

# Michigan Law Review

---

Volume 101 | Issue 6

---

2003

## Individual Vulnerability and Cultural Transformation

Eric J. Mitnick

*Thomas Jefferson School of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Society Commons](#)

---

### Recommended Citation

Eric J. Mitnick, *Individual Vulnerability and Cultural Transformation*, 101 MICH. L. REV. 1635 (2003).

Available at: <https://repository.law.umich.edu/mlr/vol101/iss6/13>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# INDIVIDUAL VULNERABILITY AND CULTURAL TRANSFORMATION

Eric J. Mitnick\*

MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS. By *Ayelet Shachar*. Cambridge: Cambridge University Press. 2001. Pp. xiv, 193. \$17.97.

Perhaps the most pressing problem in multicultural theory and practice today is the problem of individual vulnerability. Most interested theorists and multicultural states now accept the basic premise that some degree of state accommodation of minority cultural practice is required as a matter of justice.<sup>1</sup> Debate then shifts to the best justifications for, and the appropriate extent of, such group-differentiated policy. Too often lost amid these discussions is the plight of vulnerable members of accommodated cultural groups: individuals subject to repression within their cultural groups, but who lose a critical aspect of their identities upon exit; individuals who would retain their cultural membership, but also their rights as individuals.

It is not that the problem of individual cultural vulnerability goes unsolved because it goes unnoticed. Rather, the problem itself receives little prescriptive attention because most theorists who consider the problem consider it to be insoluble.<sup>2</sup> In her valuable new book on multiculturalism, however, Ayelet Shachar<sup>3</sup> takes the plight of vulnerable cultural group members, particularly women, as her primary focus. Further, she offers innovative legal-institutional prescriptions designed to permit the retention and simultaneous transformation of cultural identities. Yet, in *Multicultural Jurisdictions*, Shachar also underestimates the extent to which her legal model is derivative of extant theory and overestimates the efficacy of her own prescriptive design.

In the second Part of this Review, I consider Shachar's analysis of the relationship between state accommodationist policy and intra-group repression, or what Shachar terms the "paradox of multicultural

---

\* Assistant Professor, Thomas Jefferson School of Law. A.B. 1988, Cornell; J.D. 1991, University of Michigan; M.A. (Politics) 1998, Princeton. — Ed.

1. See Will Kymlicka & Wayne Norman, *Introduction to CITIZENSHIP IN DIVERSE SOCIETIES* 1, 4 (Will Kymlicka & Wayne Norman eds., 2000) (assessing the current state of multiculturalism within Western democracies).

2. See *infra* notes 48-50 and accompanying text.

3. Assistant Professor, University of Toronto Faculty of Law.

vulnerability” (p. 3). While there is perhaps less that is novel in Shachar’s descriptive account than one might reasonably anticipate, the context she brings to bear on the plight of vulnerable individuals is itself a significant virtue. In particular, Shachar’s treatment of the problem as it arises in the context of family law helpfully demonstrates the ways that costs of multicultural accommodation may be disproportionately borne by women.

In Part III, I take up Shachar’s institutional prescriptions for the transformation of illiberal cultural groups. In her conception of a joint, but competitive, state-cultural jurisdictional scheme — a scheme through which cultural elites would be induced, and vulnerable members empowered, to revise repressive cultural practices — Shachar offers an approach that is genuinely path-breaking. Yet, for all its ingenuity, Shachar’s model remains underdeveloped. The prescriptions Shachar offers in *Multicultural Jurisdictions*, at least as they now stand, would have little effect on the lives of most at-risk group members, including those most vulnerable to the authority of cultural group majorities and elites.

First, though, we shall need to locate Shachar’s work within (or perhaps beyond) the broader framework of liberal-multicultural theory. This is the subject of Part I.

## I. LIBERAL MULTICULTURALISM

### A. *Culture, Community, and Justice*

Like so many other ongoing discussions in modern liberal theory, the recent multicultural debates have their roots ultimately in Rawls’s conception of justice,<sup>4</sup> specifically in the well-known communitarian response to that conception.<sup>5</sup> The thrust of the communitarian critique, relevant for present purposes, contends that Rawls’s theory relies on an overly atomistic, unrealistically universalized conception of the self as prior to its ends.<sup>6</sup> The Rawlsian conception of the person, communitarians charge, is both false, because individuals naturally exist encumbered by particular social attachments, and ultimately dangerous, because the radical valorization of individual right threat-

---

4. See JOHN RAWLS, A THEORY OF JUSTICE (1971).

5. Works illustrative of the communitarian critique of Rawlsian liberalism include ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) [hereinafter SANDEL, LIBERALISM]; MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); Charles Taylor, *Atomism*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 187-211 (1985). For an overview of these works, see Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985).

6. RAWLS, *supra* note 4, at 560 (“For the self is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities.”).

ens the virtues of civic and communal life.<sup>7</sup> There was thus an obvious, though misleading, correlation at the outset of the recent debates in multicultural theory between proponents of cultural rights and communitarian critics of liberalism.<sup>8</sup> The early proponents of cultural rights, like their communitarian counterparts, were similarly concerned with the affirmation of particular (i.e., cultural or communal) attachments.<sup>9</sup>

This initial correlation between communitarianism and multiculturalism was in part bred of a confusion over the nature of cultural rights. Many theorists assumed that claims for cultural rights were, in essence, assertions of group or communal rights.<sup>10</sup> On this basis, the multicultural debate was originally thought of as yet another front in the broader dispute between individualists and collectivists over the relative priority of the self and its ends. Liberal theorists thus initially rejected multicultural claims for fear of sacrificing the precedence of the individual to that of the community.<sup>11</sup> Even more, cultural rights were (as it happens, correctly) perceived as claims for a formally unequal distribution of benefits and duties among persons in society on the basis of group membership. Liberal theorists thus initially also opposed claims for cultural rights in defense of what they took to be liberal neutrality.<sup>12</sup> As a result, the first liberal proponents of multicult-

7. MACINTYRE, *supra* note 5, at 204-05; MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 14 (1996) [hereinafter SANDEL, *DEMOCRACY'S DISCONTENT*] ("Unless we think of ourselves as encumbered selves, already claimed by certain projects and commitments, we cannot make sense of . . . indispensable aspects of our moral and political experience."); SANDEL, *LIBERALISM*, *supra* note 5, at 152-54. In this sense, the communitarian critique echoes the earlier sentiments of Marx. See Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26, 42 (Robert C. Tucker ed., 2d ed. 1978) (1843) ("But liberty as a right of man is not founded upon the relations between man and man, but rather upon the separation of man from man. It is the right of such separation. The right of the circumscribed individual, withdrawn into himself.")

8. For an overview of the evolution of the debate over cultural rights, see WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 17-38 (2001) [hereinafter KYMLICKA, *POLITICS IN THE VERNACULAR*].

9. See, e.g., Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 *NOTRE DAME L. REV.* 615 (1992); Ronald Garet, *Communality and Existence: The Rights of Groups*, 56 *S. CAL. L. REV.* 1001 (1983); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 *CAN. J.L. & JURISPRUDENCE* 19 (1989); Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 *CAN. J.L. & JURISPRUDENCE* 217 (1991); Frances Svensson, *Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes*, 27 *POL. STUD.* 421 (1979); Vernon Van Dyke, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, 44 *J. POL.* 21 (1982).

10. See sources cited *supra* note 9.

11. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 46 (1995) [hereinafter KYMLICKA, *MULTICULTURAL CITIZENSHIP*].

