:

> Denial of membership has caused hardship to the Martinez family, especially in obtaining medical care available to Indians. In 1968 Julia Martinez's now-deceased daughter Natalie, suffering from strokes associated with her terminal illness, was refused emergency medical treatment by the Indian Health Services. This was solely because her mother had previously been unable to obtain tribal recognition for her.[3]

[1] See Kymlicka 1995, pp. 34–44.

[2] *Santa Clara Pueblo* v. *Martinez*, 436 US 49 (1978). For a thorough exploration of the *Martinez* case, see Resnik 1989.

[3] Respondents' brief, pp. 2–3, cited in Resnik 1989, p. 721. Another important related aspect was that the Martinez children were facing denial of education and housing-related monetary assistance, which the United States' federal policy only extends to those Pueblo members recognized by internal tribal law. See Christofferson 1991, p. 170.

However, the US Supreme Court chose not to discuss these dire consequences of denial in terms of their distributive effect. Instead, it focused on the *demarcating* function of the Pueblo membership rules, which were deemed "no more or less than the mechanism of social . . . self-definition," and, as such, basic to the tribe's cultural survival.[4]

In 1978, after an initial defeat in a US District Court, which was then reversed by the Court of Appeals (which held that "the tribe's interest in the [membership rules] ordinance was not substantial enough to justify its discriminatory effect"), the Martinez family finally lost their legal battle to obtain recognition of their children as members of the Pueblo tribe. The ruling meant that the Martinez children (and all similarly situated children) had no right to enjoy the rights, services, and benefits that were automatically granted to children of Pueblo fathers (regardless of their mothers' membership/non-membership status), who, according to the tribe's gender-biased rules, were still considered group members. The Martinez children were thus barred from access to federal services such as health care, education, and housing assistance,[5] just as they were forced to forfeit their right to remain on the reservation in the event of their mother's death – simply because their mother broke the Pueblo's punitive code against women by marrying a non-tribe husband.[6] In a controversial decision, the US Supreme Court upheld this situation by refusing to strike down the tribe's membership rules (and refusing to face their distributive consequences).[7] It rejected the legal claim raised by Martinez on the basis of a "non-intervention" rationale, which lends precedence to the tribe's own criteria for satisfying membership rules as a means of ensuring the tribe's cultural preservation.

The *Martinez* case served to strengthen the autonomy of the Pueblo *vis-à-vis* the state, by granting the tribe autonomy to fully determine its membership boundaries. But the US Supreme Court decision also effectively gave legal sanction to the deprivation of benefits and the systematic maltreatment of a particular category of group member – some Pueblo mothers (and their children) – so long as it was in accordance with the group's traditions.

In this situation, the group's collective interest in preserving its *nomos* is achieved, in part, through the imposition of severe and disproportionate burdens upon a particular class of group member. The *Martinez* case

[4] See *Martinez*, p. 54 (citing the opinion of the US District Court of New Mexico, which ruled in favor of the tribe).

[5] For further discussion, see Resnick 1989, pp. 720–722; Christofferson 1991, pp. 183–184.

[6] See *Martinez*, pp. 52–53.

[7] Scores of articles and commentaries were written on the *Martinez* case. Some experts in federal Indian law praised it as a victory to tribal sovereignty, whereas most defenders of women's rights found the case to be difficult because it insulated from review tribal powers related to equal protection and due process provisions.

provides just one example of the tendency in multicultural accommodation toward legitimizing in-group power inequalities. Whenever certain categories of individual are systematically put at risk under the auspices of state-backed accommodation policies such as here, the paradox of multicultural vulnerability is bound to emerge.[8]

Standard citizenship models

"Citizenship," as Justice Warren famously put it, "is nothing less than the right to have rights."[9] It secures rights for the individual by linking her to a state. Individuals are also guaranteed certain basic rights through various international law treaties and supranational instruments, as well as regional intergovernmental agreements aimed at protecting human rights. Yet the state-centered definition of citizenship, entailing a particular legal status based on membership in a specific political community, still remains extremely important.[10] It defines who belongs to a state, and who is entitled to the benefits associated with full and equal membership in that state. A state bears duties to protect the rights of its citizens and residents, irrespective of their group affinity, and is held accountable if such rights are violated under its sovereignty – in certain cases, even if it has not actively participated in such violations.[11]

[8] The *Martinez* case, and related Canadian cases, concern the complex set of interactions between an historically oppressed group and the colonizing state which affect the status of citizen insiders. For a comprehensive discussion of the American federal government's involvement in the process by which the Pueblo's membership rules were defined and codified, see Resnik 1989, pp. 702–719. In Canada, the federal government had been directly implicated in the preservation of gender-biased membership rules through the infamous section 12 (1)(b) of the Indian Act. This section held that a female tribe member who married a non-Indian husband lost her status as a tribe member, and could not henceforth register as an Indian and a band member. The Indian Act was unsuccessfully challenged in 1974 in the case of *Canada (Attorney General)* v. *Lavell*, [1974] SCR 1349. The Indian Act was eventually changed in 1985, but only after the enactment of the Canadian Charter of Rights and Freedoms. See Bill C-31 (An Act to Amend the Indian Act), RSC 1985, c. 32 (1st Supp.). Prior to this change in law, the United Nations Human Rights Committee (UNHRC) ruled against Canada in the 1981 *Lovelace* case. In that case, the UNHRC held in favor of Mrs. Lovelace, who lost her status as an Indian in accordance with the Indian Act after marrying a non-Indian. However, the Committee's reasonings were not based on gender discrimination. Rather, it held that Mrs. Lovelace had a right of access to her native culture and language "in community with other members" of her group, according to section 27 of the International Covenant on Civil and Political Rights. See *Lovelace* v. *Canada*, UN GAOR, Human Rights Committee, 36th session, Supp. 17, UN Doc. A/36/40 (1981).

[9] See *Perez* v. *Brownell*, 356 US 44 (1958), p. 46.

[10] See Kymlicka and Norman 1994.

[11] I focus my remarks on citizens and residents as the prime beneficiaries of the rights and protections of the modern state. Under this category I include all persons who permanently reside in a given territorial unit. This definition is broader than a strict immigration law definition, since it can encompass the claims of illegal immigrants, so long as they are *de facto* permanent members of a given polity.

In practice, however, few governments have a perfect record when it comes to protecting the citizenship rights of their members.[12] An emerging body of regional and supranational institutions now permits individuals (rather than state actors) to bring rights claims against national governments.[13] This supranational-regulation regime is still in its embryonic stages. While it may in the future supersede national jurisdictions, this regime is more often conceived as *complementing* state-centered citizenship, rather than replacing it.[14] This means that we need to more closely investigate the legal status which defines citizenship – a unique relationship which grants the individual a stake in the state, and entitles her to the protection of its laws.

