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# Reconstructing Multiculturalism: Picking Up After the 'Fall'

Jessie Brechin  
LL.B. (Hons)

Submitted in fulfilment of the requirements for the  
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School of Law  
College of Social Sciences  
University of Glasgow

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## ABSTRACT

This thesis critically examines the criticism that has been levelled at normative multiculturalism and discusses a potential way in which multiculturalism can be reconstructed to better address the difficulties of a diverse population.

Multiculturalism, principally liberal multiculturalism for the purposes of the current project, has been the subject of much criticism in recent years. Reconciling a liberal position based on the primacy of *individual* rights, with the protection of and rights of marginalised or otherwise vulnerable *groups* has proven difficult. Two key failings of the current liberal approach are identified. Firstly, there is a tendency to pursue a hands-off approach, whereby the state is reluctant to interfere in the affairs of minority groups, to the detriment of vulnerable internal minorities. Secondly the preoccupation with respect for difference and a 'right to culture' has led to minority cultures being essentialised and concretised in a way that perpetuates existing power hierarchies within these groups as well as ignoring natural processes of cultural development and adaptation. Jacob Levy's 'Multiculturalism of Fear' is considered. By placing the prevention of fear and humiliation *above* the preservation of the 'right to culture' Levy is able to circumvent the preoccupation with being seen to interfere with cultural practices. There are difficulties with this theory however and these are discussed. The thesis concludes by suggesting a way in which the 'Multiculturalism of Fear' could be used as a starting point for the development of an alternative approach to multiculturalism, one that might remove the preoccupation with difference and foster positive inter- and intra-cultural understanding.

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## **DECLARATION**

I declare that this thesis is my own work, and has not been plagiarised. Where information or ideas are obtained from any source, this source is acknowledged in the footnotes.

## **Introduction**

Multiculturalism is a fact of modern society. Individuals identify as part of one or more of an endless variety of cultural groupings, and this shapes the way that they act in society in general. The importance and durability of cultural membership has many positive affects – providing communities, values and ways of life - as well as negative ones - creating tension between cultures and groups and distorting the way in which groups interact with each other and with the state.

Legally and politically speaking, multiculturalism refers to the way in which these different ‘belongings’ are dealt with on an institutional and societal level. The goal of most policies of multiculturalism is to foster an environment in which members of different cultures are able to retain their own beliefs and values, whilst participating as equals in a liberal society.

In recent years there has been somewhat of a ‘backlash’ against typical strains of liberal multicultural thought, and this has led to a general distaste with the concept, some going so far as to declare that multiculturalism has fallen and is ‘over’. It will be argued that this is not the case. There has certainly been a move away from support for many multicultural models, and the current approaches leave much to be desired, however multiculturalism, if anything, is more important than ever. The global political climate in recent years has highlighted the problems of intercultural tension and misunderstanding; in the United Kingdom and in many other Western democracies there is increased tension between cultural groups, particularly following the increased visibility of terrorism, and the ‘influx’ of immigrants from countries whose traditional cultures are far removed from those of the local population. Further, the economic downturn has created hostility (in some cases open hostility) between groups and in many countries there has been a rise in support for nationalist parties calling for measures of segregation and decreased sensitivity to cultural difference.<sup>1</sup>

It is suggested that, in the present context, these circumstances have two important consequences: firstly that there has been a decline in popular support for multicultural policies, and secondly that this political situation has been mischaracterised as a

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<sup>1</sup> For a discussion of this phenomenon see Hage, Ghassan. *White nation: Fantasies of white supremacy*

failure of multiculturalism. This thesis discusses the ways in which the theory of multiculturalism has struggled; quite apart from the particular political circumstances which have led to its unpopularity. Multiculturalism, particularly liberal multiculturalism, has faced a number of difficulties since it came to prominence in the latter half of the twentieth century. The challenges of reconciling a liberal society, based on the primacy of individual rights with the protection of and support of culture (inherently a collective enterprise) have been great. From failing to protect vulnerable members within vulnerable groups to undermining principles of universalism, there have been many criticisms levelled at multicultural theory. This thesis aims to critically examine the perceived ‘flaws’ of multiculturalism and to explore how one might move beyond these flaws, and construct a multicultural theory better equipped to deal with the fact of (descriptively) multicultural societies.

Section A considers the perceived ‘fall’ of liberal multiculturalism. In particular it will address the work of Will Kymlicka, Ayelet Shachar and Brian Barry. Liberal multiculturalism has been attacked from a number of different positions, and these positions are largely divided into internal and external critiques of multiculturalism. The internal critiques, most of them feminist critiques, take aim at the way in which multiculturalism fails to protect vulnerable members within cultural groups whilst the external critiques look at the difficulties in relationships between cultural groups and between the state and cultural groups.

In essence, the internal critiques argue that vulnerable members within cultural groups can suffer when policies are put in place that result in the perpetuation of inequalities in that group. The fear of being seen to interfere with the practices of a cultural group means that the state, under liberal multicultural models, often puts vulnerable group members at risk by tacitly approving practices that may be harmful to them. The liberal focus on the rights of the individual, and in particular on the concept of the ‘right to culture’ make it difficult to interfere. Patriarchal structures and discriminatory rules are able to persist, effectively protected by the state, under the rubric of the respect for culture. The use of ‘cultural defences’ in criminal cases is used as an illustration of the potential dangers of this tendency. Whereas some suggest that the existence of the ‘right to exit’ a cultural community provides



sufficient safeguard to protect these vulnerable members, it is argued that this is not the case.

With regard to the external critiques, it is believed that legislating to protect cultural practices and policies such as creating separate religious schooling in order to ensure legal equality between groups can in fact do more harm than good. The enshrining of a cultural practice in law prevents the natural process of cultural adaptation and development, and further increases the differentiation between cultural groups. By emphasising difference in this way some approaches to multiculturalism can increase the risk of self-segregation and ghettoization, as well as perpetuating stereotypes and reducing positive cross-cultural interaction.

As well as examining the critiques, this thesis aims to discuss the response to these critiques and to evaluate their effectiveness. Following this analysis it is argued that there are two main challenges facing multicultural theory, and in particular liberal multiculturalism; namely that they tend to adopt a hands-off approach to cultural practices, in a way which fails to protect vulnerable internal groups, and that they tend towards the concretisation of cultures, stunting natural development and reducing the possibility for inter-cultural dialogue and adaptation.

Section B considers a possible alternative structure of multiculturalism, as suggested by Jacob Levy in his influential 'The Multiculturalism of Fear'. Based on a concept of negative consequentialism, the Multiculturalism of Fear argues that the elimination of fear, rather than the promotion of liberal rights, should take priority in a multicultural society. As opposed to more popular liberal forms of multiculturalism, which struggle with the structural difficulties posed by accommodating group membership and group rights within a society based on individual rights, Levy views these 'rights' as secondary to the prevention of fear, cruelty and humiliation. Rather than focusing on an idea of the 'good life', the Multiculturalism of Fear is based on the *avoidance* of the '*summum malum*', or universally recognisable 'bad'. In addition to articulating this new priority model, Levy attempts to address the way in which the application of multicultural models should be approached. It is suggested that there needs to be greater recognition of both the durability and flexibility of culture: neither natural processes of cultural development nor the importance of culture to the individual should be underestimated. Levy advocates a 'long-line' approach to the treatment of

cultural practices, arguing that a gradual process is the most effective way of altering behaviours that are based in deeply held cultural beliefs.

Although Levy's 'Multiculturalism of Fear' has great potential to construct a theory of multiculturalism better suited to reality than that of the more traditional liberal thinkers, it does not quite execute that aim. Due to a combination of factors, Levy confines himself to extreme examples and seems to struggle with some of the same difficulties as the liberal multiculturalists. Drawing on the lessons learned from both the criticism of current multicultural models and from Levy's work the final part of this thesis addresses the possibility of developing the thesis of the Multiculturalism of Fear. Firstly it will be argued that there should be a move away from the articulation of multiculturalism in terms of 'minority' and 'majority', as the terms create unnecessary differentiation and help to perpetuate ideas of minorities as 'other', whilst discouraging any introspection on the part of the 'majority'. The use of a 'reasonable man' test would remove some of the difficulty created by the perception that the 'minority' is judged by 'majority' norms. Secondly it will be considered that a negative theory has greater potential than a 'positive' one to effectively address the difficulties faced by virtue of being in a diverse society. If a concept of the *summum malum* is combined with a negative presumption that a cultural practice is 'guilty until proven innocent' of creating fear then vulnerable members of cultural groups will be better protected from the perpetuation of in-group inequalities.

Whilst the criticism of multiculturalism has been wide-ranging and persistent, this thesis aims to demonstrate that all is not lost. There are significant difficulties to overcome, however multiculturalism can and should be reconstructed to deal with the realities of contemporary diverse societies.

## **A: THE RISE AND 'FALL' OF MULTICULTURALISM**

### **The development of contemporary multiculturalism**

#### The origins of multicultural theory

Before embarking on an examination of the 'fall' of multiculturalism and the possibility of its redemption, it is necessary to consider some of the background and terminology of the multicultural discourse. Multiculturalism has come to encompass a huge body of political, social and legal thought.

In order to be properly understood, a distinction must be made between (at the very least) the normative usage of 'multiculturalism' and 'multicultural', and the descriptive usage of the same. In a descriptive sense, multicultural denotes simply the presence of more than one culture in a particular space, state or society. British society is multicultural because of the fact that its inhabitants belong to a huge variety of cultures and cultural backgrounds. In this way, most European countries have been multicultural for hundreds if not thousands of years.

Herder and Montesquieu, among others, recognised the importance of culture and cultural difference long before there was a normative conception of multiculturalism.<sup>2</sup> Whilst their conceptions of diversity and the importance of culture vary both from each other and from current ideas, each demonstrates an understanding that an individual's culture is intrinsically important to them, and affects the way that they view and engage with the world. Descriptive multiculturalism was as much a fact for them as it is now.