12. For a recent articulation of this view, see BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001), contending that cultural rights contravene liberal egalitarian principles.

turalism faced a dual challenge: they first needed to dispel the notion that cultural group-differentiated rights were detrimental to individual interests; and second, they needed to establish how it was that official group-differentiated policies and institutions, insofar as they distinguished among categories of persons in the distribution of benefits and duties, were not *prima facie* contrary to justice.<sup>13</sup>

Liberal multiculturalists thus set about the task of explaining that although rights grounded in cultural differences clearly are strongly associated with cultural group membership, this does not demonstrate that cultural rights must be essentially equivalent to group or collective rights.<sup>14</sup> Rather, cultural rights merely vest on the basis of cultural membership, and most such rights (for example, language rights, rights freely to practice one's religion) vest legally in *individuals* rather than in any collective entity.<sup>15</sup> There indeed may be cultural rights that vest in, and can only be asserted by, a group *qua* group (a right to collective self-determination, for example), but these are exceedingly rare in modern liberal democracies.<sup>16</sup> Moreover, even rights that logically can be pressed only by a collectivity remain grounded in individual interests; rights such as these remain legitimate only to the extent that they benefit individuals on the basis of their membership in the particular group at issue.<sup>17</sup>

Furthermore, the notion that modern liberal states, composed of a plurality of ethnic, religious and (intra)national groups, could be truly neutral with respect to culture has been exposed as fiction.<sup>18</sup> Governments necessarily make decisions on a broad range of matters that affect culturally identified persons in disparate ways. Public

13. See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989) [hereinafter KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE*]; IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994).

14. See, e.g., Michael Hartney, *Some Confusions Regarding Collective Rights*, in *THE RIGHTS OF MINORITY CULTURES* 202-27 (Will Kymlicka ed., 1995); Jan Narveson, *Collective Rights?*, 4 *CAN. J.L. & JURISPRUDENCE* 329 (1991).

15. For a discussion of the investitive conditions of rights in individuals, see D.N. MacCormick, *Rights in Legislation*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 189, 204-05 (P.M.S. Hacker & J. Raz eds., 1977).

16. See, e.g., Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 *J. PHIL.* 439 (1990). For a helpful typology of cultural rights, see Jacob T. Levy, *Classifying Cultural Rights*, in *NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS* 22 (Ian Shapiro & Will Kymlicka eds., 1997).

17. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 207-09 (1986).

18. See JOSEPH CARENS, *CULTURE, CITIZENSHIP AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* 53 (2000) (“[C]ultural neutrality is an illusion.”); KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 11, at 111 (arguing that cultural neutrality is “patently false”); KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 8, at 32 (“[M]ainstream institutions are not neutral, but rather are implicitly or explicitly tilted towards the interests and identities of the majority group.”).

schooling, for example, and provision of other public services and institutions (e.g., court systems, health and welfare agencies) must occur in some language, and there will inevitably be members of particular cultural groups placed at a disadvantage by such linguistic choices.<sup>19</sup> Similarly, decisions to close government offices on particular public holidays — indeed the very structure of the “work week” itself — and decisions with respect to state symbols, rituals, and uniforms, will disadvantage some persons on the basis of their culture while granting advantages to others.<sup>20</sup> And it would likely surprise few of us to learn that most of these decisions tend to privilege, implicitly or explicitly, the dominant or majority culture.<sup>21</sup> Moreover, even self-conscious efforts to remedy cultural disadvantages by devolving decisionmaking authority to more local levels generate certain cultural inequities, for the decisions regarding the drawing of geographical and jurisdictional boundaries themselves then become culturally sensitive.<sup>22</sup> State-sanctioned minority cultural group-differentiated policies are thus commonly defended by multicultural theorists as a reasonable remedy for inevitable official partiality.

### B. *Autonomy and Toleration*

Thus, the more interesting contemporary debates in multicultural theory rarely concern the essential justice of culturally differentiated policies per se. Rather, recent discussions tend to accept as an initial premise that official differential treatment is made necessary by state bias toward particular conceptions of the good, and so have focused instead on the appropriate *extent of*, and *occasions for*, such differential treatment. Indeed, with the exposure of ethnocultural neutrality as fantasy, cultural rights have in recent years found a rather congenial resting place directly in the heart of liberal theory.<sup>23</sup> Yet questions regarding just how far liberal society should go in accommodating the

---

19. See Charles Taylor, *Nationalism and Modernity*, in THE MORALITY OF NATIONALISM 31, 34 (Jeff McMahan & Robert McKim eds., 1997) (“[A] state-sponsored, — inculcated, and — defined language and culture, in which both economy and state function, is obviously an immense advantage to people if this language and culture are theirs.”).

20. CARENS, *supra* note 18, at 54 (stating that public holidays and state symbols “are always culturally laden”); KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 11, at 114-15 (arguing that in countries like Canada and the United States, state symbols, public holidays, the work-week, and government uniforms tend to “reflect the needs of Christians”).

21. KYMLICKA, POLITICS IN THE VERNACULAR, *supra* note 8, at 24-25 (noting the timing of admission of states into the union reflect choices “deliberately made to ensure that anglophones would be a majority within each of the fifty states of the American federation”).

22. CARENS, *supra* note 18, at 54; KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 11, at 112.

23. Indeed, Rawls himself has recast his theory to account for private attachments. See JOHN RAWLS, POLITICAL LIBERALISM (1993).

claims of minority cultural groups have been answered variously depending principally upon how respondents regard the fundamental nature of the liberal justification for differential rights. That is to say, while debates over multiculturalism have now largely become debates *within* liberal theory, they have also evolved into debates fundamentally *about* liberal theory, or about the nature and principal commitments of liberalism and the liberal state.<sup>24</sup>

Without doubt, the prevailing point of view in the recent multicultural literature has taken autonomy as the fundamental value in liberal theory.<sup>25</sup> The predominance of the autonomy perspective in liberal multicultural theory is due in no small measure to its obvious association with, indeed derivation from, the classical conceptions of liberalism put forth by Kant, Mill, and Rawls.<sup>26</sup> What this emphasis means for multiculturalism is that, far from resting claims for cultural recognition and accommodation on communal interests (as in the first stage of the debate described above), group-differentiated rights are now substantially more likely to be defended as essential to *individual* well-being.<sup>27</sup>

And the relationship is not hard to see. Liberalism grounded in the autonomy perspective is committed at its deepest levels to individual self-invention,<sup>28</sup> yet one of the principal ways in which persons define

24. Proponents of both of the broadly defined perspectives on liberalism described below urge a fundamental reconceptualization of liberal society as deeply plural. See Chandran Kukathas, *Cultural Toleration*, in ETHNICITY AND GROUP RIGHTS 69, 84 (Ian Shapiro & Will Kymlicka eds., 1997) [hereinafter Kukathas, *Cultural Toleration*] (“[W]e should think of the public realm as an area of convergence of different moral practices.”); Joseph Raz, *Multiculturalism*, 11 *RATIO JURIS* 193, 197 (1998) (“We should learn to think of our societies as consisting not of a majority and minorities, but as constituted by a plurality of cultural groups.”). For an alternative view, criticizing liberalism as an authoritative basis for discerning the propriety of cultural policies on the ground that liberalism is itself “embedded in a particular culture,” see BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 338 (2000).

25. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 11; JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 155 (rev. ed. 1995).

26. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., HarperCollins Publishers 1964) (1785); JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., Random House 1974) (1859); RAWLS, *supra* note 4; John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515 (1980).

27. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 11, at 105 (stating that cultural membership enables individual choice); RAZ, *supra* note 25, at 178 (commenting that cultural groups’ “moral claim to respect and to prosperity rests entirely on their vital importance to the prosperity of individual human beings”). *But see* Chandran Kukathas, *Are There Any Cultural Rights?*, 20 *POL. THEORY* 105, 107 (1992) [hereinafter Kukathas, *Are There Any Cultural Rights?*] (observing that liberalism’s “emphasis on individual rights or individual liberty bespeaks not hostility to the interests of communities but wariness of the power of the majority over minorities”).

28. “[I]t is the privilege and proper condition of a human being . . . to use and interpret experience in his own way. . . . He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation.” MILL, *supra* note 26, at 122-23.

themselves is through social attachments. "For most people," as Joseph Raz has written, "membership in their cultural group is a major determinant of their sense of who they are; it provides a strong focus of identification; it contributes to what we have come to call their sense of their own identity."<sup>29</sup> Hence, insofar as membership in a particular cultural group may constitute an aspect of identity, rights that respect such cultural attachments serve rather directly to protect crucial individual interests.<sup>30</sup> Further, in contrast to communitarian conceptions of the self, liberal theorists envision even constitutive ends and attachments as subject to critical reflection and revision.<sup>31</sup> This is why official recognition and accommodation of diverse cultural attachments is deemed essential to liberal individualism; cultural associations provide the critical "contexts of choice" within which individuals may define and revise aspects of our selves.<sup>32</sup> According to the autonomy perspective, then, cultural rights are conceived of as (some of) the instruments of liberal self-invention.