Citizenship: the bond between the individual and the state

Since antiquity, citizenship has defined the legal status of membership in a political community. Under Roman jurisprudence, "citizen came to mean someone free to act by law, free to ask and expect the law's protection."[15] This legal status signified a special attachment between the individual and the political community. In general, it entitled the citizen to "whatever prerogatives and . . . whatever responsibilities that [we]re attached to membership."[16] With the creation of the modern state, citizenship came to signify a certain equality with regard to the rights and duties of membership in the community. The modern state began to administer citizenship, and it now determines who secures citizenship, how it is conferred on individuals, what the associated benefits may be, and what rights and privileges it may entail. As a legal status, citizenship has come to imply a unique, reciprocal, and unmediated relationship between the individual on the one hand, and the political community or the state on the other.[17]

[12] One need only consult the annual Amnesty International or Human Rights Watch Reports to confirm this observation.

[13] Perhaps the most familiar supranational institution of this kind is the UNHRC. Although this was established as a committee of experts rather than a court, its recent practice reveals an increasingly "court-like trend." For a detailed analysis of this emerging supranational-regulation regime, see Helfer and Slaughter 1997.

[14] Even the new concept of European Citizenship introduced in the 1992 Treaty of European Union (the Maastricht Treaty) and modified in the 1997 Treaty of Amsterdam is explicitly based on state-centered citizenship. European citizenship can only be acquired through one's preexisting affiliation to a Member State. As it currently stands, this new supranational membership therefore *complements* rather than replaces state-based citizenship. Article 8 of the 1997 Treaty of Amsterdam explicitly states that: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."

[15] See Pocock 1995, p. 36.

[16] See Walzer 1989, p. 211.

[17] See Brubaker 1992, pp. 35–49.

The missing third component

Proponents of multiculturalism aim to expand the traditional understanding of citizenship. In a realm previously occupied only by the individual and the state, they wish to carve out a new conceptual space for identity groups.[18] Standard citizenship models prioritize either individual rights, as in the classic liberal citizenship model, or both individual rights and a strong sense of membership in the political community, as in the civic-republican model. Thus these models, almost by definition, exclude the recognition or accommodation of minority cultures from standard citizenship theory. In the United States, for example, even religiously defined *nomoi* groups – ostensibly protected by the Free Exercise clause of the First Amendment – are often denied accommodation by state authorities as a result of the entrenched existence of the standard citizenship model.[19] At the same time, a certain hard line against identity groups has been rationalized under equal protection jurisprudence as "blindness to differences."[20] This constitutional approach reflects, to a great extent, standard citizenship theory's conceptualization of the identity group as something that should operate *outside* the public sphere. In short, this view dictates that "differences" should be confined to the domain of the private. Identity group affiliations, according to this view, have no salience in the realm of the public, and consequently do not merit any recognized legal status.[21]

Why we need a multicultural conception of citizenship

Proponents of the multicultural citizenship model condemn "blindness to differences" constitutionalism. They call instead for a new vision. Citizenship, they claim, must be re-imagined as "a heterogeneous public in which persons stand forth with their differences acknowledged and respected."[22] A fresher and more nuanced understanding of citizenship begins with the view that group-based distinctiveness, ignored in the past in favor of assimilation to a dominant or majority identity, should now be recognized, respected, and even nourished by the contemporary state.[23]

At the heart of many contemporary justifications for multicultural

[18] For a definition of "identity groups," see note 5 in ch. 1.
[19] See, for example, Monsma and Soper 1998.
[20] See, for example, Gotanda 1991; Natapoff 1995.
[21] For a critical evaluation of "the two domains thesis," or the liberal formula for relegating identity groups to the realm of the private, see Spinner 1994.
[22] See Young 1990, p. 119.
[23] See Taylor 1994, p. 38.

citizenship lies a deep concern about power, particularly about the power of the state and dominant social groups to erode minority cultures. The pioneering works of theorists like Will Kymlicka, Charles Taylor, and Iris Young, whose writings in the early 1990s mark the beginnings of the current multiculturalism debate, clearly illustrate this concern. These scholars focus on assessing the justice claims of minority groups, and argue in favor of respecting group-based cultural differences, in addition to the protection of basic citizenship rights, and the nourishment of individuals' capacities.

These authors deploy a variety of arguments to state their case, most of which can be seen as resting on a common strategy: they all agree that difference-blind institutions which "purport to be neutral among different groups . . . are in fact implicitly titled towards the needs, interests, and identities of the majority group; and this creates a range of burdens, barriers, stigmatizations, and exclusions for members of minority groups."[24] Proponents of multiculturalism are thus pointing to the fact that any society, no matter how open and democratic, will always have certain cultural, linguistic, and historical traditions which welcome some of its members more completely than others, because the institutions of that society have been largely shaped in their image.[25]

Part of the problem is that "the state cannot help but give at least partial establishment to a culture,"[26] and that this culture often reflects the norms and preferences of the majority community.[27] The adoption of multicultural accommodations is still said to remedy the disadvantages that members of minority cultures may suffer under other universal or "difference-blind" citizenship models.

Kymlicka builds his scholarly edifice to multiculturalism on a philosophical foundation. He begins by claiming that cultural membership is an important good, which is a relevant criterion for the state to consider

[24] See Kymlicka and Norman 2000, p. 4.

[25] This critique shares much in common with feminist arguments about the entrenchment of male standards in the definition of seemingly neutral key societal and legal arrangements. Consider two classic examples: the American case of *Geduldig* v. *Aiello*, 417 US 484 (1974), or the Canadian case of *Bliss* v. *Attorney General of Canada* [1979] 1. SCR 183. In both instances, each country's Supreme Court failed to acknowledge that employment insurance schemes which did *not* include coverage of pregnancy – perhaps the only clear biological distinction between men and women – constituted discrimination against women on the basis of sex. While these cases were later overruled, they are a living testimony to the enduring capacity of law to entrench a particular point of view, and defend it as the point of view from nowhere. Critical race theorists are also engaged in the project of exposing how "facially neutral" laws and policies may in fact codify or create an adverse effect on individuals based on their race.

[26] See Kymlicka 1995, p. 27.

[27] Note that the assumption here is not that a society's standards are necessarily flawed or misguided, but that they are never fully blind to difference.

in distributing benefits, rights, and authority.[28] Kymlicka then proceeds to argue for the justice of taking "differences" into consideration and introducing policies that provide minority cultures with special protections. He chooses not to impute value to ethnocultural communities by virtue of their ethnicity, their specificity, or their vulnerability *qua* communities. Instead, he suggests that minority cultures deserve protection because they provide *individuals* with a secure context of choice, which in turn allows them to make meaningful decisions.[29] Unlike members of the majority, whose cultural context of choice is relatively secure, by virtue of the fact of speaking the majority's language, or their belonging to its dominant ethnic, cultural, racial or religious group, members of non-dominant communities do not enjoy the same guarantees. Minority cultures' traditions, languages, norms, practices, and distinct ways of life may in fact face extinction if no form of group-based accommodation is put into place by the multicultural state in time. Kymlicka thus offers an autonomy-enhancing justification for the adoption of differentiated-citizenship rights within a diverse society.