In its normative meaning however, multiculturalism is a far younger idea, one closely associated with the politics of difference and the politics of recognition. There is some

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<sup>2</sup> For a discussion and comparison of Herder and Montesquieu's contributions to cultural pluralism see Bikhu Parekh, *Rethinking Multiculturalism: cultural diversity and political theory*, (MacMillan Press, 2000) chapter 2

debate as to the exact origin of the contemporary, normative notion of multiculturalism. The initial use of the word ‘multiculturalism’ in political discourse is often associated with the changes in immigration policies in Australia and Canada in the late 1960’s and early 1970’s. Previously Australia had operated a ‘whites-only’ immigration policy; however the relaxation of such rules resulted in a large influx of Asian immigrants, many of whom desired to maintain significant elements of their cultural heritage.<sup>3</sup>

Similarly Canada faced difficult decisions about its cultural make up and heritage, given tensions between its French- and English-speaking populations. This resulted in the creation of a ‘Royal Commission on Biculturalism and Bilingualism’, which in turn led to a commitment to wider cultural pluralism becoming official policy.<sup>4</sup>

An alternative view (although it is perhaps reconcilable with the above) is that ‘multiculturalism’ developed in response to the advent of the international human rights movement and the emphasis of ideals of equality and shared humanity, in spite of cultural (or any other) differences.

Kymlicka argues that ‘support for multiculturalism rests on the assumption that there is a shared commitment to human rights across ethnic and religious lines. If states perceive certain groups as unable or unwilling to respect human-rights norms, they are unlikely to accord them multicultural rights or resources.’<sup>5</sup> Therefore, from this perspective, it follows that prior to the idea of universal human rights coming to prominence, there was not, nor could there have been, a concept of normative multiculturalism.

Whilst the idea of liberal rights was hardly new, the claim of their universality only began to gain international traction and credibility following the Second World War. Previous ideas of inherent ethnic or racial superiority or inferiority were inextricably associated with Nazism and the 1948 Universal Declaration of Human Rights marked an attempt to move away from that legacy. Ali Rattansi emphasises the significance of this move:

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<sup>3</sup> Lopez, Mark. *The origins of multiculturalism in Australian politics, 1945-1975*. Melbourne University Publishing, 2000.

<sup>4</sup> Ali Rattansi, *Multiculturalism: A very short introduction*, (OUP 2011) p8

<sup>5</sup> Will Kymlicka, *Multiculturalism: Success, Failure and the Future*, 2012 Migration Policy Institute p2

‘The real novelty of this principle of human equality should be recognised. In 1919 when Japan had tried to introduce a clause regarding human equality into the covenant of the League of Nations, this had been immediately rejected by the Western nations. This is not surprising. The Europeans, after all, were involved in defending empires in large parts of Asia and Africa based quite explicitly on racial principles which deemed whites superior to other races.’<sup>6</sup>

New ideas of equality and increased immigration to Europe from former colonies made cultural difference more prominent than it had been previously. Further, from the mid twentieth century there was a reassertion of feelings of nationalism, particularly on the part of sub-state national groups.<sup>7</sup> As in Canada, this led to calls for greater recognition and even independence for such minorities. These factors combined almost to force states to respond to questions of cultural diversity, thus creating the need for a normative multiculturalism.

Will Kymlicka identifies these factors as being three particular waves of political movement initiated by the assertion of universal equality ‘to contest the lingering presence or enduring effects of older hierarchies’:

- ‘1) the struggle for decolonisation, concentrated in the period 1948-65;
- 2) the struggle against racial segregation and discrimination, initiated and exemplified by the African-American civil-rights movement from 1955-1965;
- and
- 3) the struggle for multiculturalism and minority rights, which emerged in the late 1960s.’<sup>8</sup>

Whether it was the catalyst or not, the human rights revolution served a dual purpose in the development of normative multiculturalism, being both a means of arguing for equality, and also a way of mediating and evaluating cultural claims:

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<sup>6</sup> Rattansi, *Multiculturalism: A very short introduction*, p14

<sup>7</sup> c Catt, Helen, and Michael Murphy. *Sub-state nationalism: a comparative analysis of institutional design*. Routledge, 2002.

<sup>8</sup> Kymlicka, *Multiculturalism: Success, failure and the future*, p4

‘Insofar as historically excluded or stigmatized groups struggle against earlier hierarchies in the name of equality, they too have to renounce their own traditions of exclusion oppression in the treatment of, say, women, gays, people of mixed race, religious dissenters, and so on.’<sup>9</sup>

In the event, the precise circumstances that led to the development of multicultural theory in its current incarnation are likely to remain disputed, and are not the focus of the present discussion. It is likely that a combination or combinations of the above factors resulted in the need for a body of theory<sup>10</sup> which could attempt to deal with the questions raised, that the precise circumstances varied from place to place and that, given the diverse set of questions that multiculturalism aims to answer, each initial theory was designed to fit the circumstances in which it was needed, rather than an attempt (until slightly later) to create a coherent body of thought.

What is important to consider, however, is that normative multiculturalism and the circumstances that lead to its development only came into being relatively recently, compared to the fact of multicultural societies. In many ways normative multiculturalism is a new attempt to answer an old question – how best to accommodate peoples of diverse cultural backgrounds within the same society? This question is now discussed from both a political theory and a social science perspective; considering on the one hand how an emphasis on group identity can be reconciled with a parallel focus on liberal rights<sup>11</sup> and on the other how different

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<sup>9</sup> Kymlicka, *Multiculturalism: Success, failure and future*, p4

<sup>10</sup> The body of theory encompasses questions of citizenship (Kymlicka, Will. *Politics in the vernacular: Nationalism, multiculturalism, and citizenship*. Oxford: Oxford University Press, 2001), education (Glazer, Nathan, and Daniel P. Moynihan. "Beyond the melting pot: The Negroes, Puerto Ricans, Jews, Italians and Irish of New York City." (1963).; Glazer, Nathan. *We are all multiculturalists now*. Harvard University Press, 1998.), recognition (c Young, Iris Marion. *Justice and the Politics of Difference*. Princeton University Press, 2011., Taylor, Charles. *Multiculturalism: Examining the Politics of Recognition*. Princeton University Press, 41 William St., Princeton, NJ 08540., 1994.), immigration (Modood, Tariq, Anna Triandafyllidou, and Ricard Zapata-Barrero, eds. *Multiculturalism, Muslims and citizenship: A European approach*. Routledge, 2012., Joppke, Christian. "Multiculturalism and immigration: A comparison of the United States, Germany, and Great Britain." *Theory and society* 25.4 (1996): 449-500.), and identity (Phinney, Jean S., et al. "Ethnic identity, immigration, and well-being: An interactional perspective." *Journal of social issues* 57.3 (2001): 493-510.)

<sup>11</sup> See Brian Barry’s *Culture and Equality*, which will be discussed in more detail below

groups can relate to each other on an intercultural level.<sup>12</sup> The strength of the claim for accommodation of difference has increased over the past decades and now minority groups' 'demand for recognition goes far beyond the familiar plea for toleration, for the latter implies conceding the validity of society's disapproval and relying on its self-restraint. Rather they ask for the acceptance, respect and even public affirmation of their differences.'<sup>13</sup>

### Approaches to multiculturalism

Over the past decades multicultural theory has been approached and justified from a number of different angles. One of the key justifications comes from the communitarian school of thought, and argues that the traditional conception of liberalism, with its inherent focus on the primacy of the individual, fails to account for the key role that social and cultural groupings play in modern society. Michael Walzer articulates this idea:

'How can any group of people be strangers to one another when each member of the group is born with parents, and when these parents have friends, relatives, neighbours, comrades at work, coreligionists, and fellow citizens - connections, in fact, which are not so much chosen as passed on and inherited?'<sup>14</sup>

Whilst Walzer is himself sceptical about the limitations of the communitarian critique, believing it to be 'doomed...to eternal recurrence', he suggests that it sheds some light on the balance that must be struck between the interests of the individual and the interests of the group. Approached from this angle, multiculturalism aims to reassert some of the primacy of the group in society. Languages and cultures are viewed as social goods, which are intrinsically of equal worth. The ideas of

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<sup>12</sup> See for example AlSayyad and Castells (eds) *Muslim Europe of Euro-Islam: politics, culture, and citizenship in the age of globalization* (Lexington Books, 2002), as well Berry, John W. "Immigration, acculturation, and adaptation." *Applied psychology* 46.1 (1997): 5-34.

<sup>13</sup> Parekh, *Rethinking Multiculturalism* p1

<sup>14</sup> Michael Walzer, 'The Communitarian Critique of Liberalism', 1990 *Political Theory*, Vol. 18 1 p10

‘recognition’, as put forward by Charles Taylor,<sup>15</sup> aim to ensure the effective equality of social goods through the provision of minority rights designed to protect, preserve and enhance the group identity.

A second justification for the adoption of multicultural policies is framed in terms of post-colonialism.<sup>16</sup> This approach focuses less on the value of cultures and of group affiliation, and more on a consideration of the ‘debt’ owed to national and indigenous minorities. Through questioning the ultimate validity and legitimacy of the majority government over the national or indigenous minority this theory advocates the adoption of self-government measures and differentiated rights based on group membership.