At the same time, there remain significant differences among adherents to the prevailing autonomy perspective in liberal multiculturalism, particularly regarding which types of groups should receive differential treatment. For example, Will Kymlicka, who has done perhaps more than any other theorist to frame the current debate,

---

29. RAZ, *supra* note 25, at 178; *see also* *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (stating that "individuals define themselves" through freely chosen relationships); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) (finding that associational freedom "safeguards the ability independently to define one's identity that is central to any concept of liberty").

30. To be clear, this is not to say that human identity may be constituted according solely to any particular characteristic or affiliation; this is not, in other words, an argument grounded in essentialism. It is instead an acknowledgement that one's culture contributes to one's identity, and that one's identity is otherwise complex, unique, and reflective of multiple and cross-cutting attachments and concerns. On the compound nature of human identity, see IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 88-89 (2000); Craig Calhoun, *Social Theory and the Politics of Identity*, in *SOCIAL THEORY AND THE POLITICS OF IDENTITY* 27-29 (Craig Calhoun ed., 1994). For discussions of the constitutive nature of group attachments see IAN HÁNEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); RAZ, *supra* note 25, at 178; ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984); Eric J. Mitnick, *Constitutive Rights*, 20 *OXFORD J. LEGAL STUD.* 185 (2000).

31. "[F]ree persons conceive of themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in these matters." John Rawls, *Reply to Alexander and Musgrave*, in *COLLECTED PAPERS* 232, 240 (Samuel Freeman ed., 1999); *see also* KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 11, at 91 (stating that conceptions of the good change "even for those people who think of themselves as having constitutive ends"); John Rawls, *Justice as Fairness: Political not Metaphysical*, in *COLLECTED PAPERS*, *supra* (positing that "our conceptions of the good may and often do change over time, usually slowly but sometimes rather suddenly").

32. KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE*, *supra* note 13, at 166 (1989) (arguing that "cultural structure . . . [should be] recognized as a context of choice"); KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 11, at 82-84 (describing "societal culture" as a critical "context of choice").



draws a critical distinction between indigenous minority national groups (for example, Native American and Alaskan tribes), that have been collectively and coercively incorporated into a broader multinational state (like the United States), and ethnic immigrant groups, composed of persons who have been incorporated on an individual or familial, and to some extent volitional, basis.<sup>33</sup> Members of incorporated national groups, Kymlicka argues, arrive (though, of course, they have never truly left) still firmly entrenched in their own “societal culture,” with its distinct institutions and social practices.<sup>34</sup> Members of ethnic immigrant groups, on the other hand, may bring with them certain aspects of their former lives, such as language and collective historical narratives, but will of necessity have left behind the institutionalized practices that formed the core of their previous societal cultures.<sup>35</sup> And since Kymlicka considers access to a societal culture a precondition of liberal justice, this distinction matters greatly. Indeed, for Kymlicka it justifies affording more extensive cultural rights to members of minority national groups, who require continuing access to their own societal cultures in order to live autonomous lives, than to members of ethnic immigrant groups, who may more readily achieve autonomy within the societal culture of the dominant national group.<sup>36</sup>

Unsurprisingly, there is considerable disagreement among liberal multicultural theorists of the autonomy perspective both over the viability of the notion of a “societal culture” itself and over the propriety of the distinctions Kymlicka draws between different types of cultural groups on the basis of that construct. Joseph Carens, for example, has noted that Kymlicka’s conception of access to a single societal culture as a precondition of liberal justice, combined with his willingness to fold immigrants within the dominant societal culture, leads logically to a blanket preclusion of distinctive cultural rights for ethnic immigrants.<sup>37</sup> Carens adheres to the basic notion of culture as an essential context of choice for autonomous individuals, but conceives of the sources of cultural meaning as “multiple, varying and overlapping,” rather than as homogenous Kymlickian societal cultures. Rather than drawing categorical lines between different types of

---

33. See KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 11, at 10-12.

34. Kymlicka defines “societal culture” as “a 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.” *Id.* at 76.

35. *Id.* at 77-78.

36. *Id.* at 82-84.

37. CARENS, *supra* note 18, at 57.

cultural groups, we serve justice best, Carens argues, by being more attentive to the full context of particular cultural claims.<sup>38</sup>

Another group of liberal commentators, even more interested in protecting cultural identities, have sought to challenge the prevailing autonomy perspective itself. Theorists such as William Galston and Chandran Kukathas have argued that liberalism, properly conceptualized, is rooted not in the notion of autonomy but in the ideals of toleration and diversity.<sup>39</sup> Galston and Kukathas both ground their alternative perspectives in a vigorous libertarianism. Galston, for example, suggests that: "The heart of the tolerance a liberal society needs is the refusal to use state power to impose one's way of life on others."<sup>40</sup> And Kukathas maintains: "For each social union to have any significant measure of integrity, it must to *some extent* be impervious to the values of the wider society."<sup>41</sup> Yet what is most critical in understanding the arguments offered by these toleration theorists is precisely that *extent*, or the degree to which each theorist is willing to take their distrust of state authority in the realm of culture. For the foundational similarity in their approaches to justifying cultural freedom on the grounds of toleration and diversity belies an even more fundamental difference in their conceptions of liberal society and the political state.

For instance, although Galston at one point claims both instrumental and intrinsic virtue in diversity, it seems reasonably clear that what he is most concerned with is respecting diversity as a means toward achieving social stability, or a fair *modus vivendi*.<sup>42</sup> Kukathas, on the other hand, defends toleration as an independent value, one constitu-

---

38. *Id.* at 72-77; see also Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, in *THE RIGHTS OF MINORITY CULTURES* 93 (Will Kymlicka ed., 1995) (criticizing Kymlicka's notion of a homogenous "cultural structure").

39. William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516, 524 (1995) ("Rather than taking autonomy or critical reflection as our point of departure, what we need instead is an account of liberalism that gives diversity its due."); Kukathas, *Cultural Toleration*, *supra* note 24, at 99 (stating that "at the core of liberalism is the idea of toleration"). The recent distinction between what I have termed above the autonomy and tolerance perspectives arose in a series of articles and responses between Kymlicka and Kukathas. See Kukathas, *Are There Any Cultural Rights?*, *supra* note 27, at 120; Chandran Kukathas, *Cultural Rights Again: A Rejoinder to Kymlicka*, 20 *POL. THEORY* 674, 680 (1992) [hereinafter Kukathas, *Cultural Rights Again: A Rejoinder to Kymlicka*] ("The differences [between Kymlicka and Kukathas] stem, ultimately from two views of liberalism."); Will Kymlicka, *The Rights of Minority Cultures: Reply to Kukathas*, 20 *POL. THEORY* 140 (1992).

40. Galston, *supra* note 39, at 524.

41. Kukathas, *Are There Any Cultural Rights?*, *supra* note 27, at 127.

42. See Galston, *supra* note 39, at 527 (recognizing diversity as instrumentally and intrinsically valuable); *id.* at 519 ("All too often the alternative to finding a way of living together — a *modus vivendi* — is cruel and bloody strife.").

tive of public reason.<sup>43</sup> Whereas Galston remains committed to diversity and mutual toleration “[w]ithin a framework of civic unity,” Kukathas would, without reservation, sacrifice social unity for toleration.<sup>44</sup> And where Galston continues to conceive of the liberal state as constructed broadly for the attainment of “shared liberal purposes,” Kukathas conceptualizes the public realm as the “convergence of different moral practices” including, but not limited to, liberalism.<sup>45</sup> In practical terms, these conceptual differences matter dramatically; Kukathas’s cultural libertarianism becomes far more radical than Galston’s. For example, while Galston’s conception of liberalism as toleration would nonetheless urge a “vigorous” liberal civic education and “strong prohibitions . . . against the use of coercion to prevent individuals from leaving . . . [cultural] groups,” Kukathas’s would sustain “communities which bring up children unschooled and illiterate” and exclude intervention “[e]ven in cases where there is clear evidence of terrible practices.”<sup>46</sup> Hence, the toleration perspective on liberalism exhibits a certain degree of diversity of its own.