Young similarly sees group membership as an important social relationship, thanks to its frequently critical ascendance over individual identity.[30] But her argument for respecting cultural differences is even more explicitly political than Kymlicka's. Young insists on transforming extant power hierarchies between groups, by ensuring that previously excluded group members gain meaningful access to the decision-making bodies that govern democratic societies.[31] Like Kymlicka, Young imagines a new heterogeneous public sphere where persons from different groups and with different ways of life can fully participate "without shedding their distinct identities."[32]

Taylor's defense of multiculturalism focuses primarily on the idea that the recognition of persons, in their distinct cultural identities, fulfils a vital human need. Such recognition is essential to our very characteristics as human beings;[33] failure by public institutions to account for our identities as group members can thus inflict harm, particularly on those who belong to non-dominant minority cultures which are denied equal respect. Taylor concludes that we can begin to repair this harm only when different cultural communities gain a presumption of equal worth, which can then translate into certain forms of autonomy and law-making powers.

[28] In *Liberalism, Community, and Culture*, for example, Kymlicka criticizes John Rawls's failure to recognize the significance of cultural membership as a "primary good" in Rawls's own terminology. See Kymlicka 1989, pp. 162–166.
[29] See Kymlicka 1989, p. 165. [30] See Young 1990, p. 45.
[31] See Young 1990, pp. 96–121, 156–191. See also Williams 1998.
[32] See Young 1989, p. 272. [33] See Taylor 1994.

The emphasis on the links between providing individuals with "an intelligible context of choice, and a secure sense of identity and belonging"[34] thus stands at the core of the quest for a new multicultural model of citizenship.[35] A crucial premise of the quest is the recognition that all cultures do not enjoy an equal chance of survival. Members of the dominant majority possess an institutional advantage which ensures that the capacities and self-respect which make their culture possible are relatively secure.[36] This is not the case with minority cultures, however. Since the birth of the modern state, non-dominant populations have been subjected to extreme assimilationist pressures. Proponents of multiculturalism argue against such coercive practices, claiming that justice requires the state to respect group-based cultural differences.[37] Institutionalized forms of respect are particularly needed where state policies which purport to be neutral mask a bias toward the needs, interests, and inherited particularities of the majority. Such ultimately repressive systems create a range of burdens, barriers and exclusions for members of non-dominant cultural communities.[38]

Potential conflicts: group, state, individual

Unlike the standard thinking on citizenship, which posits a unique, reciprocal and unmediated relationship between the individual and the state, the new multicultural understanding of citizenship also recognizes identity groups as deserving special or differentiated rights.[39] Will Kymlicka, for example, distinguishes between three forms of group-differentiated rights: "self-government rights," which involve the delegation of legal powers to national minorities; "polyethnic rights," which might include financial support and legal protection for certain practices associated with particular ethnic or immigrant groups; and "special representation rights," such as guaranteed seats for designated minority groups within the central institutions of the larger society.[40] Such thinking departs from the perception of citizens as individuals who are uniform in their membership of a larger political community. Instead it views them as having

[34] See Kymlicka 1995, p. 105.
[35] For further discussion, see Kymlicka 1989.
[36] See Walker 1997, p. 216.
[37] For a comprehensive theory of the role of culture in human life, which in turn serves as the basis for defending multicultural accommodation as an integral part of the principle of full membership in a polity, see Parekh 2000.
[38] For an elegant summary of this critique, see Kymlicka 1999.
[39] As we have seen in the early writings on multiculturalism, theorists like Will Kymlicka, Iris Young, and Charles Taylor all argued in favor of respecting group-based cultural differences, by drawing on a shared view of the shortcomings of the standard citizenship model. I concisely summarize the major claims of this critique in Shachar 2000c.
[40] See Kymlicka 1995, pp. 6–7, 26–33.

equal rights as individuals, while *simultaneously* meriting differentiated rights as members of identity groups.

Surprisingly, Kymlicka pays relatively little attention to religiously defined minority communities. These groups do not occupy a special category in Kymlicka's tripartite typology. Instead, they are lumped together with ethnic and immigrant groups, although their concerns and historical incorporations into the body politic do not necessarily correspond to the *voluntary* criteria for immigration stressed by Kymlicka.[41] Various religious sects such as the Old Order Amish, the Mennonites, the Hutterites, and the Hassidic Jews arrived in North America after fleeing from systemic persecution in their European homelands. In seeking a safe haven in the "new world" they did not intend to break their communal structures or give up their unique ways of life. Rather, they sought a more tolerant political environment in lieu of the often hostile and repressive treatment they had known before. These groups can thus be viewed as possessing a stronger case for demanding accommodation than ethnic immigrants who, according to Kymlicka, have more or less "uprooted themselves" and implicitly surrendered some of their group-specific claims upon their voluntary and individual entry into a new society.[42]

Although they may not seem central to the contemporary debate over multiculturalism, religiously defined minority communities have historically been considered the prime candidates for accommodation, and this notion is prominent in classic liberal theory as well as in the contemporary constitutional codes of most democratic countries in the world. Given this history, the treatment of non-dominant religious minorities offers a relatively rich body of legal experience with different measures of accommodation. As the following chapters will show, this experience can only assist us in thinking more systematically about multiculturalism and citizenship.

Regardless of the specific type of group involved, the multicultural challenge to the standard models of citizenship raises fundamental questions about whether citizens' identities as members of *nomoi* groups should matter publicly, or the extent to which these identities should be politically relevant.[43] If we agree with Kymlicka, Young, and Taylor that

[41] See Kymlicka 1995, pp. 20, 63.

[42] According to Kymlicka, the claims of religious groups for accommodation are weaker than those of minority nations (such as the Québécois or First Nations in Canada), because only the latter are entitled to enjoy the most expansive form of differentiated rights: territorial self-government.

[43] These questions are posed by Jürgen Habermas in a short essay entitled "Multiculturalism and the Liberal State." See Habermas 1995.

these identities should matter publicly and should be considered politically relevant, then we must ask how the recognition of identity groups through accommodation should affect what John Rawls calls the "primary subject of justice": that is, "the way in which the major social institutions distribute fundamental rights and duties,"[44] and the division of authority in the modern state. These questions are important because they focus our attention on the legal-institutional mechanisms of differentiated citizenship. They ask us to consider not only the distribution of rights and decision-making authority, but also the distribution of duties and burdens. So the real issue becomes a matter of weighing not only the benefits but the costs of multiculturalism, together with attempting to resolve the problem of their distribution both outside and inside the group.[45]

Schematically, six prototypical legal conflicts can arise under a multicultural citizenship model. Not all are unique to a differentiated citizenship system, but they may take on significant new dimensions under it. They are: (1) individual vs. individual; (2) individual vs. state; (3) identity group vs. identity group; (4) identity group vs. state (the most often discussed legal conflict under multiculturalism); (5) non-member vs. identity group (as, for example, in affirmative action cases); and (6) individual group member vs. identity group. My principal concern is with the final category.

Multicultural accommodation raises complex questions about the appropriate relationships between group and state authorities, particularly with regard to jurisdictions over individuals living within *nomoi* groups. This issue becomes even more pressing when we are faced with systematic violations of citizenship rights which are supposedly endorsed by group traditions. This problem derives from the delicate tripartite balance involved in multiculturalism, which needs to be continually renegotiated between the group, the state, and the individual who belongs to both. We must therefore find a way to enable the multicultural state to allocate jurisdiction to identity groups in certain legal arenas, while

[44] See Rawls 1971, p. 7.