Currently the main approach to the justification of multicultural policies comes from liberalism itself (as opposed to the communitarian approach which opposes the liberal focus on individualism, and the postcolonial approach which does not particularly concern itself with liberalism). Drawing both on principles of autonomy and of equality, Kymlicka constructs his theory of liberal multiculturalism and differentiated citizenship. Whilst the emphasis remains on the individual, it is argued that the true liberation of the individual can only be achieved by autonomy, and that preserving the cultural framework allows that individual the autonomy to pursue and adhere to a culture of their choosing. Others have been sceptical about the possibility of combining this individual emphasis with the discussion of groups: ‘can a theory of rights that is so individualistically constructed deal adequately with struggles for recognition in which it is the articulation and assertion of collective identities which seems to be at stake?’<sup>17</sup> In terms of equality, Kymlicka believes that members of minority cultures are automatically at a disadvantage compared to their counterparts in the majority culture, and that extra safeguards for the integrity of that minority culture are needed.

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<sup>15</sup> c Taylor, Charles. *Multiculturalism: Examining the Politics of Recognition*. Princeton University Press, Princeton, 1994.

<sup>16</sup> c Kymlicka, *Multicultural Citizenship*, p116 on the role of history in determining the strength of a cultural claim.

<sup>17</sup> Jürgen Habermas, ‘Struggles for recognition in the democratic constitutional state’, (1993) *European Journal of Philosophy*, 1.2 p128. Habermas himself is ultimately of the opinion that liberalism can in fact deal adequately with this challenge.



This form of 'liberal' multiculturalism (which by and large is the focus of this section) divides those belonging to minorities into three groupings: national minorities, indigenous peoples, and immigrant populations. Indigenous populations, such as the Maori in New Zealand or the Inuit in Canada, are viewed as having a particularly strong claim to accommodation.<sup>18</sup> National minorities are categorised as those that have a long history in the country, may speak a different language to the majority, and usually have a 'homeland' within the state, such as Quebecois in Canada, or the Welsh in the UK. These minorities often have the greatest claim to self-government rights. The most contentious groups for the purposes of claims to multicultural accommodation are those of relatively recent immigrant origin. In general the first two groups are seen as having the stronger claim to 'group rights' whilst immigrant populations are seen to have a limited claim to what Kymlicka terms polyethnic rights:

'It is important to distinguish this sort of cultural diversity from that of national minorities. Immigrant groups are not 'nations' and do not occupy homelands. Their distinctiveness is manifested primarily in their family lives and in voluntary associations, and is not inconsistent with their institutional integration.'<sup>19</sup>

The 'polyethnic' rights given to immigrant populations tend to include both extensions to existing legislation, such as the provision of resources for Islamic faith schools in the UK, in addition to more established majority religions, and exemptions from otherwise universally applicable legislation. Examples of this would include exempting Sikh men from the requirement to wear a helmet on a motorbike or on construction sites.<sup>20</sup> Liberal multiculturalism for Kymlicka is 'based upon the idea that justice between groups requires that the members of different groups be accorded different rights'.<sup>21 22</sup>

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<sup>18</sup> See discussion in Kymlicka, *Multicultural Odysseys*; for criticism of this position see Parekh, *Rethinking Multiculturalism*, p102

<sup>19</sup> Kymlicka, *Multicultural Citizenship*, p14

<sup>20</sup> *Ibid.* p31

<sup>21</sup> That justice between individuals requires justice between groups is implicitly stated.

During the first wave of multicultural thought, there was much reflection on the possibilities and benefits of a system of differentiated citizenship.<sup>23</sup> Whilst equality in terms of human rights and anti-discrimination legislation allowed minorities to be equal on paper, it was suggested that additional rights were needed in order for minorities to achieve effective equality. Kymlicka is a strong supporter of this kind of concession:

‘...it is increasingly accepted in many countries that some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of citizenship.’<sup>24</sup>

‘These group-specific measures... are intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society.’<sup>25</sup>

The recognition debate also helped to shape the multicultural discourse, by emphasising the importance of cultural affirmation to the identity and development of the individual. Whilst the debate itself will not be discussed in detail, there are certain

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<sup>22</sup> Whilst Kymlicka does make a concerted effort to differentiate between different types of minority claims, the same cannot be said for much of the literature on multiculturalism. Whilst the focus of much of the debate, and indeed of the present argument, is on immigrant populations there is a tendency to approach ‘minority’ as synonymous with ‘immigrant’, and therefore many of the arguments against normative multiculturalism are not, in fact, critiques (at least effective ones) of it as a whole, rather critiques of its use to accommodate immigrant populations. Similarly most media references to normative multiculturalism tend to only concern multiculturalism as it applies to immigrant populations.

<sup>23</sup> See for example Iris Young, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship”, *Ethics* 1989 99: 250–274; MS Williams, *Voice, Trust, and Memory. Marginalized Groups and the Failings of Liberal Representation*, 1998, Princeton, Princeton University Press and Kymlicka and Norman, “Return of the Citizen: A Survey of Recent Work on Citizenship Theory”, 1994 *Ethics*, 104 (2): 352–381

<sup>24</sup> Kymlicka, *Multicultural Citizenship*, p26

<sup>25</sup> Kymlicka, *Multicultural Citizenship* p30

elements that aid the understanding of the importance of culture to the individual and group. In particular the *nomos* became an important concept for multicultural theory, principally in the development of liberal multiculturalism, and its emphasis on the ‘right to culture’. Robert Cover coined the term *nomos* in the early 1980’s to denote the normative universe within which individuals are able to operate, one in which ‘law and cultural narrative are inseparably related.’<sup>26</sup> The idea of the *nomos* suggests that law cannot be considered separately from individuals and their beliefs:

‘The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.’<sup>27</sup>

Therefore, with a new awareness of the cultural differences between minorities within the population, theorists came to consider the diverse *nomoi* that existed within any given state, and the way in which multiculturalism might help to preserve these *nomoi*. Not only was the *nomos* vital to the individual’s interpretation of the law, it was a crucial part of their identity, and as such was important to protect. As the make-up of the state changed, whether from the influx of immigrants, or the re-assertion of national identity and the claims of indigenous peoples, the narratives present in a (descriptively) multicultural society were no longer ones that could be ignored in the construction of legal norms.

Multicultural theory came to incorporate a huge body of political and social thought throughout the latter half of the twentieth century. However since the early 1990’s it has fallen from grace in many circles. In what has sometimes been characterised as

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<sup>26</sup> Ayelet Shachar, *Multicultural jurisdictions: Cultural differences and women’s rights*, (Cambridge University Press, 2001) p2

<sup>27</sup> Robert Cover, ‘Foreword: *nomos* and narrative’, (1983) *Harvard Law Review*, 97, p4

the ‘retreat’ from multiculturalism or the ‘multicultural backlash’<sup>28</sup> the desirability, in both theory and practice, of a commitment to ideas of differentiated citizenship and entrenched diversity began to be called into question. It is with these critiques that the rest of this first section is concerned.

### **The multicultural ‘backlash’**

The criticism of multiculturalism has been widespread. Shachar divides the ‘second wave’ of multicultural theory (or the ‘backlash’ arguments against multiculturalism) into two categories, internal – concerning the potentially negative effects that multiculturalism might have on community members - and external – regarding the relationships between cultures and between cultures and the state.<sup>29</sup>

#### Internal critiques of multiculturalism

Shachar explains that the internal critiques often focus on the position of vulnerable individuals within accommodated groups, and the fears that respect for group difference can lead to in-group subordination. Of those who raise concerns of this ‘internal’ kind, the vast majority still accept ‘the basic thrust of the justice claims raised by minority groups’. In this way it can be seen as a critique of the application of multiculturalism, rather than of the body of theory itself. The focus tends to be on the practical impact that specific policies and forms of accommodation can have on group members, and the way in which costs and benefits are distributed within a community.<sup>30</sup>

In what Shachar calls the ‘paradox of multicultural vulnerability’,<sup>31</sup> individuals inside the group can be injured by the very reforms that are designed to improve their status as a member of a minority group within the multicultural state.

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<sup>28</sup> see for example Kymlicka, ‘Multiculturalism; success, failure and future’, p3

<sup>29</sup> Shachar, ‘Two Critiques of Multiculturalism’, (2001) *Cardozo Law Review*, 23 253

<sup>30</sup> c Kymlicka, ‘The new debate on minority rights’, in Laden and Owen (eds), *Multiculturalism and Political Theory*, (Cambridge University Press, 2007) p44

<sup>31</sup> Shachar, *Multicultural Jurisdictions*, p5

Fears have been voiced that liberal theories of multicultural accommodation, such as those presented and defended by Kymlicka, in fact pose a threat to the core values of liberalism.<sup>32</sup> The idea of the centrality of individual rights comes into question when groups are granted powers to organise their internal affairs. In the development of group rights for any minority community, it is generally the community leaders who negotiate and campaign for these rights. In this situation ‘power would in effect be vested in the most powerful elites within these groups, to lord it over their members without the kinds of constitutional constraints and dispersals of power that are part and parcel of the organisation of liberal states’.<sup>33</sup> These same leaders have an interest in maintaining their power within the community, and so will most likely argue for rights and policies that play to their personal interests. In this way, many policies of multicultural accommodation serve to perpetuate existing power hierarchies within minority groups and deprive subordinate group members of the voice they are supposedly guaranteed by a liberal state.

In a culture where, for example, women are often seen as playing a secondary role, or as being subordinate to men, this can be damaging. By ceding control over certain areas of family law or of education policy, the state gives more power to those who wish to perpetuate inequality. On this point Susan Moller Okin argues that until suppressed groups are granted full access to and participation in negotiations for group rights, their interests may in fact be harmed rather than promoted by the granting of such rights.<sup>34</sup>

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<sup>32</sup> c discussion in Habermas, *Struggles for Recognition*, also AS Roald, ‘Multiculturalism and Pluralism in Secular Society; individual or collective rights?’, *Ars Disputandi : The Online Journal for Philosophy of Religion* vol. 5 p147 and *Multicultural Citizenship: A Liberal Theory of Minority Rights*. by Will Kymlicka Review by: Brian Barry *Ethics*, Vol. 107, No. 1 (Oct., 1996), pp. 153-155

<sup>33</sup> DM Weinstock, ‘Liberalism, multiculturalism and internal minorities’, in AS Laden and D Owen (eds), *Multiculturalism and Political Theory*, p246

<sup>34</sup> Susan Okin, *Is Multiculturalism bad for women (with respondents)*, (Princeton University Press, 1999) p24

### *Feminist critiques*

The internal critiques of multiculturalism are most often feminist critiques, focusing on the role of gender within minority groups and the perpetuation of patriarchal structures. It is noted, however, that these arguments apply equally to any subordinated group, particularly children<sup>35</sup> and homosexuals.