### C. *A New Path?*

Recent liberal-multicultural theory has thus been marked by two major stances: the autonomy and toleration perspectives on liberalism. Moreover, there has been a significant range of disagreement between the two as well as within each perspective. Yet on one issue, the views of all of the above commentators converge. Theorists of the autonomy and toleration perspectives commonly presume an inevitable clash between the collective interests of any given cultural group and the individual interests of certain of its members.

Adherents of both the autonomy and toleration perspectives generally countenance what Kymlicka has called “external protections,” or group-differentiated policies designed to “protect a particular ethnic or national group from the destabilizing impact of the decisions of the larger society.”<sup>47</sup> These sorts of protections — for example, conduct exemptions granted to members of particular religious groups, or rights to the use of particular languages or natural resources — seek to achieve a fair degree of equality *between* different groups in society. Where the perspectives differ, however, is with

---

43. Kukathas, *Cultural Toleration*, *supra* note 24, at 83 (“Toleration is not important because it *promotes* reason . . . . [T]oleration is important because if toleration is forsaken then so is reason.”).

44. Galston, *supra* note 39, at 526; Kukathas, *Cultural Toleration*, *supra* note 24, at 99.

45. Galston, *supra* note 39, at 525; Kukathas, *Cultural Toleration*, *supra* note 24, at 84.

46. Galston, *supra* note 39, at 528; Kukathas, *Cultural Toleration*, *supra* note 24, at 87, 89.

47. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 11, at 37.

respect to what Kymlicka terms “internal restrictions,” or cultural group claims “to restrict the liberty of [group] members in the name of group solidarity.”<sup>48</sup> These sorts of claims, ranging from constraints on criticism of group customs to practices involving mutilation and arguably torture, seek collective freedom to preserve and implement traditional practices, even at the expense of individual freedom and equality *within* particular groups.<sup>49</sup>

With respect to claims for internal restrictions, theorists who take autonomy as liberalism’s fundamental commitment would privilege individual over collective freedom, whereas theorists who conceive of liberalism’s core as toleration would more readily sacrifice intragroup individual liberty to cultural tradition. Indeed, this point of divergence, as described here by Kukathas, serves as the essential presupposition of the current liberal-multicultural debate:

My contention here is that we are faced with a fundamental conflict between two irreconcilable aspirations: on one hand, to leave cultural communities alone to manage their own affairs, whatever we may think of their values; and, on the other hand, to champion the claims or the interests of individuals who, we think, are disadvantaged by their communities’ lack of regard for certain values. Unfortunately, one cannot have it both ways.<sup>50</sup>

In *Multicultural Jurisdictions*, however, Shachar aims to disprove this presupposition. She maintains that we can indeed have it both ways. To do so, however, Shachar argues that we need “a new way of practicing multiculturalism” (p. 5), one that will “align the benefits of *enhanced* external protections between groups with the benefits of *reduced* internal restrictions” (p. 8). We need a “brave new blueprint” (p. 7) that will enable us to “strive[] for the reduction of injustice between groups, together with the enhancement of justice within them” (p. 4). We need “a new and better way of accommodating difference” (p. xi), “[t]ruly new thinking on multiculturalism” (p. 15), “new and better legal-institutional mechanisms” (p. 62), “a new architecture for dividing and sharing authority in the multicultural state” (p. 13), even “a *radically* new architecture for dividing and sharing authority in the multicultural state” (p. 88; emphasis added).

Shachar is clearly correct that a new approach is needed. The problem is that too much of what Shachar offers here is not new, and the portion that is genuinely innovative, at least as it stands, will not work. But *Multicultural Jurisdictions* represents an important institutional turn in the multicultural debate, an opening that theorists should seize upon and further develop. Indeed, as I shall demonstrate

---

48. *Id.* at 36.

49. See Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171, 195 (1993) (noting that “clitoridectomy may qualify as a form of torture”).

50. Kukathas, *Cultural Rights Again: A Rejoinder to Kymlicka*, *supra* note 39, at 678.

below, while Shachar's descriptive project here too often recycles prior discussions, her institutional prescriptions are likely to frame the debate for years to come.

## II. CULTURAL GROUPS AND INDIVIDUAL VULNERABILITY

### A. *The Paradox of Multicultural Vulnerability*

Shachar's descriptive project begins with twin admonitions, familiar to the multicultural literature, regarding the nature of personal identity and the structure of society. First, Shachar cautions, we must "re-acquaint ourselves with the complex and multi-layered nature of multicultural identity" (p. 15). This is the now proverbial reminder to avoid overessentializing the cultural aspect of group members' identities. The idea, which virtually all theorists appear to have accepted, is that no individual may be constituted according solely to any particular aspect of their identity; rather, all persons exist as complex psychic entities, with multiple, crosscutting and even contradictory attachments and concerns.<sup>51</sup> Second, and relatedly, Shachar reminds her readers that modern society is structured according to the "multicultural triad" of group, state, and individual, and that the individual will "have interests and rights that derive from *concurrent* membership in both group and state" (p. 5).

As we have seen above, and as Shachar reminds us here, the multi-dimensional nature of human identity and modern society serve in most accounts of liberal multiculturalism as critical elements in the justification of official group-differentiated policies and institutions.<sup>52</sup> Yet Shachar emphasizes these aspects not to buttress further the interests of cultural *groups*, but rather to focus attention on the interests of the *individuals within* such groups (p. 6). Her point is that while state accommodation of cultural difference may be required as a matter of justice, we must at the same time not lose sight of our critical concern for the general rights and life opportunities of the individual members of cultural groups once the group has been accommodated. "In an ideal world," writes Shachar, "enhancing the autonomy of *nomoi* groups would also always improve the status of at risk individuals inside the group, or at least would never serve to legitimate the maltreatment of certain group members."<sup>53</sup> In reality, however, certain

---

51. See YOUNG, *supra* note 30, at 88-89; Calhoun, *supra* note 30, at 27-29; Mitnick, *supra* note 30, at 200. Anthony Appiah has noted the existence of both collective and personal dimensions of individual identity. See K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 149, 151 (Amy Gutmann ed., 1994).

52. See *supra* Section I.B.

53. Pp. 4-5. Shachar's reference to cultural groups as "*nomoi* groups" is derived from Robert Cover's use of the Greek *nomos* to describe a discrete legal culture, or a collection of

traditional practices for which cultural groups will seek accommodation will directly contravene the individual rights of particular group members, even to the point of being radically repressive. Even more, the state will then be complicit in the cultural repression of vulnerable group members, for the vulnerability of particular categories of persons, and in particular women, is often already deeply encoded in cultural *nomoi*. State accommodation thus serves at times to perpetuate already existing power hierarchies and, with them, intragroup repression (p. 47). “[H]ow” then, Shachar asks, “do we protect group members from routine violations of their citizenship rights, when those violations arise from the traditional practices of the group which we have already sanctioned through accommodation?” (p. 3). This is the dilemma that Shachar terms “*the paradox of multicultural vulnerability*” (p. 3).

Now, the reality of threats to individual members of cultural groups from state accommodation of traditional practices has been discussed at length by numerous theorists.<sup>54</sup> Yet even if her identification of this multicultural dilemma is itself less than novel, one significant virtue of Shachar’s treatment is the context she brings to bear on the problem. As Joseph Carens has indicated, and as Shachar here echoes (p. 8), “we do not really understand what general principles and theoretical formulations *mean* until we see them interpreted and applied in a variety of specific contexts.”<sup>55</sup> Reflecting this concern, Shachar introduces several genuinely valuable examples of multicultural experience throughout her book. And she does so not simply from well-recognized modern pluralistic states like the United States (pp. 18-20) and Canada (pp. 152-54), but also from countries as seemingly diverse as India (pp. 80-84), Kenya (p. 55, n.43), and Israel (pp. 79-80). Indeed, Shachar’s description of the paradox as it arises in the arena of family law (ch. 3) is perhaps the most sustained contextual analysis of the problem of individual cultural vulnerability to date.