[45] My discussion explores the differentiated effects of accommodation on members of minority communities, but the movement toward a multicultural citizenship model may also have significant implications for persons living outside these accommodated communities as well (e.g. by creating more diverse public spaces, and by allocating certain public funds or opportunities based on a combination of personal qualifications and group memberships). In recent years, the reversal of race-based affirmative action programs in the United States illustrates how vicious a response such special rights programs can evoke, regardless of their historical justification. For a comprehensive discussion of the dangers of inter-group conflicts that any theory of multiculturalism must address, see Levy 2000.

simultaneously respecting group members' rights as citizens.[46] Two resolutions are generally offered to this problem, which I have named the strong version and the weak version of the multicultural model.[47] Each has different consequences when evaluated from the perspective of the paradox of multicultural vulnerability.

Strong and weak versions of multiculturalism

The strong version of multiculturalism calls for a fundamental shift in our understanding of citizenship. Identity groups are to be granted extensive formal, legal, and constitutional standing so that they may govern their members in accordance with their *nomos*. In order to free minority communities from the tyrannical imposition of centralized state law – viewed as an "imperial yoke, galling the necks of the culturally diverse citizenry"[48] – the state should introduce at least two accommodation measures. First, it must allow for some degree of self-government for identity groups, and second, it must officially include the voices of identity groups within the constitutional framework and within public discourse.[49]

The strong multicultural model, however, focuses almost exclusively on the problem of injustice between groups. The individual and the state are no longer the central components of citizenship, as they were in the standard citizenship models. Rather, it is the identity group which takes center stage. Yet in its crusade for respect between groups, the strong multicultural model tacitly conceals the phenomenon of in-group oppression. While highlighting the conflicts that exist *between* identity groups or *among* identity groups and the state, the model obscures the power relations *within* identity groups. Also, little consideration is given under this version of multiculturalism to the many problems of group agency (such as the criteria determining who can "speak for a group"), or the political effects of accommodation policies upon the ossification of identity in such minority communities. The strong model therefore oversimplifies the web of relationships that exist between the individual, the group, and the state. It simply replaces the state–individual-centered understanding of standard citizenship theory with a state–identity-group-centered understanding.

[46] I am not assuming that citizenship rights are uncontested or crystal clear. They are an outcome of each country's democratic process, besides being codified in the commitments that each polity has taken upon itself by signing and ratifying regional and international human rights conventions.

[47] I have discussed these two versions of multiculturalism in Shachar 1998.

[48] See Tully 1995b, p. 5. See also Tully 1995a.

[49] See Tully 1995b. On other representations of the strong multicultural model, see, for example, McDonald 1991.

Even worse, it does so at the expense of overlooking the potential burdens that these new accommodation measures might impose on the individual who belongs to *both* group and state.

The weak version of the multicultural model more effectively addresses the question of who bears what costs. It acknowledges the potential tensions between the accommodation of identity groups and the protection of citizenship rights. The weak version therefore offers a more compelling model of multicultural citizenship. While proponents of the weak version may disagree about the justifications for specific accommodation policies, they agree on the proposition that a morally adequate treatment of identity groups means providing multicultural accommodation *without* abandoning the protection of individual rights.[50] Will Kymlicka, a prominent representative of the weak version, expresses this goal in the following way:

> I believe it is legitimate, and indeed unavoidable, to supplement traditional human rights with minority rights. A comprehensive theory of justice in a multicultural state will include both universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or "special status" for minority cultures.[51]

Moreover, Kymlicka argues that the real test of the multicultural model of citizenship lies in its ability to "explain how minority rights coexist with human rights, and how minority rights are limited by principles of individual liberty, democracy, and social justice."[52] The strong multicultural model fails Kymlicka's test because it emphasizes solely the rights of identity groups. In contrast, the weak version to some degree mediates among the components of the three parties in any multicultural system – the group, the state, and the individual. Unfortunately, the weak multicultural model also contradicts its own central tenet when it advocates accommodation even in cases where putting legal authority in the hands of the identity group means exposing certain group members to routine in-group violations of their individual citizenship rights.

This problem becomes visible when we adopt the perspective of the paradox of multicultural vulnerability: the sober recognition that in reality a well-meaning attempt to empower traditionally marginalized minority communities may just end up re-enforcing power hierarchies within the accommodated community instead. This perennial potential problem raises a serious challenge to Kymlicka's (untested) presumption that multiculturalism is "primarily a matter of external protections."[53] As

[50] These justifications range from autonomy-based/valorization of choice arguments, to tolerance/respect for diversity reasoning, to anti-subordination/non-dominance justifications. [51] Kymlicka 1995, p. 6. [52] Ibid. [53] See Kymlicka 1996, p. 160.

the *Martinez* case shows, the external aspects of multicultural accommodation are not so easily distinguished from the policy's internal impact.

This blind spot in the weak version's analysis is partly related to an overly narrow focus on "identity" as singular – as if one's cultural membership were unmediated by other social factors, such as gender, sexual orientation, age, marital status, and the like.[54] This single-axis perception fails to capture the potential multiplicity of a group member's identity-creating affiliations – to her culture, state, family, religion, and the like. Even more troubling, it is blind to the particular vulnerability that traditionally subordinated categories may face in the context of their own cultures, and which may be exacerbated under the auspices of the state's accommodationist policies.

As mentioned earlier, Kymlicka claims that awarding a degree of differentiated rights to *nomoi* groups who seek external protection is a crucial feature of the weak version of multiculturalism, which thus applies a corrective lens to the troubling "blindness to differences" approach of standard citizenship theory. On the other hand, Kymlicka is also committed to the perception that minority cultures which systematically impose internal restrictions upon their members are not equally entitled to accommodation. While this distinction provides a much-needed normative yardstick, two significant problems effectively undercut its viability and feasibility – at least so long as it is not accompanied by a comprehensive legal-institutional mechanism for combating intra-group rights violations.

First, the distinction between "external" and "internal" aspects of multiculturalism tends to collapse when put into practice. Often the jurisdictional powers that are important for the group to ensure its external protection *vis-à-vis* the larger society are the same powers which can be used to perpetuate internal restriction on certain categories of group member. Second, in discussing the limits of toleration in *Multicultural Citizenship*, Kymlicka powerfully argues that "a liberal conception of minority rights will not justify (except under extreme circumstances) 'internal restrictions' – that is, the demand by a minority culture to restrict the basic civil and political liberties of its members."[55] However, there is a tension between Kymlicka's prohibition on internal restrictions and his tripartite typology detailing which groups merit what sort of recognition for their cultural identity. Kymlicka defines national minorities as deserving the most expansive form of accommodation – territorial self-

[54] On the usage of a multiple-axis analysis (or "intersectionality") as a response which challenges exclusive and separate categories, especially in the context of race and gender, see, for example, Crenshaw 1989; Volpp 1996.

[55] See Kymlicka 1995, p. 152.

government rights – whereas members of immigrant, ethnic, or religious groups are entitled to less comprehensive accommodation.