Okin is one of the strongest proponents of this internal critique. She focuses on the oppression of women and girls, although she has acknowledged that the arguments can and should be extended to all subordinated groups within minorities.<sup>36</sup>

The feminist critique of multiculturalism generally has two levels. The first scrutinises the assumption that policies which aim to respect difference are beneficial for all group members, and the second aims to highlight the way in which in-group power relations and debates over 'authentic' and 'correct' interpretations of tradition and culture can put women at risk 'when captured by more conservative or fundamental elements'.<sup>37</sup>

During its formative stages, Shachar asserts that this critique 'highlighted the blindness of first-wave multiculturalism to a number of significant factors: intra-group rights violations, gendered power relations and the central role that women play in many minority communities given their heightened gender responsibilities as 'cultural' conduits of the group's distinct narrative of the world, that is, its *nomos*'.<sup>38</sup>

The internal feminist critique was largely successful in this initial aim, raising awareness and provoking debate on the potential tensions arising between cultural protection and women's rights.<sup>39</sup> In its more recent incarnations, the critique has begun to address more complex issues such as the public policy implications of these

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<sup>35</sup> c R Reich, 'minors in minorities', in Eisenberg and Spinner-Halev (eds) *Minorities within Minorities: equality, rights and diversity*, (Cambridge University Press, 2005)

<sup>36</sup> Okin, *Is Multiculturalism bad for women?*, p117

<sup>37</sup> Shachar, *Feminism and multiculturalism: mapping the terrain*, in Laden and Owen (eds), *Multiculturalism and Political Theory*, p115

<sup>38</sup> *ibid* p116

<sup>39</sup> see AS Roald 'Multiculturalism and Pluralism in Secular Society; individual or collective rights?', *Ars Disputandi : The Online Journal for Philosophy of Religion* vol. 5 p149

tensions, and the way in which they might be remedied. Shachar divides those developing these debates into three categories: liberal feminists, post-colonial feminists and multicultural feminists.

*i) Liberal Feminism*

Liberal feminism asserts that liberal values should be distributed equally between genders. Okin is one of the main proponents of this viewpoint. The position ‘suggests a strong presumption in favour of depoliticising group-based identities, a process that has been associated with the strict separation of law from religion’.<sup>40</sup> Okin has attracted criticism for what is perceived to be her overly simplistic view of minority cultures, which, whilst purporting to be feminist, is at times bordering on xenophobic.<sup>41</sup> She portrays minority cultures as being consistently sexist and illiberal, to the point that she suggests many women would be in a better position if their culture were ‘to become extinct (so that its members would become integrated into the less sexist surrounding culture)...’<sup>42</sup> This, accompanied by statements such as ‘much of most cultures is about controlling women’ has made Okin somewhat of a punching bag for liberal multiculturalists. Bikhu Parekh illustrates this view:

If some (women) do not share the feminist view, it would be wrong to say that they are victims of a culturally generated false consciousness and in need of liberation by well-meaning outsiders. That is patronising, even impertinent, and denies them the very equality we wish to extend to them. This is not to say that they might not be brainwashed, for sometimes they are, but rather that we should avoid the mistaken conclusion that those who do not share our beliefs about their wellbeing are all misguided victims of indoctrination.<sup>43</sup>

This is not to suggest that there is no substance in Okin’s arguments, merely that they fail to take into account the realities of individuals’ multiple affiliations and the diversity of minority cultures and experiences. Further Shachar observes that ‘Okin

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<sup>40</sup> Shachar, *Feminism and Multiculturalism*, p118

<sup>41</sup> c Parekh’s response to Okin – ‘A varied moral world’ in *Is multiculturalism bad for women?*, p73

<sup>42</sup> Okin, *Is multiculturalism bad for women?*, p22

<sup>43</sup> Parekh, ‘A varied moral world’, in Okin, *Is multiculturalism bad for women?*, p73

apparently believes that while significant changes in the gender norms of the majority culture in Western societies have occurred as a result of human agency and resistance, no comparable potential for substantive egalitarian reform exists for the minority culture'.<sup>44</sup> Although the way in which Okin's arguments have been put forward and articulated is inflammatory (and possibly deliberately so), they have been helpful in paving the way for a more nuanced feminist critique of multiculturalism.

Okin views feminist issues as inherent to the idea of minority rights, and as such has been suggested to be one of the few proponents of the critique who view it as a blanket objection to the idea of minority rights.<sup>45</sup> However this is not strictly true as she states that ultimately, 'the compatibility of group autonomy with the liberal commitment to individual rights thus comes crucially to depend upon the degree to which individual members actually consent to the strictures that are visited upon them as group members',<sup>46</sup> suggesting that she is of the opinion that minority rights can work, as long as these issues are taken into account.

#### *ii) Post-colonial feminism and cultural defences*

The second group that Shachar identifies, that of post-colonial feminism, focuses on some of the issues raised in the criticism of Okin's position. In particular the critique questions simplistic understanding of culture and focuses on the idea mentioned above, that group leaders argue for a bastardised version of their 'culture' which serves their interests, and can actively exclude the voices and concerns of other group members.<sup>47</sup> Further, this second group criticises the assumption of superiority of the majority culture that they deem to be evident in the way that accommodation is approached. Minority groups are accommodated to varying degrees, dependent on the way in which their cultural practices are perceived as being acceptable to or recognisable in the majority culture. This is often illustrated by the discussion of successful 'cultural defences' in the criminal law context.

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<sup>44</sup> Shachar, *Feminism and Multiculturalism*, p121

<sup>45</sup> Kymlicka, *The new debate on minority rights*, p45

<sup>46</sup> *ibid* p256

<sup>47</sup> Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third World Feminism*, (Routledge, 1997) p10



The use of cultural defences has been the subject of debate for a long time – well before it was incorporated into the feminist wave of multicultural critiques.<sup>48</sup> These defences tend to apply in much the same way that mental illness or provocation do, in that they are used to indicate that the accused did not have the necessary mens rea to be considered guilty of the crime. The most frequently discussed examples<sup>49</sup> raise questions for sexual equality:

‘... types of cases in which cultural defences have been used most successfully are: 1) kidnap and rape by Hmong men who claim that their actions are part of their cultural practice of *zij poj niam*, or ‘marriage by capture’; 2) wife-murder by immigrants from Asian and Middle Eastern countries whose wives have either committed adultery or treated their husbands in a servile way; 3) murder of children by Japanese or Chinese mothers who have also tried but failed to kill themselves, and who claim that because of their cultural backgrounds the shame of their husbands’ infidelity drove them to the culturally condoned practice of mother-child suicide...’<sup>50</sup>

Considering the nature of these crimes it is perhaps surprising that the cultural defence discussion has not always been centred on gender.

The feminist criticism of cultural defences centres on the idea that they can seem to mitigate crimes against women, and to misrepresent women as less autonomous beings.<sup>51</sup> The received conception of ‘culture’ in the courtroom is that which has been conveyed by deemed authority figures within that culture, most of who are typically

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<sup>48</sup> See for example Julia P Sams ‘The Availability of the “Cultural Defense” as an Excuse for Criminal Behavior’ (1986) *Georgia Journal of International and Comparative Law*, 16, 335-354; Doriane Lambelet Coleman ‘Individualizing Justice Through Multiculturalism: the Liberal’s Dilemma’ (1996) *Columbia Law Review* 95, 1093-1166; Nancy S Kim ‘The Cultural Defence and the Problems of Cultural Preemption: A Framework for Analysis’ (1997) *New Mexico Law Review*, 27, 101-139

<sup>49</sup> The arguably unfortunate tendency of multicultural theorists to base discussions on anecdotal rather than statistical examples will be discussed below. The most frequently discussed examples of cultural defences come largely from the United States, where a number of academics and activists have been vocal in their opposition to the concept.

<sup>50</sup> Okin, *Is Multiculturalism Bad for Women?*, p18

<sup>51</sup> Anne Phillips, ‘When Culture Means Gender: Issues of Cultural Defense in the English Courts’ (2003) *Modern Law Review* 66/4 510

male.<sup>52</sup> Further, the use of cultural defences to explain crimes against women who are said to have had an affair, and thereby destroyed the honour of their husband, lends itself to the assumption that women in minority cultures are typically or should be subordinate and subservient in a way not recognised in the dominant culture.

Whilst these observations do raise interesting questions about the way in which the acceptance of cultural defences can facilitate the subordination and oppression of women, it is suggested that there is not enough evidence to come to the conclusion of the post-colonial feminists, who argue that this is reflective of the claim that ‘the courts are willing to recognise ‘cultural’ factors for minority defendants only when they resonate with mainstream gendered norms’.<sup>53</sup>

Rather, it might be that the important conclusion to be drawn is one regarding the way in which the legal system can be manipulated in the name of multiculturalism.<sup>54</sup>

Phillips is concerned about the use of exemptions in the legal system as it calls in to question the principles of legal universalism, and asks whether it is ‘appropriate to single out cultural membership as entitling people to differential treatment under the law, or does this veer too far in the direction of different laws for different communities?’<sup>55</sup> The difficulty is not, she argues, that ‘it allows individual circumstances to be taken into account in sentencing (of itself, this is hardly contentious), but because, in its larger application, it threatens to elevate cultural membership above other considerations.’ Further, Phillips recognises that this could lead to a situation where largely assimilated individuals ‘rediscover’ their cultural affiliation as it becomes useful to them. This use – or abuse - of culture will be discussed further subsequently.