Shachar describes family law as the “specific social arena where the multiculturalism paradox often hits hardest” (p. 11). Indeed, even absent multicultural accommodation, there is perhaps no communal realm more commonly conceptualized as private than that of the family, and collective privacy has been shown to breed individual

---

persons joined in virtue of a particular set of group-generated prescriptions and unique narratives. P. 2; see also Robert M. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

54. See, e.g., KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 11, at 38 (noting that some cultural groups “are concerned with controlling internal dissent, and seek group-differentiated rights in order to impose internal restrictions on their members”); Kukathas, *Cultural Toleration*, *supra* note 24, at 88 (“[S]ignificant harms can be inflicted (by the dominant powers in the group) on the most vulnerable members of a minority community.”); Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661 (1998).

55. CARENS, *supra* note 18, at 3.

vulnerability.<sup>56</sup> Yet, as Shachar points out, such vulnerability becomes even more acute as authority over the regulation of family life is devolved from the state, which is somewhat more likely to intervene to protect at-risk individuals, to the leaders of the family's cultural group, the traditional precepts of which may *explicitly prescribe* individual vulnerability (p. 45). Moreover, since so many cultural groups define the contours of their communities according to familial lineage and marital-status rules (p. 52), group leaders are more likely to demand jurisdiction in the context of family law than in virtually any other legal arena (p. 57). "A *nomoi* group's membership rules, encoded in family law, thus provide the bonds which connect the past to the future, by identifying who is considered part of the tradition" (p. 46). Indeed, in the absence of authority over the rules, and therefore bounds, of group membership, a cultural community's capacity to preserve and further construct its unique collective identity must to some extent be sacrificed. And this will be particularly true of nonterritorial cultural groups, or "imagined communities" (p. 54), the membership boundaries of which can *only* be constructed socially.

The collective constitutive autonomy enjoyed by virtue of state accommodation of cultural traditions is not without its costs, and Shachar's thorough exploration of the relationship between multicultural accommodation and family law demonstrates the ways in which the costs of accommodation and collective autonomy are often borne disproportionately by the more vulnerable members of minority cultural groups, particularly women. "[W]omen occupy a special position in constituting collective identities" (p. 50), since they are "the bearers of legitimate children and [the] primary socializers of the young" (p. 55). Yet, ironically, the unique biological and social roles women occupy in the preservation and extension of cultural identities serve also to rationalize severe limitations on their life options (p. 56). For example, since many cultural groups view control over marriage and birth as critical elements in the demarcation of membership in their communities, such groups may seek to prescribe "how, when, and with whom women can give birth" (p. 52). Further, women may be denied educational and employment opportunities, and, in the event of divorce, inequitable property distribution rules may be applied, in an effort specifically to prevent women from abandoning their roles as bearers of the group's *nomos* (p. 56).

Faced, at once, with seemingly imperative collective claims to cultural constitutive autonomy and self-determination, but also the knowledge that accommodation of such claims is likely only to perpetuate the vulnerability of particular categories of individuals within cultural groups, what resolution from the perspective of liberal

---

56. See SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 134-69 (1989).

justice? How are we to respond to the paradox of multicultural vulnerability? In the central portion of her book, Shachar describes the currently prevailing responses to the paradox, each of which she characterizes as inadequate, and she then presents her own solution, centered on an innovative legal-institutional model. Yet, in the process, Shachar too readily discounts the extent to which her institutional approach is derivative of, and indeed supported by, liberal-multicultural theory.

### B. *Responses to Multicultural Vulnerability*

Shachar discusses two primary theoretical responses, both of which serve as a source for a dominant legal approach, to the problem of multicultural vulnerability. The “re-universalized citizenship” response (pp. 65-68), exhibited in the writings of persons such as Susan Moller Okin and Brian Barry,<sup>57</sup> maintains that where the good of a particular individual and that of her cultural group conflict, the state must privilege the interests of the individual, even if the result is a radical severance of the individual from her culture. Derivative of this first theoretical response, the “secular absolutist” legal model (pp. 72-78) declines to accommodate the traditional practices of cultural groups, electing instead to preserve full state authority over, and so protection of, group members. In contrast, the “unavoidable costs” theoretical response (pp. 68-70), advocated most prominently by Chandran Kukathas,<sup>58</sup> contends that the multicultural state must be severely constrained from intervening between a cultural group and its members, even given pervasive individual-rights violations. This second response, then, provides the underlying theoretical basis for the “religious particularist” legal model (pp. 78-85), which (predictably) grants far more extensive authority to cultural groups to pursue traditional beliefs and practices.

Now, of course, these positions are essentially relabeled reiterations of, on the one hand, premulticultural-universalistic liberalism, and, on the other, the toleration perspective on liberal multiculturalism.<sup>59</sup> Nevertheless, Shachar’s insightful criticism of certain aspects of the leading proponents’ theories is worthy of attention. For example, Shachar seems clearly right in suggesting that Okin’s sweeping view that multiculturalism necessarily degrades women fails to account for potential female agency, and so too radically discounts the prospect of

---

57. P. 64; see BARRY, *supra* note 12; Susan Moller Okin, *Is Multiculturalism Bad for Women?*, 22 BOSTON REV. 25 (1997).

58. P. 65; see Kukathas, *Are There Any Cultural Rights?*, *supra* note 27; Kukathas, *Cultural Toleration*, *supra* note 24.

59. See *supra* Sections I.A-B Shachar’s own theory, I contend below, is a working out of the autonomy perspective.



cultural change in virtue of that agency (p. 66). Similarly, Shachar demonstrates that Kukathas's position rests on some arguably dubious assumptions: first, while he relies heavily on individual freedom of association to justify multicultural accommodation, most cultural group members join at birth rather than as a result of any explicit consensual act; and second, while cultural membership may as a matter of justice entail recognition and accommodation, so too might membership in other social identity (for example, gender) groups (p. 70).

Though she does not mention it in connection with her analysis of these two radically divergent theoretical responses, Shachar is also critical of a third, more moderate, response to the problem of multicultural vulnerability. This third theoretical response — labeled at one point by Shachar as “weak multiculturalism” (p. 29) — is in fact none other than the autonomy perspective on liberal multiculturalism, described above, and conveyed most prominently by Will Kymlicka.<sup>60</sup> Yet, Shachar's critique of Kymlicka's theoretical approach is strange indeed, for Shachar's own prescriptive legal model appears to be grounded in Kymlicka's liberal-multicultural theory.