Kymlicka holds that in the case of national minorities it would be a mistake for the state to act as if it had the authority to intervene in their internal affairs, even if such groups routinely violate certain of their members' individual rights.[56] "In cases where the national minority is illiberal," he writes, "this means that the majority will be unable to prevent the violation of individual rights within the minority community."[57] By this formulation, however, Kymlicka is taking for granted that a certain type of group (such as a national minority) merits accommodation by the very *nature* of its group type.[58] Yet this is not a sufficient test even according to his own account. We also need to establish that the group does not impose excessive internal restrictions upon its members. Kymlicka seems to overlook this two-step process while addressing the special case of national minorities. Instead, he upholds their entitlement to the fullest degree of accommodation, even though this is precisely what needs to be established by his own internal–external distinction. For if even groups that systematically impose internal restrictions upon some of their members can have their external protections upheld, what can remain of the inside–outside distinction? Kymlicka apparently prefers to overlook this inconsistency by maintaining that groups such as the Santa Clara Pueblo Indians deserve self-governing rights, *regardless* of discriminatory evidence like that found in the *Martinez* case.[59]

This is where Kymlicka cannot make weak multiculturalism work. We saw earlier that Kymlicka protects the situated individual by putting in a qualification on accommodation, which states that no identity group merits differentiated rights if it uses such jurisdictional powers to impose unjust internal restrictions. By this analysis, national minorities like the Pueblo should not receive autonomous self-governing powers when they compromise the rights of their members. Yet Kymlicka clearly supports their accommodation, insisting that any attempt to act differently will most likely be perceived as a form of aggression or paternalistic colonialism.[60] Here Kymlicka is fully consumed by the state–group dichotomy.

[56] See Kymlicka 1995, p. 166. This is surprising because Kymlicka asserts that liberal outsiders have a duty to support "any efforts the community makes to liberalize their cultures," and because he views the violation of group members' rights by their own group as morally unjust. See Kymlicka 1992, p. 144; Kymlicka 1995, pp. 166–170.

[57] See Kymlicka 1995, p. 168.

[58] Jacob Levy offers a related critique by suggesting that we should focus on the nature of the accommodation claim, rather than on the nature of the group which makes it. See Levy 1997, p. 50.

[59] Kymlicka himself selects this example; see Kymlicka 1995, p. 165.

[60] See Kymlicka 1995, pp. 163–172.

This is inconsistent with the careful balancing act which Kymlicka generally observes in his theoretical defense of weak multiculturalism, which keeps the potentially conflicting interests of the group, the state, and the individual more clearly in view.

The conundrum Kymlicka encounters while advocating accommodation to groups which (by his own standards) should not be granted the strongest form of differentiated rights seems to derive from a certain slippage in his position: from a defense of the weak version of multiculturalism into something more akin to the strong version, at least in relation to national minorities. Since Kymlicka takes for granted what still remains to be established (that national minorities merit accommodation), he can only labor to define the role of the state against the paradox of multicultural vulnerability and its nefarious impingements. He thus corners himself into a position that resembles the strong version of multiculturalism when he suggests that the state, as a third party, has little if any authority to intervene in the group.[61] And this formulation is redolent with assumptions about the proper relationship between these two entities to which the individual simultaneously belongs.

Is the state really just an "outside" third party, which is clearly and neatly detached from the "inside" group realm? Or does this supposition conceal certain circumstances that have historically contributed to frictions between the state and *nomoi* groups? Since the late eighteenth century, identity groups have undergone substantial changes, many of them related to the modern state's campaign to transform "the population, space, and nature under [its] jurisdiction into a closed system without surprises that can . . . be observed and controlled."[62]

Today there is no multicultural solution that can replicate a bygone era, long before the rise of the modern state and its ineradicable alternations of the political landscape. Groups can no longer isolate themselves from the broader society as before.[63] Groups that today petition the state for accommodation have already been touched by the operation of that state and, to a significant degree, have been re-shaped in their encounter with it. Some groups have suffered extreme violence, even genocide, in contact with the state. Others have been subjected to a host of direct and indirect means of state intervention, intended to transform their members into "civilized" or sufficiently assimilable individuals worthy of full citizenship. In the latter case, three patterns of responses to such homogenizing pressures can be seen to generally occur.

[61] See Kymlicka 1995, p. 165. [62] See Scott 1995, p. 231.
[63] Even prior to the creation of the modern state, *full* seclusion by minority group members was rarely, if ever, possible.

Three types of group response to assimilation pressures

We can distinguish three main types of response to the strain of enforced assimilation, wherein identity group members are pushed to become "like their fellow countrymen." These are:

1. the dissolution of all previous community loyalties, or "full assimilation";
2. political, social and economic integration along with the retention of some aspects of the group's cultural traditions, or "limited particularism"; and
3. the employment of explicit measures to preserve group identity as unquestionably distinct from mainstream society, or "reactive culturalism."

Among these three patterns of response, the third raises the most interesting and complex issues for proponents of the weak version of multiculturalism. In reviewing these three response types, I draw in particular on the historical experiences of different sub-sections of the Jewish community and the assimilation pressures they faced in countries such as France, Germany, and the United States. I do so because members of the Jewish community were traditionally seen (at least in the eyes of the Christian majorities of most Western countries) as representing the "quintessential Other": the Other which must be "emancipated" from the group in order to qualify as a citizen.[64]

Full assimilation

The first major response-type is that of "full assimilation." This response can take the form of religious conversion, intermarriage, or simply a decisive break with the past. In the early nineteenth century, with the conferral of civic rights in France and Germany, significant numbers of Jews chose the latter option. They completely renounced their Jewish identity in the hope of becoming culturally undifferentiated members of the body politic. And in exchange for this renunciation, they were granted civil and political rights as individual citizens. Since only men were initially allowed access to the benefits of citizenship, gender affected the nature and timing of decisions about full assimilation. For example, women were less likely to relinquish their communal identity, and if they did so, it was primarily in order to marry a non-group member. Men, on the other

[64] See, for example, Karl Marx, "On the Jewish Question," reprinted in Marx 1994, pp. 28–56. For further discussion, see Brown 1995; Smith 1997.

hand, enjoyed more freedom to choose the route and timing of full assimilation.[65]

Indeed, the values and promises of the Enlightenment era deeply influenced many Jews in both France and Germany.[66] Significant numbers of them chose the path to full assimilation.[67] Yet the fact that these individuals forfeited their group identity, and opted to see themselves first and foremost as members of the political community, did not by any means preclude continued discrimination. Even before the Holocaust made Jewishness an ascriptive rather than a self-defined identity, various legal restrictions were imposed upon those identified as Jewish by "blood." Converted Jews and their descendants were made painfully aware that it was not entirely in their power to change their group identity. Subtle and not-so-subtle discrimination ran deep, and occasionally re-emerged even in post-Enlightenment societies. State and social institutions reminded Jews of their stigma of ancestry, even when they had long abandoned any marker, practice, or belief associated with Judaism.