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<sup>52</sup> Volpp, ‘(Mis)Identifying Culture : Asian women and the cultural defence’ (1994) *Harv. Women’s LJ* 57, p77

<sup>53</sup> As articulated, but not argued, by Shachar, *Feminism and Multiculturalism*, p125 For a more detailed exposition of this theory, see Daina C Chiu, ‘The Cultural Defense: beyond exclusion, assimilation and guilty liberalism’, (1994) *California Law Review* 82/4 1053

<sup>54</sup> This strand is taken up by Brian Barry in his influential ‘*Culture and Equality: an egalitarian critique of multiculturalism*’ (Polity Press, 2001) in which he criticises the adoption of any public policy that considers cultural difference as a factor, and might therefore (intentionally or by manipulation) lead to exemptions for otherwise universal laws. This text is discussed in more depth below.

<sup>55</sup> Phillips, ‘When Culture Means Gender’, p513

In general, the post-colonial feminist approach to the critique of multiculturalism comes to a similar conclusion to that of the liberal feminist approach; namely that there is very little that can be said in favour of granting minority rights. This would seem to be a natural conclusion given the severity of the problems that this body of work highlights, however it might be suggested that the focus is too narrow to come to such a decision. This approach concentrates on the impact of multiculturalism or of culture-sensitive approaches in the context of criminal law, particularly crimes of sexual violence, abuse and killings. As such, the conclusions that are drawn do not necessarily apply to the broader (and more generally relevant) questions of cultural accommodation within education and family law.

### *iii) Multicultural feminism*

The final category of the feminist critiques is the most recent development. Partly in response to the negative view of multiculturalism taken by the other two groups, multicultural feminism, rather than a critique, is a qualified defence of multiculturalism; arguing for a more political understanding of culture. This understanding should be one that recognises the utility of culture in the formation of the individual, and acknowledges the right and ability of individuals, and particularly of women, to determine the importance of their own culture. The multicultural feminists therefore advocate a shift away from the focus on the merits of culture and towards a more critical look at the implementation of ideas of multiculturalism at a political and juridical level. By moving the feminist focus from simply a discussion of the subordination of women within minority cultures to a more general critique of the way in which the ‘legal and sociological hardening of borders of inclusion/exclusion between minorities and majorities may expose women to risk’,<sup>56</sup> the multicultural feminist approach goes some way to bridging the theoretical gap between the internal critiques and the external critiques. It is noted however, that the distinction between internal and external critiques, whilst helpful, is less clear-cut than presented by Shachar. This suggestion will be developed more fully below.

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<sup>56</sup> Shachar, ‘Feminism and multiculturalism’, p129

### *The 'Exit option'*

In response to many of the internal, and particularly the feminist, critiques of multiculturalism, it has been suggested that the dangers of oppression or subordination of group members are best combated by ensuring the right of the group member to exit that group.

Chandran Kukathas is a strong supporter of the right to exit, which he defines as an 'unalienable right to leave – to renounce membership of – the community'.<sup>57</sup> In general if an individual is oppressed or subordinated within their cultural or religious group, they have the option to exit that group, and to disassociate themselves, thereby ending their own suffering. Kukathas supports this exit argument for three reasons.

Firstly his approach to multiculturalism is strongly non-interventionist, which he believes to be based on individual rights. The exit thesis supports the idea that individuals within minority groups maintain their individual citizenship rights. As with all personal associations, an individual's cultural group should be of no consequence to the state. Rather than requiring the state to interfere on an individual's behalf, and therefore be seen to make a judgement about the value or content of a culture, Kukathas believes that the responsibility is with the autonomous individual, who can make the choice to leave.

Secondly he suggests that the right of exit mitigates in-group oppression or injustice, because any acceptance of this is implicitly consensual where there exists another option. Closely connected to concept of cultural relativism, there is a suggestion that those from outside the culture should not and cannot evaluate the oppressiveness of a minority culture.<sup>58</sup> Once again from a liberal perspective, Kukathas argues that individual's 'wish to live according to the practices of their own communities has to be respected... individuals should be free to associate, to form communities and to live by the terms of those associations'.<sup>59</sup> Therefore, whilst a culture might be

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<sup>57</sup> Kukathas, *Are there any cultural rights?*, (1992) *Political theory*, Vol 20 1 105, p117

<sup>58</sup> This reluctance to interfere in culture will be discussed in detail below. It is argued that this is one of the key flaws of liberal multicultural models.

<sup>59</sup> Kukathas, *Are there any cultural rights?*, (1992) *Political theory*, Vol 20 1 105, p116

oppressive by liberal standards, the individual still has the right to choose to belong to it. There can be no assumption that an illiberal practice cannot be consented to.

Finally Kukathas acknowledges the connection between the right of exit and individual's voice within their community. In a situation where there is an alternative to the community, that community has to listen more carefully to the voices of its members, enhancing their rights as members of the group. Given that the interests of an accommodated minority group generally lie in preserving the existence of that group, the power of exit translates to the power of influence within the group. This is particularly true in the context of women, because it is through women, and their children, that cultural membership is preserved, continued and expanded. In certain cultures women are viewed as the external representation of the nature of that culture, and therefore their continued membership is of perhaps even greater interest to the minority community as a whole than that of the dominant groups within that minority. Enabling oppressed minorities within minorities to leave their community and renounce membership of the associations that oppress them provides them the ability to exert influence within that association. If the choice to exit is viable and realistic, then it creates what might be considered a 'market' element, meaning that the minority group has to compete to be an attractive option, rather than merely retaining members by default.<sup>60</sup>

### *Criticisms of the 'Exit Option'*

Whilst it is undeniable that the legal right to renounce membership of a cultural community is positive in that it allows the individual a measure of autonomy, it is generally acknowledged that the idea of exit rights as effective protection against in-group subordination or maltreatment is inadequate. In some of its manifestations, such as Kukathas's second argument above, the exit rights narrative is closely connected to the idea of 'implied consent'. It assumes that if a vulnerable or even abused individual has not actively sought to remove him or herself from the context in which they are

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<sup>60</sup> A viable exit, in this context, gives voice to the otherwise oppressed internal minorities. This will be addressed further in the final section.

being harmed, then their consent is implicit.<sup>61</sup> Fernandez points out that assumptions such as these stem from the liberal conception of cultures as voluntary associations. This fails to take into account the fact that ‘nomoi groups, like states, ultimately acquire the majority of their members by birth instead of through adult choice’.<sup>62</sup> Cultural groups are not just associations, but often crucial parts of the individual’s nomos. Rejection of membership of the group may not be possible without the loss of the individual’s identity. Further, in the case of immigrant groups, vulnerable individuals may not have sufficient connections outside of their cultural group, nor language skills, to be able realistically to exit the community.<sup>63</sup>

Even Kukathas has recognised that the exit option is ‘insufficient to ensure any kind of freedom from oppression since it is precisely the most vulnerable members of such communities who would find exit most difficult and costly’.<sup>64</sup> Vulnerable members who might wish to utilise the option of exit are more likely to be those who would have the least ability to survive out with their cultural environment. Women, as a particularly vulnerable group, are often oppressed in such a way that limits their ability to become independent, both personally and economically. Okin explores this idea at length and describes three particular ways in which cultural factors affect women’s realistic right to exit. Firstly cultural practices are often manifested in education. Demands for separate faith schools in the United Kingdom, and for particular educational exemptions for minority groups, give the minority group a large degree of control over the education of children. According to Okin, this poses a difficulty because of the lack of education that is offered to girls, and also the content

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<sup>61</sup> Shachar notes that this doctrine has roots in archaic laws on subjects such as domestic abuse and marital rape.

<sup>62</sup> Shachar, *Multicultural Jurisdictions*, p46

<sup>63</sup> Albert Hirschman examined the relationship between voice and exit in his 1970 book ‘*Exit, Voice and Loyalty: response to decline in firms, organisations and states*’ (Harvard University Press, 1970). Although largely dealing with voice and exit in a consumer setting, Hirschman does touch upon the importance of this distinction in a social organizations, where he believes that ‘exit is ordinarily unthinkable, though not always wholly impossible, from such primordial human groupings as family, tribe, church and state. The principal way for the individual member to register his dissatisfaction with the way things are going in these organisations is normally to make his voice heard in some fashion.’ p76

<sup>64</sup> Kukathas, ‘Cultural toleration’, (1997) *NOMOS* 39 69, p87

of that which they do receive. Secondly, early or involuntary arranged marriage has the effect of tying women or girls to their cultural community both personally and economically. Okin believes that as women are seen as a means of preserving the culture, both symbolically and biologically, they are pressured into having children in order to ensure cultural survival. At this point, as mothers, they become complicit in the cultural manipulation and socialisation of their children.<sup>65</sup> Finally Okin notes that the entire process of socialisation within a minority culture that is oppressive towards women undermines the self-esteem of those women, meaning that they are unable realistically to forge a life for themselves out with that community.

In terms of the exit option, Shachar offers a less sensationalist critique, explaining that currently ‘the right of exit argument suggests that an injured insider should be the one to abandon the very centre 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’.<sup>66</sup> In this critique she argues that although the idea of exit is important, and should not be dispensed with, more needs to be done to consider how such an exit is enabled. A similar viewpoint is expressed by Weinstock, who suggests that exit rights make vulnerable members pay a very high price for the repressiveness of their group.<sup>67</sup> Whilst it may be true that the right to leave gives oppressed members more of a voice within their community, it would still come at a huge cost to the member. The minority group might lose an individual, but the individual loses their entire community. If that is not viewed as a realistic option by the minority group, then no voice is gained from threatening it.