Recall that Kymlicka's theory of multicultural accommodation calls for equality between cultural groups, in the form of “external protections,” but rejects claims pressed by cultural groups that would violate individual members' general rights, on the ground that such “internal restrictions” are inconsistent with liberal autonomy.<sup>61</sup> In *Multicultural Jurisdictions*, Shachar contests Kymlicka's “too simple distinction between ‘external’ and ‘internal’ aspects of accommodation” (p. 42) on two grounds. First, Shachar challenges the “viability” of the distinction itself, arguing that the powers afforded to cultural groups in the name of external protections might also be used by the group to impose internal restrictions (p. 30). Second, Shachar claims that Kymlicka's approach, grounded as it is in liberal autonomy, is self-defeating, insofar as it advocates the extension of external protections notwithstanding potential restrictions on individual freedom.<sup>62</sup> But Shachar's critique of Kymlicka is misleading on both counts. Kymlicka's theory clearly does account for the possibility that “external protections can open the door to internal restrictions.”<sup>63</sup> More

---

60. See *supra* Section I.B.

61. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 11, at 35-44

62. Kymlicka's model, Shachar says, “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.” P. 29.

63. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 11, at 43; see also *id.* at 40 (“[P]olyethnic rights [might] be used to impose internal restrictions.”); *id.* at 42 (“This distinction between internal restrictions and external protections . . . is not always easy to draw. Measures designed to provide external protections often have implications for the liberty of members within the community.”); *id.* at 44, 153 (stating that internal restrictions “are incon-

importantly, Kymlicka is manifestly hostile to the prospect of accommodative policy serving as cover for intragroup-rights violations.<sup>64</sup>

Yet, while Shachar fails to demonstrate that Kymlicka's theory is misguided, she does reveal a sense in which his approach is incomplete. For while Kymlicka is clearly sensitive to the relationship between external protections and internal restrictions, he has not, to date, offered a *means* to detach cultural accommodation from intragroup repression. Indeed, the most sensible reading of Shachar's approach may be as an institutional working out of Kymlicka's autonomy perspective on multicultural accommodation. Both Shachar's concern for the vulnerability of particular categories of individuals, and her insight that state protection of cultural groups might exacerbate unjust restrictions on the liberty of individual members, are already manifest in Kymlicka's work. Hence, despite Shachar's efforts to distance and distinguish herself from Kymlicka, it seems as if Kymlicka supplies the theoretical response to the problem of multicultural vulnerability that underlies Shachar's own innovative legal model.

### III. TRANSFORMATIVE MULTICULTURALISM

#### A. *Four Models of Joint Governance*

Shachar critiques what she characterizes as the two dominant responses to multicultural vulnerability for imposing upon cultural group members an unfortunate and unnecessary ultimatum. Under either approach, it's "either your culture or your rights" (p. 5):

Both approaches offer a misguided 'either/or' resolution to the paradox of multicultural vulnerability. Both require that women and other potentially at-risk group members make a choice between their rights as citizens or their group identities. But this amounts to a choice of penalties . . . . Neither the 're-universalized citizenship' option nor the 'unavoidable costs' approach has satisfactory answers to offer women and other members who legitimately wish to preserve *both* their cultural identities *and* to challenge the power relations encoded within their minority groups' traditions. (p. 71)

---

sistent with any system of minority rights that appeals to individual freedom or personal autonomy").

64. Indeed, in an interesting exchange with Shachar, Kymlicka makes this point clear:

It's clear that the capacity to impose internal restrictions is inextricably bound up with the acquisition of external protections, and so we need to analyse them together. However, my claim is that the goal, from a liberal point of view, is (a) to ensure that groups have the external protections they need, while (b) creating the institutional safeguards which prevent groups from imposing internal restrictions.

Will Kymlicka, *Comments on Shachar and Spinner-Halev: An Update from the Multiculturalism Wars*, in MULTICULTURAL QUESTIONS 112, 127 n.7 (Christian Joppke & Steven Lukes eds., 1999).

In order, then, to transcend an ultimately insufferable choice between one's culture and one's freedom from cultural oppression — and so to permit vulnerable individuals to continue to find meaning in their group memberships while simultaneously maintaining access to their general rights — Shachar suggests we must take an *institutionalist* turn. We must reexamine our assumptions with respect to jurisdiction itself, or the legal-institutional doctrine delineating public decisional authority (p. 72). Contrary to the preconceptions underlying the currently dominant legal and theoretical paradigms, it is not the case, says Shachar, that cultural group members must be subject solely to one source of legitimate authority, either the state or the group (p. 85). Indeed, “in today's day and age, no single authority can expect to be the sole source of legal norms and institutions affecting its members” (p. 15). Instead, Shachar contends, the only practicable solution to the paradox of multicultural vulnerability lies in a scheme of *joint* governance.

A joint governance approach is grounded in what Shachar terms a “‘cultural’ understanding of institutions” (p. 89). The approach recognizes that individuals may concurrently belong to, and so derive rights and obligations from, multiple communities (p. 13). It thus seeks a solution to the complicated problem of multicultural accommodation and individual vulnerability by engendering interaction, and at times even open competition, between different sources of jurisdiction (p. 88). Before rendering her own preferred joint governance structure, Shachar describes and assesses four already existing legal-institutional models that exhibit features of joint governance. The critical commonality among the four designs considered is in the idea that each may provide a means to escape the intolerable either/or dichotomy imposed by the more extreme universalist and particularist approaches described above. Under a joint governance institutional model, the expectation is that one may have one's rights and one's culture too.

The first, and to those familiar with American governmental structures, most recognizable, form of joint governance is a “federal-style accommodation” approach, under which legal authority is allocated across different levels of government (p. 92). This devolution of jurisdictional authority to more local agencies may provide an enhanced degree of collective autonomy to *nomoi* groups with substantial populations in a given region, while simultaneously constraining repressive group practices by virtue of generally applicable individual rights. Yet the very aspect of federalism that potentially yields more expansive cultural freedom, Shachar points out, serves also to limit the structure's efficacy more generally: the accommodationist resources of federalism are limited to territorially based groups (pp. 94-95).

The second joint governance scheme, which Shachar describes as “temporal accommodation,” divides authority over individual group

members between the state and the cultural group according to certain time intervals linked to those traditions conceived of as most critical to the preservation of the group's nomos (p. 97). Shachar in fact suggests that the well-known case *Wisconsin v. Yoder*<sup>65</sup> might be viewed as an illustration of temporal accommodation, insofar as the Amish children involved in the case fell within the jurisdiction of state educational authorities until eighth grade, but within the jurisdiction of the cultural group beyond that point (p. 98). Yet, as above, the same aspect of temporal accommodation that serves to maintain the group nomos also condemns the scheme; for during the period of time that members remain subject to the jurisdictional authority of the group, individuals necessarily also remain vulnerable to culturally enacted repression (p. 103).

The third form of joint governance, termed "consensual accommodation," allocates a one-time choice among jurisdictional frameworks to each individual (p. 103). So, for example, a member of a particular religious group might decide to marry in accordance with her group's traditions, or she may instead opt for a state-sanctioned ceremony. The authority selected would then also have jurisdiction over the dissolution of that relationship. A virtue of the consensual accommodation model, then, is its aspiration to promote individual agency in the affirmation of cultural attachments. Yet, as with other consent-derivative structures, the consensual approach presupposes that choice is truly free — at best an arguable supposition in the realm of cultural membership, and doubly so with respect to vulnerable group members. Moreover, the conclusive nature of the choice, Shachar observes, fails to protect individual members from the unforeseeable consequences of their jurisdictional decisions. While "[i]t might seem like a merely symbolic and natural decision at the time, to preserve the traditions of one's forebears by celebrating marriage in accordance with the group's practices" (p. 108), the constraints imposed by one's culture on divorce or childrearing might be far less bearable. Indeed, the one-time character of the jurisdictional decision merely resurrects, rather than remedies, the either/or culture/rights conundrum.

The final model considered by Shachar, prior to her own, is the "contingent accommodation" model. Here jurisdictional autonomy is devolved from the state to *nomoi* groups in particular legal contexts deemed essential to the group's cultural identity, but only so long as the group's implementation of its authority rises above state-defined minimum standards (p. 109). The most immediate problem with this approach, Shachar suggests, is the almost certain perpetuation of cultural partiality, in light of the state's singular role in delineating

---

65. 406 U.S. 205 (1972).

standards. Ian Shapiro, among other theorists, has sought to redress such bias, while still averting cultural repression, through the creation of multidimensional regulatory structures.<sup>66</sup> Under such an approach, matters would be divided as subject either to state or cultural primary jurisdiction, but with the alternate authority serving in a “back-up” role as a source of secondary jurisdiction (p. 111). Thus, the cultural entity might exercise primary authority within a context critical to its nomos, and the state would retain primary jurisdiction within contexts more generally critical to human well-being, but in each case a secondary authority would strive to ensure the legitimacy of the decision reached.