However, the full assimilation option at least enables group members to decide that they no longer wish to follow a minority cultural tradition – in theory if not in practice. But in order for this option to be viable, members of both the minority and the majority cultures must labor to define and maintain a system where a purely universal or non-sectarian citizenship identity is attainable for all. Some might argue that this ideal is unattainable, and that its hold on our imagination is part of the problem rather than part of the solution.[68] For the purposes of our discussion, however, it is enough to remember that for individuals who consciously forgo their group culture and are comfortable viewing themselves as indistinguishable from other citizens, the paradox of multicultural vulnerability does not tend to arise because they do not generally claim any measure of cultural accommodation from the contemporary state.

Limited particularism

The second major type of response to state assimilation pressures is "limited particularism." Groups which have embraced this option typically amend certain aspects of their traditions in order to close the gap between the minority group's culture and the dominant majority's

[65] See Hyman 1995, p. 18.
[66] For further discussion see, for example, Goldscheider and Zuckerman 1984; Endelman 1987.
[67] For an engaging discussion of this transition and its implications for the understanding of communal identity, see Stolzenberg and Myers 1992.
[68] For this line of critique, see Young 1989.

norms. These groups thus adapt themselves to fit the public–private divide that many modern states promote. Jewish reform leaders, for example, were willing to exempt their followers from certain traditional Jewish practices in order to facilitate their social, political, and economic integration into the larger society, while at the same time maintaining their distinct religious affiliation (i.e. they did not endorse full assimilation). In the United States, nineteenth-century Reform Jews chose to forsake Jewish identity markers such as the yarmulke (a skullcap traditionally worn by Jewish men) and so were no longer visibly distinguishable as Jews by their dress.[69] Ritual observance was also modified in ways that made Judaism "dignified and American." English replaced Hebrew as the language of prayer, organ music was introduced into religious services, and men and women began to sit together, the men often with their heads uncovered.[70] These changes did not constitute full assimilation, however. Reform Judaism still retained most of the moral statutes derived from the Jewish tradition, and established religious, educational, and philanthropic institutions in order to inculcate a sense of Jewish particularism among their different communities' members.[71]

Groups that follow the limited particularism path can benefit from multiculturalism, especially when contemporary accommodation by the state takes the form of removing historically entrenched sectarian practices which have dominated the public sphere – such as the familiar example of Sunday closing laws, which once imposed such an unfair burden on members of non-Christian minorities.[72] However, groups that choose "limited particularism" rarely demand external protections which can serve as a guise for maintaining internal restrictions on certain group members.

Reactive culturalism

The real source of problems for the weak version of multiculturalism comes from an altogether different response to assimilation pressures: that of "reactive culturalism." This response entails a strict adherence to a group's traditional laws, norms, and practices as part of an identity group's active resistance to external forces of change, such as secularism or modernity. Reactive culturalism can be expressed in various ways – in a rigid reading of a group's textual sources, for example, or by closely

[69] See Auerbach 1990, p. 75. [70] See Auerbach 1990, p. 76.
[71] See Hyman 1995, pp. 10–17.
[72] In the American context, see *Braunfeld* v. *Brown*, 366 US 599 (1961); *Gowan* v. *Maryland*, 366 US 420 (1961). For a critical evaluation of Sunday closing laws in Canada, see Weinrib forthcoming.

monitoring the behavior of its members and quickly quashing any unorthodox interpretation of the tradition as evidence of decay. In all, these amount to attempts to more clearly demarcate the group's boundaries by walling it off from the outside world.[73]

In instances of reactive culturalism, images of women and of the family frequently become symbols of a *nomoi* group's "authentic" cultural identity, a phenomenon which is manifested, for example, in religious communities from Orthodox Judaism to Islamic traditionalism to Evangelical Protestantism. When a group's assertion of its identity becomes inlaid with elements of reactive culturalism, some of its more hierarchical practices may gain heightened significance as manifestations of the group's difference from mainstream society.

In such instances, the interpretation of the group's tradition may become closed in upon itself, thus precluding various possibilities of reform within the tradition. In other words, the *nomoi* group becomes increasingly unable to adapt its law to new conditions. It often follows this path of heightened rigidity out of a fear that any adaptation might lead to increased assimilation and gradual disintegration of the collective *nomos*. Under such conditions, debates regarding the future of the community and its norms are stifled, and in-group attempts to bring about less hierarchical interpretations of the group's tradition are effectively blocked.

Thus reactive culturalism is not simply the expression of a pure unalloyed culture so much as the result of a cross-cultural interaction that has already occurred, in which the state has also played its role. Today, groups which have embraced this reactive option often seek to govern substantial aspects of their members' everyday lives, and thus petition the state for legal permission to do so.[74]

[73] Reactive culturalism may also emerge as a response to segregation, especially when members of minority communities seek to assimilate but are rejected by members of the wider society because they are perceived as "too different." I thank Rainer Bauböck who called my attention to this point in a personal communication. Bauböck suggests, rightly in my view, that religious fundamentalism among immigrants in contemporary European societies can thus be understood as reflecting the phenomenon I label as reactive culturalism.

[74] In the arena of education, for example, a *nomoi* group may wish to withdraw its young members from the public school, as was the landmark case of *Wisconsin* v. *Yoder*, 406 US 205 (1972). In *Yoder*, the US Supreme Court approved an accommodation measure to exempt children at the age of fourteen from two more years of mandatory schooling, as requested by the Old Amish Order community. For a critical view of this decision, see Arneson and Shapiro 1996. Another type of challenge in the education arena might include a demand by group members to exempt their children from exposure to material that challenges the parents' worldview. Unlike *Yoder*, this accommodation claim was rejected by the US Supreme Court in the case of *Mozert* v. *Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 US 1066 (1988). For a comprehensive commentary on this case, see Stolzenberg 1993.

Groups that follow the reactive path may appear to be the best candidates for differentiated-citizenship rights, because they are "different" and make public demands for explicit and uncompromising accommodation. Yet they are precisely the identity groups which are the most prone to abuse multiculturalism. Such internal restrictions of a "reactivist" group can be perpetuated and in fact exacerbated through well-meaning multicultural accommodation. This problem is further aggravated when the outside–inside dichotomy serves as the rationale for the so-called "non-intervention" policy of the state – even in the face of systemic abuse of certain members' citizenship rights.

The inevitable inside–outside interaction

Multiculturalists understandably worry that non-dominant cultures which have reactively asserted their identities will be eradicated by the contemporary state in the name of official neutrality. In the past, the state has vigorously fought expressions of difference that constituted either an outrage against, or merely an affront to, the finer sensitivities of a dominant group.[75] Therefore, certain scholars reacted by championing the view that the state, under a multicultural citizenship model, should both grant greater autonomy to *nomoi* groups, and uphold a policy of "non-intervention" into identity groups' affairs.