The second problem that Shachar sees with the ‘exit option’ is that it is final. The idea of the non-interventionist model of accommodation, as advocated by Kukathas, means that exit is essentially the only choice available to the oppressed, rather than a last resort. A woman whose rights are being abused by the minority group to which

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<sup>65</sup> See Okin, *Is multiculturalism bad for women?*, p12

<sup>66</sup> Shachar, *Multicultural Jurisdictions*, p41

<sup>67</sup> Weinstock, ‘Liberalism, multiculturalism and the problem of internal minorities’, p248

she belongs has to choose between the ‘implicit consent’ to those abuses, and total abandonment of the community (assuming that this is even possible). Shachar surmises that ‘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’.<sup>68</sup>

The dismissal of the importance of culture implied by this apparent ultimatum is antithetical to the entire liberal argument in favour of multiculturalism. Liberal multiculturalism supports group rights and differentiated citizenship because of the crucial role that culture plays in the life of the individual. If a theory of liberal multiculturalism relies on the exit option as its primary safeguard against in-group subordination then it fails to achieve this aim, and could even be said to create a situation where individuals must choose between culture and liberal values.

### External Critiques

The external critiques of multiculturalism pick up on this contradiction, and examine the desirability of any commitment to multiculturalism. Under this head of argument it is often suggested that by employing multicultural policies, allowing cultural exemptions or legalising difference in any way, cultural identities become ‘hardened’ into political categories. Fossilising cultural differences in this way perpetuates inequality. The argument is summarised by Kymlicka:

“Multiculturalism may be intended to encourage people to share their distinctive customs, but the very idea that each group has its own distinctive customs ignores processes of cultural adaptation, mixing and melange, and renders invisible emerging cultural commonalities, thereby potentially reinforcing perceptions of minorities as eternally ‘other’.”

Although the ultimate suggestion of all the external critiques is the same, in that they argue against multicultural policies that categorise individuals, it is approached from several different angles.

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<sup>68</sup> Shachar, *Multicultural Jurisdictions*, p41



*Brian Barry's 'Culture and Equality'*

Brian Barry's much discussed book *Culture and Equality* is framed as a challenge to multicultural theory, and forms a key part of the external critique, attacking multicultural theory from a variety of standpoints. Ultimately Barry advocates the adoption of policies that aim to 'privatise difference' however it is his discussion of the more 'conventional' approaches to multiculturalism that is most relevant to the current project.

Whilst criticised widely due to his propensity to make sweeping statements such as 'multicultural policies are not in general well designed to advance the values of liberty and equality, and... the implementation of such policies tends to make a retreat from both', Barry makes several important observations about the theoretical shortcomings of multiculturalism.

Firstly he makes the point that far from reducing inequality, most multicultural policies seem to be designed to preserve the factors that have led to that inequality. In this sense the distinction between choice and opportunity becomes important.

“Members of minority cultures may, indeed, suffer from a paucity of resources or opportunities, but the case for culture-based special rights does not depend on its being so. Rather, the argument is that, even where resources and opportunities are equal, the members of a group are entitled to special rights if their distinctive culture puts them in a position such that they are in some way less well placed to benefit from the exercise of the rights that provide the standard resources and opportunities than are others.”<sup>69</sup>

This has the effect that whilst all citizens/ members of a society have the same opportunities available to them, they are restricted in their ability to choose these opportunities by their culture. 'The critical distinction is between limits on the range of opportunities open to people and limits on the choices that they make from within a certain range of opportunities'.<sup>70</sup> In terms of the autonomy arguments that are put forward in favour of differentiated citizenship, this suggests that the limitations should be considered to be part of the private affiliation that an individual has with

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<sup>69</sup> Barry, *Culture and Equality*, p13

<sup>70</sup> *ibid.* p37

their (supposedly cultural) group, rather than any societal inequality for which the state has responsibility.

Barry further suggests that there is some disagreement between proponents of multiculturalism as to whether they are attempting to give members of minority cultures effective equality of opportunity and of choice, whilst retaining their cultural 'distinctiveness', or whether 'the objective of special treatment for members of disadvantaged groups is to make the need for that special treatment disappear as rapidly as possible'.<sup>71</sup> In the case of the first objective, any special rights that were granted to a minority population would have to be granted on a theoretically permanent basis. Doing so would create a permanent difference in treatment between members of cultural groups, and therefore mean that minority groups were considered, interminably, to be something 'other' than the majority, rather than as an important and equally worthwhile component of the same society. In the case of the second objective, the effective levelling of the playing field would likely mean that those belonging to previously disadvantaged minority groups no longer possessed the characteristics, or 'cultural distinctiveness' which necessitated the differential treatment in the first place. In this instance the well-meaning multicultural policy in fact leads to accelerated de facto assimilation.

For Barry therefore, the current approaches to multiculturalism necessitate a choice between the perpetuation of difference, and the erosion of difference. There is no middle ground and, possibly more importantly, there seems to be no flexibility. Barry suggests that these approaches constitute an either/or approach to difference, one which is at odds with the nature and flexibility of cultures.

In terms of self-government rights and devolution to national minorities or indigenous populations, Barry urges further caution, due to the asymmetrical nature of such power structures. In such situations, members of the national minority retain a vote in

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<sup>71</sup> *ibid.* p13

the state elections, and representatives from the nation's territory vote in the parliament on issues that do not affect their constituencies at all:<sup>72</sup>

‘The complaint, dismissed by Kymlicka, that asymmetry ‘create[s] two classes of citizens’ seems to me completely valid. On one side, there are those citizens who determine their own affairs and in some matters play a part in determining the affairs of everybody else as well. On the other side, there are those citizens who determine their own affairs in some matters and in other matters are unable to determine their own affairs because some other people who have no business taking part in decisions on them have a right to do so.’

Barry is of the opinion that the only country which has so far avoided this difficulty in the decision making process is Belgium, divided as it is into Flemish and French, with relative autonomy for each group, and debate and bargaining over state-wide policy and practices. Not entirely willing to concede that this system works he adds, ‘the endless process of haggling that is Belgian politics is so nauseating to all concerned that it is widely thought that the country would already have broken up if it were not for the problem posed by Brussels – a Francophone enclave in Flemish territory that is too big a prize for either side to be willing to relinquish.’<sup>73</sup>

As a supporter of the privatisation of difference, and the pursuit of difference blind policies save in very exceptional circumstances, Barry concludes that ‘pursuit of the multiculturalist agenda makes the achievement of broadly based egalitarian policies more difficult in two ways. At the minimum it diverts political effort away from universalistic goals. But a more serious problem is that multiculturalism may very well destroy the conditions for putting together a coalition in favour of across-the-board equalisation of opportunities and resources’.<sup>74</sup>

It might be noted that Shachar heavily criticises Barry for this assessment of multiculturalism, suggesting that he is guilty of making value judgements about the

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<sup>72</sup> Known in the context of Scotland and the UK as the ‘West Lothian question’, erroneously named the East Lothian question in Barry’s discussion in *Culture and Equality* pp311-313, quote at p312

<sup>73</sup> Barry, *Culture and Equality*, p313

<sup>74</sup> *ibid.*, p325

merits of other cultures, and as Okin has been accused of doing, ultimately regarding them as intrinsically inferior to the majority culture. For Shachar, Barry makes a key error in considering the accommodation of diversity quite apart from any contemporary developments in concept and reach of citizenship:

‘Barry hardly pays any attention to the relationship between the rise of the ‘politics of difference’ and the universal expansion of citizenship, even though this important line of inquiry might furnish strong arguments for the proponents of the external critique of multiculturalism. One could argue for example, that democracy (here treated as universal suffrage) has become a catalysing force behind the recent claims for multicultural accommodation; since perhaps for the first time in modern history, members of non-dominant communities are now treated as full citizens with entrenched political rights. Under such circumstances, we might further argue that, once the fire of inter-community conflict has been lit – it can prove much harder to control than under non-democratic conditions.’<sup>75</sup>

Further Barry himself acknowledges that his assessment may not be considered entirely fair, given that there is a wide variety of opinion even amongst ‘avowed multiculturalists’ and none personally subscribes to each of the opinions that he has attributed to them as a whole. It is suggested that that is not necessarily a reason to discount or discredit Barry’s criticism however, because whilst there might not be a single ‘avowed multiculturalist’ who subscribes to all of the arguments he attacked, the discussion goes a long way to revealing the huge discrepancies between the purported ‘ideal’ of multiculturalism, and the implementation of multicultural theory.

### *Universalism, categorisation and differentiation*

The adoption of multicultural policies, such as the acceptance of cultural defences discussed above, or exemptions from legislation concerning dress, is also considered

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<sup>75</sup> Shachar, ‘Two Critiques of Multiculturalism’ p282, Barry does refer to the expansion of citizenship in *Culture and Equality*, however it is to make a rather different point about the politics of ‘divide and rule’.

in the external critiques as they can pose a challenge to the idea of universalism. Although the aim of many of these policies is to give specific rights to specific groups that are intended to compensate for the restrictions that that group's culture create on the exercise of otherwise uniform rights, they are in fact better tailored towards an aim of removing inequality by removing difference, as Barry suggested above. Phillips points out that 'universalism is more closely associated with the idea that all individuals should have the same rights or protections or entitlements than the idea that all individuals should end up the same.'<sup>76</sup>

Further, having different laws for different people requires categorisation and differentiation. Difficulties arise in attempting to classify people who might qualify for differential treatment, and this creates a situation where people have to make a choice between being officially affiliated to a minority culture, or to the supposed majority culture or status quo.<sup>77</sup>

As articulated by the post-colonial feminists, this can lead to people 're-discovering' their cultural background when it suits them, even though they may have almost completely assimilated/ integrated to the majority culture in other respects.