Despite the promise she sees in this sort of dynamic interactive approach to joint governance, Shachar questions the contingent model’s practicability: For example, would state or cultural norms determine error? While the state might surely intervene in cultural affairs, by what mechanism could the cultural group intervene in state affairs? Moreover, by leaving the division of primary authority to state and cultural auspices, the virtue of individual agency raised by the consensual model is sacrificed. Individual members are thus “forced to play the role of whistleblowers (informing the other jurisdictional authority of violations of their rights by the other entity), instead of being allowed to work as *authors*” of the institutional structure designed to protect their own interests (p. 113; emphasis added).

Hence, all four extant models of joint governance present institutional structures designed, in recognition of persons’ multiple attachments, to compel interaction between state and cultural sources of authority. While each approach presents certain virtues, each also, in its own way, fails ultimately to accommodate cultural differences while simultaneously protecting vulnerable group members from cultural repression. In what then lies the solution to the paradox of multicultural vulnerability? The fatal flaw, Shachar believes, common to each institutional design so far considered, lies in the failure of each approach to hinge the accommodation of traditional group practices on the reduction of intragroup repression (pp. 89, 113). To do so, says Shachar, we need an institutional structure of joint governance specifically designed to induce cultural elites, and to empower vulnerable individuals, to transform their cultures from within (p. 14).

### B. *Cultural Transformation*

As with the four institutional schemes described above, indeed incorporating certain of their more salutary aspects, Shachar’s “transformative accommodation” model embraces the notion of multiple

---

66. See IAN SHAPIRO, *DEMOCRATIC JUSTICE* (1999).

sources of authority linked to persons' "multiple identity-creating affiliations" (p. 118). What distinguishes transformative accommodation from previously considered joint governance models, according to Shachar, is three core principles.

First, the transformative model would divide jurisdiction between the state and cultural groups not merely along traditional subject matter lines (for example, education, family law, criminal justice), but also within each social context. Thus, neither the state nor the group would maintain exclusive jurisdiction with respect to, say, marriage; instead, the cultural group might retain power over issues of status and membership, while the state might exercise authority over the distribution of property (pp. 119-20). The point of this first condition, which Shachar terms "the 'sub-matter' allocation of authority" (p. 118), is both to permit concurrent state and cultural influence over group members and to compel interaction among those sources of authority.<sup>67</sup>

Shachar's second principle she calls "the 'no monopoly' rule" (p. 118). "According to this rule, neither the group nor the state can ever acquire exclusive control over a contested social arena that affects individuals both as group members and as citizens" (p. 121). But this requirement seems an effective corollary of the first; allocating jurisdiction within contested social contexts according to "sub-matters," and mandating that no single authority maintain monopoly power over any contested social context, seem but two sides of the same coin.<sup>68</sup>

Shachar's third principle, "the establishment of clearly delineated choice options" (p. 118), does a bit more work. With this condition, Shachar's model offers members of cultural groups a wholly new option, and a new instrument for change: it offers at-risk individuals a partial exit. Individual members, Shachar proposes, "must have clear options which allow them to choose between the jurisdiction of the state and the *nomoi* group. Choice here means that they can remain within the submatter jurisdiction of the original power-holder (approval) or that they can resist that jurisdictional authority at predefined 'reversal' points (disapproval)" (p. 122). According to Shachar's theory, the opportunity to invoke a partial exit would enable vulnerable individuals to exercise their rights as citizens of the state

---

67. "Meaningful consideration of marriage and divorce rules thus requires a consideration of both jurisdictions: the authority which governs each distinct legal sub-matter, as well as the complementary authority which jointly governs (or 'co-prevails') in a contested social arena." P. 120.

68. Shachar notes the inevitable inefficiencies that would be associated with a joint governance model, like hers, that requires interaction across jurisdictions to resolve fully any dispute. She contends that on balance any loss in judicial economy is more than compensated for by the gain registered from a critical review of cultural traditions and (somewhat vaguely) of federalist-institutional structures more generally. Pp. 130-31.

without sacrificing their cultural identity. Even more, by affording individuals the option to choose between cultural and state sources of authority, this model would engender competition between jurisdictions, and, with it, the capacity for cultural transformation (p. 123).

One example, indeed one that recurs in Shachar's treatment (pp. 57-60, 133-35), is the traditional Jewish notion of an "anchored woman," or an *agunah*. Under Jewish law, a married woman cannot initiate a religious divorce (a *get*), and so become free to remarry within her faith, without first obtaining her husband's consent.<sup>69</sup> The consequences of the doctrine are frequently quite severe; a recalcitrant or abusive husband might engage in blackmail, leaving an *agunah* with no choice beyond ceding undeserved (typically, property or custodial) rights to her husband or abandoning her cultural membership (pp. 58-59). Consider, though, how the situation might change under an accommodation model that empowers vulnerable individuals by offering them clearly delineated choice options. The *agunah* seeking a divorce would be afforded an opportunity partially to exit; that is, to sever her current relationship pursuant to state jurisdiction. She would then be free (by force, if necessary) to remarry in accordance with her cultural traditions.<sup>70</sup> Hence, partial exit may enable a vulnerable member of a cultural group to exercise her general rights as a citizen of a liberal state, yet also retain her particular cultural identity.

Shachar's most critical point here, though, is not merely that partial exits should be made available, but that where partial exits are made available, they will rarely be needed. Faced with the prospect of selective exit, indeed faced with exit by the biological and social "bearers" of the group's *nomos*,<sup>71</sup> cultural leaders will have a strong incentive to reinterpret their texts and traditions in ways that enable them to reverse oppressive and discriminatory practices.<sup>72</sup> "Avoiding the reversal of jurisdiction becomes a matter of self-interest to the group, since it allows the group to protect whatever degree of self-regulating power it has already secured over its members, rather than risk losing it piecemeal" (p. 125). The partial exit is thus not an end in itself, but an instrument of cultural change. It is a risk imposed upon cultural elites, the avoidance of which entails the avoidance of cultural repression. Moreover, by devolving jurisdictional decisions to indi-

---

69. Pp. 57-58. For the biblical source of this doctrine, see *Deuteronomy* 24:1.

70. "At this point, the state will acquire (group-backed) authority to enforce the removal of all barriers to remarriage (even if the marriage was originally created by religious solemnization)." P. 135.

71. See *supra* Section II.A.

72. "*Nomoi* communities are living entities. They are not suicidal in nature. Most have ample resources for re-interpretations which permit them to preserve their *nomos* while adaptively responding to change." P. 140.

viduals themselves, the transformative model creates “a dynamic new space for meaningful participatory group membership” (p. 123). The transformation of culture is thus accomplished not merely from on high, but broadly in virtue of the actions and expectations of all group members, including those individuals historically more vulnerable. In that sense, Shachar’s design seemingly aspires to democratize culture.

One obvious criticism sure to be leveled against Shachar by the proponents of a more accommodating approach to cultural practice (for example, the toleration perspective), would consist in the notion that any state-imposed cultural change, regardless of the particular agents of that change, necessarily fails to treat cultural groups justly.<sup>73</sup> A culture transformed from within, but only in virtue of a structural remedy imposed from without, is no different, according to this “non-interventionist” view, than a culture transformed directly by the state (p. 37). Shachar has a response to this view, however. She asserts that cultural practice, at least in modern multicultural states, is critically enmeshed within a broader social context: “[T]he group and the state are both viable and mutable social entities which are constantly affecting each other through their ongoing interactions” (p. 118). Indeed, Shachar suggests that it may in fact be interaction with an overly accommodationist state that unnaturally arrests the otherwise “organic processes of [cultural] change” (p. 85). In response to a state which affords expansive jurisdiction to groups on the basis of cultural difference, cultural elites have incentives to maintain such differences in order to maintain their authority, even where the maintenance of difference entails the maintenance of oppressive practices.<sup>74</sup> Hence, Shachar notes an important, if rather ironic, sense in which transformative accommodation might actually enable, rather than subvert, the normal processes of collective cultural self-determination. Of course, in light of the uniformly antirepressive ends she expects her model to provoke, to accept Shachar’s premise (that state-imposed cultural transformation merely frees the culture to evolve as it naturally would) one would also have to believe that cultures naturally evolve in a linear, and uniquely progressive, fashion.