The term "non-intervention" refers to a legal policy traditionally associated with two different arenas: *laissez-faire* economics and family privacy.[76] In the multicultural context, a non-intervention policy would defer to the group's traditions, even in instances where the paradox of multicultural vulnerability is at work, that is, where a group's practices are systematically exposing certain categories of members to sanctioned in-group violations in the name of protecting the group's collective *nomos*.[77]

Against "non-intervention"

"Non-intervention" is a misleading term. It re-enforces the myth that, left to their own devices, identity groups could exist as autonomous entities bearing little relation to the state.[78] Of course, if this were the case, then there would be no need to envision a multicultural model of citizenship –

[75] See Shaskolsky-Sheleff 1993, p. 194.
[76] For a detailed discussion, see Olsen 1983, p. 1504. [77] See Kukathas 1992, p. 127.
[78] The "walls" of identity groups are never absolutely sealed. Even under a liberal non-interventionist policy, the state may (and even should) indirectly intervene in identity groups through measures such as tax exemptions. See, for example, Barry 2001, pp. 52–53.

for the very logic of this project requires the state to change the background rules affecting the status of identity groups. And after all, under both the strong and the weak versions of multiculturalism, some entity must define the criteria by which groups will be recognized, accommodated, and awarded group-differentiated rights. Significantly, the state itself plays a crucial role in determining which groups are allowed a degree of binding legal authority over their members, and who in the group is permitted to hold such state-backed legal power.

That identity groups might benefit from having their members bound by the group's traditions rather than by state law is, as I have noted, a perfectly sensible suggestion. But who should define which group's established traditions merit accommodation? And which voices from within an identity group should be recognized by the state as representative of the "integrity of a group's culture?" These questions have yet to be addressed in the multicultural literature, even though they critically concern the muddiest of anthropological, sociological, and ethnographic waters of debate. The paucity of available scholarship on these questions contributes to a prevalent murkiness in the multicultural debate, obscuring the ways in which the state operates among *nomoi* groups.[79]

In the family law arena, for example, multicultural accommodation policies which recognize the authority of religious communities to perform legally binding marriage and divorce ceremonies (in lieu of civil registration procedures) also set standards that define *who* in the group has the legal power to solemnize marriage and divorce.[80] The accommodation of identity groups in the context of a larger political community, therefore, is never just an act of "recognition." Given the interaction between inside and outside forces, as well as the diversity within identity

[79] *Nomoi* groups are not the fixed and unchanging essences that they are often portrayed to be. In asserting that identity groups are not to be conceived as non-conflictual or ahistorical entities, I do not intend to imply that identity groups are fictional entities or that they are not at least partly constitutive of their members' identities as encumbered selves. However, I also do not conceive of identity as something which is "virtually burnt into the genes of people." See Vertovec 1996, p. 51. For a critique of biologically or naturally based conceptions of race encoded in law, see Lopez 1994. See also Liu 1991. Liu describes the study of "intercultural relations" as based on the rejection of the perception that "the boundaries of group identity are fixed or at least readily apparent. Such an arrangement makes it difficult to conceptualize the relations between groups or how identities are mutually constructed in moments of contact."

[80] Since marital status has significant consequences not only for the parties involved but also for various third parties, the state sometimes requires a group to establish a register indicating the marital status of their members. When "inside" officials control such tasks for the state, they may be subject to some "outside" regulation. In Israel, for example, where matters of marriage and divorce fall under the exclusive jurisdiction of religious officials, state law regulates the terms of appointment of Jewish, Muslim, and Druze judges serving in religious courts.

groups, the state inevitably affects in-group power relations and legitimizes certain interpretations of an identity group's culture over other possible competing interpretations, regardless of however well meaning the state's accommodation policies might be.

The state-sanctioned delegation of jurisdiction to authorities within an identity group, when accompanied by a "non-interventionist" policy, thus plays right into the hands of power-holders in the group. It allows these leaders to define any potential change in the group's (now state-sanctioned) practices as corruptions of the *nomos*. Members who attempt to bring about in-group changes, by suggesting a less gender-biased reading of its family law practices, for example, are consequently open to accusations of cultural betrayal.[81]

Moreover, the so-called "traditional" treatment of women sometimes becomes a cultural emblem symbolizing a group's authentic identity. Not surprisingly, this phenomenon – a manifestation of reactive culturalism – further complicates the relationship between the group, the state, and the individual. In such instances of reactive culturalism, any state intervention in issues related to family law can be seen by the entire group as a threat to their *nomos*. Enormous pressure is thus put on women insiders to relinquish their individual citizenship rights and to demonstrate group loyalty by accepting the standard interpretation of group doctrine as the only correct reading of their group's tradition.

One argument against state intervention (even when the intervention is to protect the rights of individuals within the group) pleads for the sanctity of cultural tradition. Any state protection of disproportionately burdened insiders is thus seen as a form of interference which threatens the survival of the group and violates its autonomy. This argument seems especially powerful when the arena of intervention is the family, because many *nomoi* groups depend on the family for their continued reproduction and their sense of identity. Yet it is equally and immediately true that *nomoi* groups have already become part of the state in the modern world. The emphasis on insulating a group's tradition is, at least in part, connected to other inevitable pressures that are imposed on the group from the wider society surrounding it. In fact, one of the predictable consequences of this ongoing interaction with the state is that some more

[81] For a description of such accusations against women by certain (more conservative) sections of Islamic communities in the Arab world, see Haddad 1998, p. 20: "[certain] Islamists fault the Arab women for appropriating the concepts of equality and liberation from the West. In this she has become an importer, they say, an imitator rather than a creative originator. Her body dwells in her country, while her mind is in the West." Clearly, however, there are various other views on women's role in Islam, as well as a plurality of Muslim positions on the relationship between the traditional *shar'ia* and the idea of equal rights regardless of gender. See, for example, An-Na'im 1990; Bielefeldt 1995.

"reactive" groups will actually ossify and reify their once-living doctrine out of the fear of cultural assimilation.[82]

The choice then is not between "intervention" and "non-intervention," because *nomoi* groups are always reacting to the effects of state power, even when they claim to be most isolated from them. Rather, the question is what kind of accommodation the state should engage in, and with what legal-institutional mechanisms. If we accept the proposition that power relations, hierarchies, and subordination may exist not only *between* groups but also *within* groups, and that in-group dynamics are influenced by the relationship between the state and identity groups, then we should be aware that multicultural accommodation may do more than merely "recognize" a group's identity. In many ways, it indirectly participates in the ongoing process of redefining the essential traditions that constitute a group's *nomos*.[83]

Given that a group's established traditions are more fluid than we sometimes acknowledge, it is theoretically possible to re-interpret those traditions that impose systemic risks and costs on certain insiders without endangering the group's identity. Admittedly, changes are difficult to bring about in any established system. Moreover, a group's hierarchical traditions sometimes become cultural flags that distinguish the group's own culture from the world outside. In such situations, group members who disproportionately bear the costs of accommodation often wind up being punished when they call for changes in the group's "essential" practices, since their actions are taken as a betrayal of the group. Under such conditions, focusing solely on the external effects of accommodation enables power-holders to twist the language of respect for groups into a license to internally subordinate certain group members.

The "domestic impunity" fallacy

Artificially compartmentalizing the relationship between the group and the state into a fixed inside–outside division thus conceals the extent to which both are in fact interdependent.[84] It also permits identity groups to surround themselves with barriers so inviolable that whatever happens *inside* those groups happens *outside* the jurisdiction of state law. In other words, if a violation of individual rights occurs within an identity group,

[82] In a different context, John Borrows eloquently phrases the dilemma that reactive culturalism raises for identity groups themselves: "[T]radition can be the dead faith of living people, or the living faith of dead people." Groups which have taken the "reactive" turn may run the risk of inhering in the former alternative. See Borrows 2000, pp. 332–333.