The demarcating function of some multicultural policies creates tension between different cultural groups, and in some circumstances can lead to there being a perceived hierarchy between these groups. If the ultimate goal of the multiculturalist is, as it is assumed to be, total equality between groups and individuals within those groups, then emphasising difference in any way must be counterproductive, highlighting the perception of minority cultures as a perpetual and, as I shall argue, typically *negative* 'other'.

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<sup>76</sup> Phillips, Multiculturalism, Universalism and the Claims of Democracy (2001) *United Nations Research Institute for Social Development*, p7

<sup>77</sup> India provides an illustration of this in the context of family law, where individuals are classified on the basis of their presumed religion; this 'personal law' system has been the subject of numerous book and articles.

### Against the division of critiques

At this point it might be appropriate to critically consider the division of these critiques of multiculturalism into the ‘internal’ and ‘external’. Shachar provides a useful categorisation that undeniably aids in the organisation and understanding of the various objections to contemporary multicultural policies. However it is suggested that by aiming to divide the critiques in this way, Shachar unintentionally obscures some of the similarities between them, which can provide a valuable insight into the real concerns raised.

The basic distinctions between the critiques, as highlighted by Shachar, are that the internal typically focuses on the negative effects that accommodation can have on individual members of a minority group, whereas the external considers the consequences for intra-group dynamics.<sup>78</sup> Further, Shachar asserts that in general proponents of external critiques fundamentally disagree with multicultural theory and those proponents of internal critiques tend to support the accommodation of difference through multicultural policy, objecting rather to the particular way in which it is managed.<sup>79</sup>

In reality these distinctions are not black and white and many of the key points raised are common to both categories. Consider the perception of minority cultures. Both groups raise arguments concerning the reinforcement of ideas of ‘otherness’. On the external side, this is discussed in relation to the use of specific legislation that highlights the differences between cultures rather than similarities, and therefore promotes the categorisation of individuals along cultural lines. The internal critique considers this in the context of cultural defences, where the implicit suggestion is that minority cultures are so different from the majority culture that they can justify acts which to the majority would be wrong or even abhorrent. Further, proponents of both internal and external critiques are concerned with the perception of minorities being

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<sup>78</sup> Shachar, ‘Two Critiques’, p257-259

<sup>79</sup> It might be argued that in fact the ‘division’ between ultimate support for and opposition to differentiated citizenship or multicultural policies is largely due to the personal bias of each writer, rather than an inevitable bias coming from the arguments themselves.

‘negative’. The internal critique (perhaps unintentionally) concerns itself with this view by highlighting the plight of vulnerable individuals within protected minority cultures. This demonstrates the negative consequences of giving group rights, and suggests that the minority cultures tend towards illiberal values and particularly towards sexism, and by doing this lends itself (presumably unintentionally) to the conclusion that minority cultures are somehow not to be trusted. In terms of the external critique, this is highlighted by the preference towards assimilation rather than cultural accommodation, or the recommendation that culture be confined to the private sphere. The implicit suggestion is that the majority culture is correct, and minority cultures should be considered of minor importance and/or relegated to being practised far away from public life.

Whilst these conclusions on the perception of other cultures are usually not argued explicitly, it is interesting to note the commonality between the critiques. The idea of minority cultures as a ‘negative other’ has been suggested to be an inevitable consequence of comparison:

‘What is *another* culture? Is the notion of a distinct culture (or race, or religion or civilisation) a useful one, or does it always get involved either in self-congratulation (when one discusses one’s own) or hostility and aggression (when one discusses the ‘other’)?’<sup>80</sup>

Many of the problems that multicultural theory faces flow from the difficulties in defining a culture, and from the necessity of defining it in relation to the presumed majority culture. In doing so, minority cultures are often mischaracterised, and through attempting to set out the content of a culture multicultural policies run the risk of essentialising cultures, not only by ‘choosing’ which aspects merit accommodation, but also by denying them the natural process of development and adaptation inherent to any culture or society.

The internal and external critiques both consider this problem of concretisation; the internal from the standpoint of individuals who are effectively denied their citizenship

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<sup>80</sup> Edward Said, *Orientalism*, (Modern Classics edn, Penguin Books, 2003) p325, original emphasis

rights by the adoption of policies that aim to preserve a group's perceived cultural attributes. A frequently cited example concerns membership to the Native American Santa Clara Pueblo tribe. Members of the tribe are able to access specific healthcare facilities. The case of *Santa Clara Pueblo v Martinez* examined the denial of access to emergency healthcare on the basis that the mother of the child in need of care had married outside of the tribe. As a result, although the children of the marriage had been raised within the community and their mother was a full blood member of the tribe, the children were not granted membership. Were the father to have been a member of the tribe, and the mother not, the children would still have been entitled to membership. This decision was upheld by the US Supreme Court on the basis that the membership rules, although obviously discriminatory, were crucial to the tribe's cultural survival.<sup>81 82</sup>

The external standpoint considers the concretisation of culture from the perspective of division, in that it is perceived to cause problems in achieving ultimate equality between cultures. As discussed above, Barry highlights the problem that legislation that aims to reduce inequality relies on the conditions creating the initial inequality to persist for its continued effectiveness. In this way, multicultural policies rely on a fixed conception of minority cultures at odds with the desired equality of personal choice and opportunity that they purport to desire.

Finally, both the internal and external critiques suggest that one of the most difficult problems facing multicultural theory is the strategic adoption or manipulation of culture, be it by individuals, the minority group, or the state themselves. Almost all of the texts referred to in this section touch upon this idea; however none appears to examine it in much detail.

The similarities between the two categories of critique highlighted by Shachar illustrate the deeper issues facing multicultural theory. The 'fall' narrative has been damning in its criticism of policies adopted by various states in the name of protecting

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<sup>81</sup> *Santa Clara Pueblo v Martinez*, 436 US 49 (1978)

<sup>82</sup> See discussion in Shachar, *Multicultural Jurisdictions*, p18



and promoting cultural diversity, however, on closer examination (and partly because of the division between internal and external) some of this criticism can be seen as superficial, failing to grapple adequately with and in some cases even to identify the key issues discussed above.

### **Qualifications to the ‘Multicultural backlash’**

Whether individual writers believe that multiculturalism itself is desirable or not, there appears to have been agreement from most schools of thought that multiculturalism as it is currently approached, in terms of minority rights and differentiated citizenship, is not working.

In spite of this ‘surprising consensus’, Kymlicka points out that there has only really been a retreat from policies of multiculturalism in respect of immigrant populations. There remain extensive and arguably expanding protections and provisions for indigenous and national minorities in most Western countries.<sup>83</sup>

This, according to Kymlicka, refutes the presumption that the move away from multiculturalism is based on a reassertion of the idea that ethnicity belongs in the private sphere.<sup>84 85</sup> Even in terms of immigrant populations, the ‘retreat’ is by no means uniform, and is based on many different factors.

In fact, Meer and Modood make the point that in Britain it can be considered that there has been a ‘re-balancing’ of the principles of multiculturalism that are in operation, rather than a ‘backlash’, because “accepting that there has been a movement does not require us to accept that this has been a retreat.”<sup>86</sup>

Kymlicka therefore argues that the master narrative on what is sometimes termed the ‘multiculturalism backlash’ is mistaken in that it ‘a) mischaracterises the nature of the experiments in multiculturalism that have been undertaken in the past 40 years, b)

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<sup>83</sup> Kymlicka, ‘The Rise and Fall of Multiculturalism?’, p104

<sup>84</sup> c Barry, *Culture and Equality*

<sup>85</sup> It might be considered, however, that the fact that certain texts fail to specify that they are largely concerned with immigrant populations, and not with indigenous or national minorities, does not devalue their contribution to the debate. To rely on this error to undermine or refute their arguments might even be considered an attempt to avoid interaction with their content.

<sup>86</sup> Meer and Modood, ‘The multicultural state we’re in’ (2009) *Political Studies* 57/3 473 p483

exaggerates the extent to which they have been abandoned and c) misidentifies the genuine difficulties and limitations they have encountered’.

The typical criticism that multicultural policies prevent the natural evolution of culture is inaccurate, he says, because an understanding of the necessity of cultural change has always been part of the multicultural project. Kymlicka also spends some time lamenting the existence of the so-called ‘3S’ approach to multiculturalism.<sup>87</sup> In this manifestation, multiculturalism refers to the symbolic celebration of perceived ‘cultural markers’ in a way that trivialises the deeper issue at stake. Kymlicka believes that this approach ignores issues of political and economic inequality and ‘even with respect to the (legitimate) goal of promoting greater understanding of cultural differences, the focus on celebrating ‘authentic’ cultural practices that are ‘unique’ to each group is potentially dangerous.’<sup>88</sup> Kymlicka suggests that the multicultural backlash has largely occurred in relation to this type of ‘Disneyfication’ multiculturalism, and therefore much of this criticism should not be taken as criticism of what he perceives as the more noble forms of multiculturalism.<sup>89</sup>

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<sup>87</sup> ‘Saris, samosas and steel drums’ as coined by Yasmin Alibhai-Brown in ‘After Multiculturalism’ (2000) *Foreign Policy Centre*