Yet even placing alternative perspectives to one side, Shachar’s model is problematic on its own terms because it is radically underdeveloped. Recall that, as articulated by Shachar, transformative accommodation is premised on three (really just two)<sup>75</sup> principles: (1) the “sub-matter allocation of authority”; (2) the “no monopoly rule”; and (3) “the establishment of clearly delineated choice options” (p.

73. Shachar notes that, in this sense, her transformative model might be perceived “as indirect intervention into the group’s ‘private’ affairs, a multicultural state acting *ultra vires*.” P. 126 n.20.

74. Shachar terms this phenomenon “reactive culturalism.” Pp. 35-37.

75. See text accompanying *supra* note 68.



118). The first two principles, as we have seen, combine to encourage interaction between the state and cultural groups from a structural perspective. The third is intended to provide individuals with an instrument of cultural and political change.

Shachar has thus proposed a highly interactive design pursuant to which *both* cultural groups *and the state* will be induced better to serve individual members.<sup>76</sup> Yet virtually all of Shachar's analysis in *Multicultural Jurisdictions* is inclined toward cultural adaptation. Even assuming the accuracy of her view that cultural group leaders, facing selective exit, will reinterpret their traditions, in what sense would we expect *the state* to react? Given the paradox of multicultural vulnerability only arises once the state has demonstrated its willingness to accommodate repressive cultural practices, why would we suddenly expect the state to seek to protect vulnerable members? In Shachar's terms, how will minority cultural group members be able to "discipline" the state with the threat of "opting-out" (p. 122), when the state has already shown itself uninterested in their plight? The basic notion of empowering individuals through a competitive jurisdictional mechanism to engender social change may itself be promising, but Schachar leaves almost wholly unexamined the public side of this state-cultural group interface.

Moreover, the principles that compose Shachar's model, and that serve to construct her transformative-accommodation design, presuppose state-cultural group *negotiation*; both the initial allocation of sub-matter jurisdiction, and the delineation of reversal points, will be subject to bargaining among state and cultural authorities (pp. 128-30). Shachar assumes that each authority would seek jurisdiction in sub-matters most central to its core mission; hence, the group would likely seek influence over questions pertinent to its survival, while the state would aim toward acquiring jurisdiction over issues of civic participation (p. 129). Yet, other than noting that at-risk group members must not be "den[ie]d voice" (p. 129 n.22), that "generosity at the negotiation stage is required from the state as the stronger party" (p. 130), and that vaguely stated "incentives" exist for authorities to self-regulate and so "engage in constructive dialogue" (p. 130), Shachar's model does little to institutionalize this critical process. Surely there will be matters deemed crucial within both state and cultural spheres (for example, both state and cultural sources of authority might view jurisdiction over education as indispensable).<sup>77</sup>

---

76. P. 117 ("Transformative accommodation seeks to adapt the power structures of both nomoi group and state.").

77. In her appendix, Shachar helpfully describes various potential products of a joint governance scheme in the context of education, *see* pp. 154-60, but she fails, here and elsewhere, to describe adequately the means by which a dispute among sources of authority over the initial allocation of submatter jurisdiction in the educational context would be resolved.

On such contested matters, what process will be invoked to resolve disputes? Would the state simply prevail, in virtue of its greater power (perhaps a reasonable, but unexplained result)? Or might something in the way of a neutral arbiter be appointed? At present, it is difficult to say. Beyond the few indistinct stipulations noted above, Shachar merely declares that the process of allocating authority and identifying choice options be approached “carefully” and with “precision” (pp. 128-29).

Finally, and perhaps most significantly, Shachar’s treatment here of individual will is overly facile. Clearly, competition between state and cultural sources of authority will only be engendered, and so cultural transformation realized, where group members have options. But the presence of options is merely a necessary and not a sufficient precondition for competition.<sup>78</sup> For a model premised on competition to be effective, individuals must not only have clearly delineated choice options but also *the capacity to exercise* such options. There are, though, reasons to expect that capacity to be limited in the multicultural context. First, while constitutive attachments are surely more susceptible to individual will than is sometimes imagined, they nonetheless are often quite difficult to abandon.<sup>79</sup> Even (perhaps particularly) the more vulnerable members of *nomoi* groups may feel deeply obligated to conform to religious and other cultural dictates. Second, individuals socialized within a particular *nomos* to be compliant — individuals socialized into vulnerability, that is — may have a particularly difficult time suddenly exercising agency.<sup>80</sup> Hence, for the most vulnerable members of cultural groups to exercise even a partial exit, much more in the way of state-sponsored resources and intervention will often be required. While the married woman in the *agunah* illustration might have been in a position to make a genuine choice,<sup>81</sup> individuals involved in more extreme cultural contexts almost surely would not.

---

78. Shachar herself appears to recognize this point, *see* p. 138, and yet she nonetheless fails to incorporate directly into her model any provision that would guarantee the agency required for competition to take place.

79. For a view of the self as essentially encumbered by communal attachments, see SANDEL, *DEMOCRACY’S DISCONTENT*, *supra* note 7, at 13-17. For an opposing view of the self as rationally revisable, see Rawls, *supra* note 26, at 543-45.

80. The reference here is to the well-developed literature on unseen dimensions of power. *See* JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980); STEVEN LUKES, *POWER: A RADICAL VIEW* (1974). Shachar notes this literature in a tangential context, p. 136 n.36, but fails to apply its teachings to her core assumptions.

81. Indeed, an *agunah’s* choices today are often not as limited as Shachar indicates. More progressive leaders in the Orthodox Jewish movement “have to varying degrees ameliorated a woman’s legal disability . . . either in ways ostensibly faithful to the legal system or in ways that reject the legal system more broadly.” Letter from Rabbi Jeremy Kalmanofsky, Jewish Theological Seminary, to the author (Sept. 10, 2002) (on file with author).

Imagine, for example, the following paradigm: in a local jurisdiction, governed according to a strict interpretation of cultural law, one woman, call her Amina, has given birth to a child outside of wedlock; another woman, Mukhtaran, happens to be related to a young boy seen in the company of a girl from a higher caste. Tribal authorities sentence Amina, after allowing her an interval of one year to wean her child, to death by stoning. They order Mukhtaran to submit to a gang-rape.<sup>82</sup> How might these women have exercised an option to switch to a public source of authority? How might these women even have learned that such an option existed? In addition to submatter allocations and clearly delineated choice options, a model premised on individual agency in a multicultural context must, at a minimum, provide for the sort of social, educational, and financial resources at-risk group members require to recognize, and take advantage of, jurisdictional options.<sup>83</sup>

#### CONCLUSION: THE ROAD AHEAD

Shachar has chosen Robert Frost's well-known allegory of two roads diverging in a wood as both prologue and epilogue to her new work on multiculturalism. "Instead of resorting to so many already established, tired and misguided approaches toward a just and workable multiculturalism," she writes, "we must follow the road less traveled" (p. 150). Though too much of *Multicultural Jurisdictions* is itself reiteration of established approaches to multiculturalism, Shachar, I think, has indeed revealed a new path: the path of a transformative multiculturalism, for which we are most fortunate. Yet it is equally unfortunate that Shachar herself has not moved very far along that path. Perhaps she now leaves it for others to show the way. Or perhaps she will return to the subject in some forthcoming work. One certainly hopes so, for Shachar has shown herself a gifted guide, and the path she has revealed will not be easy going. Indeed, given the extent of the problem of individual vulnerability, and the resources required to solve it, we may have miles to go before we sleep.

---

82. The scenarios depicted are derived from actual stories. See Norimitsu Onishi, *Mother's Sentence Unsettles a Nigerian Village*, N.Y. TIMES, Sept. 7, 2002, at A3; Beena Sarwar, *Brutality Cloaked as Tradition*, N.Y. TIMES, Aug. 6, 2002, at A15.

83. Shachar's treatment of these critical issues is fleeting, at best. See pp. 124, 138-39. Her project would be better served had she built these as preconditions directly into her model and explored pragmatically how they might be achieved.