[83] Even groups that aspire to complete cultural isolation must interact to some degree with outside forces – though that interaction may be centered on their efforts to more clearly demarcate their own boundaries.

[84] See Scott 1988, p. 37.

the violation is categorized as a "private affair." The state, as an outside entity, has no business intervening. This binary opposition leads us astray, however, not only because it ignores the web of relations between inside and outside, as well as the fragility of these categorizations, but also because it obscures the fact that what constitutes a "private affair" is in itself defined by the state's regime of law.[85]

The (re-)establishment of a "privacy zone" in the identity group context is sometimes justified by an appeal to the "right of exit" rationale – the rationale that every individual has a right to leave her group if she so wishes. This rationale suggests that the solution to the problem of systematic sanctioned in-group maltreatment is not to devise less hazardous accommodation policies, nor to envision more creative legal-institutional solutions; it is simply to permit at-risk group insiders to leave if they do not like their group's practices.

In fact, this right of exit solution offers no comprehensive policy approach at all, and instead offers a case-by-case approach, imposing the burden of resolving conflict upon the individual – and relieving the state of any responsibility for the situation, even though as the accommodating entity it still has a fiduciary duty toward all citizens. Specifically, the right of exit argument suggests that an injured insider should be the one to abandon the very center of her life, family, and community. This "solution" never considers that obstacles such as economic hardship, lack of education, skills deficiencies, or emotional distress may make exit all but impossible for some.[86]

It is not at all clear how the accommodating non-intervening multicultural state envisioned by proponents of the "right of exit" option is supposed to ensure that group members who wish to exit their traditional cultures can viably do so. By turning a blind eye to differential power distributions within the group hierarchy, and ignoring women's heightened symbolic role in relation to other group members, the right of exit rationale forces an insider into a cruel choice of penalties: either accept all group practices – including those that violate your fundamental citizenship rights – or (somehow) leave.[87]

According to this logic, once individuals enter (or choose to remain within) minority communities, they are presumed to have relinquished the set of rights and protections granted them by virtue of their citizenship.

[85] For a detailed account of the legal construction of the privacy discourse, see Siegel 1996.
[86] In other words, little thought is given under this approach to questions of *enabling* exit (assuming, for the sake of argument, that we accept it as the appropriate solution to addressing the paradox of multicultural vulnerability). For further critiques of the right of exit rationale, see Mahoney 1992; Kymlicka 1992, p. 143.
[87] For a defense of this position, see Kukathas 1992.

But consider this analogy: it could be argued that the state must not intervene in any couple's marital affairs, even in cases of domestic abuse, because the battered wife's failure to leave a marital relationship into which she voluntarily entered nullifies the offense. This in fact was the legal doctrine for much of the nineteenth century in American law, which favored the policy of state non-intervention in the domestic arena and interpreted a woman's consent to marriage as implied consent to atrocities such as rape or battering by her spouse.[88] This doctrine of implied consent assumes that those who have not used the exit option have implicitly agreed to their own subordination. Given this historical background, it is troubling that after abolishing the implied consent doctrine in state law, we find it resurfacing in the context of the contemporary defense of "non-interventionist" multiculturalism.

Summary

We saw in this chapter how standard citizenship models fail to carve out a conceptual space for *nomoi* groups in the public sphere, and instead focus solely on the bundle of rights and obligations that individuals bear toward the state. The new multicultural vision of citizenship improves upon the standard theory by bringing in a third element, alongside the individual and the state: the identity group. With this significant improvement comes new problems, however, concerning the appropriate relationship between group and state authorities, particularly with regard to jurisdiction over individuals living within *nomoi* groups. As illustrated by the *Martinez* case, accommodation by the state which is designed to enhance the autonomy of the group can also play a role in sanctioning in-group power hierarchies. This is the paradox of multicultural vulnerability, and it calls attention to the less recognized costs of accommodation, as well as to the fact that these costs are often disproportionately borne by traditionally less powerful categories of group member.

The benefits of multiculturalism must not be treated in isolation from the costs of accommodation. Hence, this chapter challenges the real-life applicability of Kymlicka's too simple distinction between "external" and "internal" aspects of accommodation. Even Kymlicka, who pays careful attention to the potential conflict between enhancing cultural diversity and protecting individual rights, fails to provide a satisfactory answer to explain why *nomoi* groups, which under the cover of multiculturalism engage in unfair in-group practices, deserve state accommodation for such practices in the first place. My conclusion, however, is not that

[88] For further discussion, see West 1990.

multiculturalism cannot fulfil the promise of accommodating deep differences in the public sphere, but rather that we must be extremely cautious about what type of multiculturalism we engage in. We must not slide unintentionally from a tripartite framework into a group-versus-state dichotomy. I caution, in short, against equating respect for groups with a license to subordinate at-risk group members.

Paying attention to the often less recognized costs of accommodation leads to a broader re-examination of how we arrived where we are today. Certain contemporary *nomoi* groups assert their identity by systematically violating the citizenship rights of their members for the sake of preserving a distinct *nomos*. Yet the *nomoi* groups claiming accommodation from the state have already been affected by the operation of that state, and their behavior is in some sense a response to that experience. There are three main types of response to assimilation pressures, and each in turn affects the kind of response it elicits from the state. The first response, "full assimilation," involves the rejection of the group's traditional distinct identity by individual members in their hope of becoming culturally undifferentiated citizens. It expects the state to uphold non-discriminatory civil standards. The second response, "limited particularism," occurs when group leaders transform certain aspects of the minority tradition in order to approximate the majority's practices, thus enabling group members to participate fully in the public sphere without losing their unique cultural identity. This compromise assumes that the state will remove culture-specific symbols from the public sphere and from state law. The third and most complex response, "reactive culturalism," describes active resistance from the group to external forces of change, a resistance often manifested through a rigid reading of the group's *nomos* and by strict monitoring of the behavior of group members. It is this response which requires the state to examine ways of publicly and politically accommodating group identity. And it is through this expectation that minority groups might advocate the adoption of a strong version of multiculturalism. Groups that have embarked on this latter path raise serious challenges to the weak version of multiculturalism when they demand public accommodation of their differences and, at the same time, seek immunity from state intervention into their "private affairs."

Yet adopting a policy of "non-intervention" only aggravates in-group restrictions, without solving the multiculturalism paradox. The "right of exit" solution similarly fails to provide a comprehensive answer. Instead, it throws upon the already beleaguered individual the responsibility to either miraculously transform the legal-institutional conditions that keep her vulnerable or to find the resources to leave her whole world behind.

Surely it is troubling when a solution demands that those who are the most vulnerable must pay the highest price, while the abusers remain undisturbed in their home communities. Women, in particular, suffer under these two options. The next chapter more closely examines the effects of well-meaning accommodations upon women in the family law arena, and considers the disproportionate burden that they often bear for the sake of preserving the collective.