<sup>88</sup> Kymlicka, *Multiculturalism: success, failure and future*, p4

<sup>89</sup> It might be suggested however, that Kymlicka is too hasty to dismiss criticisms that relate to this ‘Disneyfication’ and that this is reminiscent of his reaction to criticisms that fail to specify that the decline has largely been in terms of immigrant multiculturalism. In his defence of multiculturalism, Kymlicka is overly selective in the criticism that he wishes to address; dismissing critiques that he feels are not aimed precisely enough, rather than considering their merits in spite of this perceived flaw. Further, in the context of ‘3S’ multiculturalism, it would seem reasonable to conclude that criticism of a caricature of multiculturalism is still legitimate criticism of multiculturalism, although it may need to be interpreted in a more nuanced manner. The suggestion that multiculturalism in its current incarnation can tend towards the concretisation of cultures is by no means a criticism that applies only to models of ‘3S’ multiculturalism. The granting of differentiated citizenship rights to minority groups relies on the received account of a culture as shaped by those who (generally speaking) have power within it, and whose interests therefore are best served by the maintenance of the status quo. Further, as suggested by Barry, concessions made to minority populations are often made on the basis that the minority group should not have to alter itself, necessarily these policies rely on the persistence of the initial equality, and therefore the preservation of the minority culture as is. Whilst these criticisms may be subtler than those directed at the ‘3S’ model of multiculturalism, they are still identifiable as the same ones. A sensationalist critique of a sensationalist version of multiculturalism is not necessarily

In general, in order for multiculturalism to work effectively, Kymlicka is of the opinion that two essential pre-conditions must be met. Firstly there must be a ‘de-securitisation’ of state-minority relations.<sup>90</sup> Securitisation of relations occurs when the state distrusts certain minority groups, or fears that they might collaborate with an enemy in co-ordinating an attack. Historically this would occur where a national minority was perceived as disloyal and likely to side with a neighbouring state in the event of an attack. Kymlicka acknowledges that this is largely a non-issue in modern Western democracies, due to the lack of neighbouring enemies and of hostility between states and national minorities or indigenous populations. Whilst he does point out that there are potential long-distance threats, such as Soviet communism in the past and Islamic jihadism today, he suggests that this in itself is not sufficient to suggest the securitisation of state - Islamic relations.

The second pre-condition for effective multiculturalism is the protection of human rights. Once again Kymlicka considers this to be a non-issue as regards national and indigenous minorities, and largely so in terms of immigrant groups.

Whilst attempting to offer a rational explanation as to the perceived ‘fall’ of multiculturalism, Kymlicka himself appears to become confused as, after so concluding that both pre-conditions are satisfied to the extent that multiculturalism may thrive, he makes the slightly incongruous statement that ‘these two factors... help explain the partial retreat from multiculturalism in some countries in relation to recent Muslim immigrants, who are often seen as both disloyal and illiberal’.<sup>91</sup> This sentiment is echoed by Meer and Modood:

‘... Muslims are currently perceived to be – often uniquely – in contravention of liberal discourses of individual rights and secularism... and is exemplified by the way in which visible Muslim practices such as veiling have in public discourses been reduced to and conflated with alleged Muslim practices such

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without use, indeed through the amplification of the issues it becomes in some ways easier to focus on the underlying problems.

<sup>90</sup> Kymlicka, *The Rise and Fall of Multiculturalism*, p106

<sup>91</sup> Kymlicka, *The Rise and Fall of Multiculturalism*, p108

as forced marriages, female genital mutilation, a rejection of positive law in favour of criminal sharia law and so on. This suggests a radical ‘otherness’ about Muslims and an illiberality about multiculturalism, and, since the latter is alleged to license these practices, opposition to the practice, it is argued, necessarily invalidates the policy.’<sup>92</sup>

The authors go on to speculate that the ‘backlash’ against immigrant multiculturalism is in fact due to a general feeling that British multiculturalism is in part responsible for contemporary national security issues.<sup>93</sup> Whilst consistent with Kymlicka’s conception of the securitisation of state - minority relations, it has been argued that the ‘failure’ of multiculturalism is much more fundamental than simple statements of suspicion being directed at Islamic populations might suggest.

In this respect Shachar offers a convincing critical analysis of the failure of multicultural theories, although she is not so careful to emphasise that the failure is largely only in respect of immigrant accommodation.<sup>94</sup> Shachar labels her critique of multiculturalism as a ‘methodological/ casuistic’ one, which offers four main claims. Firstly she points out that, due to many of the multicultural theories having been set out and studied by political and legal theorists, rather than sociologists, “major works in the field have relied on ad hoc examples and stylised hard cases to illustrate (their claims)” rather than any extensive statistical studies, therefore their ‘empirical rigor’ is called in to question.<sup>95</sup> Secondly Shachar observes that there is a similar lack of regard to specific regional and national contexts. The great diversity of conditions and situations even across Europe is often reduced to a ‘Western’ prototype, the analysis of which, according to Shachar, is of little help or meaning. Furthermore, she cites a ‘dearth of definitional clarity’<sup>96</sup> in the field, meaning that words such as ‘culture’ and ‘identity’ are deployed in confusing and often conflicting senses, significantly complicating an already confusing field.

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<sup>92</sup> Meer and Modood, ‘The Multicultural State We’re In’ p481

<sup>93</sup> Meer and Modood, ‘The Multicultural State We’re In’ p481

<sup>94</sup> Shachar, ‘Two Critiques of Multiculturalism’

<sup>95</sup> Shachar believes that Barry is particularly guilty of this.

<sup>96</sup> Shachar, ‘Two Critiques of Multiculturalism’, p290

The final claim cited by Shachar is constituted by the cumulative effect of the first three, and one that she believes to be most damning of all:

“... (Multicultural scholars) have gotten the order of things fundamentally wrong. Here, the main assertion is that most authors in the first and second wave of literature based their theoretical edifice on the assumption that culture is the *cause* of inter-communal tensions – rather than a political *resource* that can be effectively mobilized; or, in other cases, an *outcome* or *reflection* of on-going power struggles and identity reconfigurations.”<sup>97</sup>

In other words the way in which multiculturalism has been approached, lends itself to manipulation, and thus perpetuates that which it aims to remedy. The strategic adoption of ‘culture’ and ‘identity’ on the part of minority groups, allows these groups to ‘extract greater political concessions from the majority’.<sup>98</sup>

### **The key failings of liberal multicultural models**

From the above discussion of the narrative of the ‘fall’ of multiculturalism it is clear that there have been many different accusations levelled at the body of theory. In spite of the best efforts of Kymlicka to minimise their perceived impact, and of Shachar to shift the focus away from these critiques towards a new angle, the presence of such damning criticism cannot be ignored.

Although the categorisation of the critiques into ‘internal’ and ‘external’ is helpful in many ways, not least for organising this discussion, it serves to obscure some of the important arguments that recur on both sides of this divide.

Parekh is of the opinion that the difficulties that have faced liberal models of multiculturalism were inevitable. ‘Although (a liberal approach to multiculturalism) takes us in the right direction, it contains unresolved contradictions and is too committed to some form of liberal monism to provide a coherent response to cultural

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<sup>97</sup> Shachar, ‘Two Critiques of Multiculturalism’, p290 original emphasis

<sup>98</sup> Ibid. p291

diversity.’ Given that liberalism began ‘as a doctrine stressing the contingency of and abstracting away ethnic, religious, cultural and other differences’ Parekh suggests that it is hardly surprising that liberalism ‘faces acute structural difficulties getting these differences back into its views of man and politics.’<sup>99</sup>

It might be argued that, in practice, there are two key failings of the current liberal multicultural models: firstly there is a reluctance on the part of the state to be seen to make any statement or judgement about the ‘value’ of a minority culture. This has led to an almost ‘hands-off’ approach being adopted, which fails to adequately protect internal minorities, and facilitates the manipulation of multicultural policies. Secondly the preoccupation with respect for difference has led to minority cultures being essentialised and concretised in a way that perpetuates existing power hierarchies within these groups. These two key faults are entirely connected, the first leading to the second, and the second perpetuating the first. It is crucial to examine these two faults in more detail, before embarking on the project of reconstructing multiculturalism.

#### Evaluating cultures – the hands-off approach

There is a perception in liberal multiculturalism that it is impossible to completely understand a culture from an external perspective. Only those who belong to it appreciate the content and value of a culture, and those who belong to one culture are not in a position to judge the merits of the content of any other. Any attempt to assess the merits of a cultural claim is open to accusations of being supremacist or imperialist. Given the liberal multicultural focus on the individual’s ‘right’ to culture, it is understandable that these accusations are feared.

#### *Cultural Defences and the reluctance to interfere*

This reluctance to evaluate cultural practices opens the way for individuals and groups to manipulate the state by playing the ‘culture card’. Lack of knowledge about

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<sup>99</sup> Parekh, *Rethinking Multiculturalism*, p12

most minority cultures plays into the hands of those who wish to excuse or justify their behaviour. There are several ways in which this can be manipulated, however the most commonly discussed is the use of cultural defences, therefore they will be discussed here as an illustration of the need to allow and support scrutiny of cultural practices.<sup>100</sup>

As suggested above, cultural defences often do not represent the actual state of culture in a given country or society. Rather, the defence plays on the ignorance of the domestic court systems, and their desire to appear to be considerate and understanding of minority needs.<sup>101</sup>

In the context of the feminist critiques of multiculturalism, the objections to cultural defences are based (mainly although not exclusively) on the potentially damaging effects that they can have on vulnerable internal minorities. The external critiques object to their use on the grounds that they undermine the principal of legal universalism. Cultural defences are used below as an illustration of the difficulties that can arise when there is an over-emphasis on a 'right to culture'.<sup>102, 103</sup>

By presenting judges with defences based on an expressed statement of 'culture', individuals give judges a decision to make based on their understanding (or lack thereof) of that intimated culture. The idea of 'this is how things are done in my culture' is incredibly dangerous for a number of reasons. Firstly it exoticises minority culture in a way that is not conducive to social cohesion, suggesting that it operates on entirely different paradigms from that of the majority culture. This concern is

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<sup>100</sup> The use of cultural defences plays a part in both the internal and external critiques of multiculturalism, a further demonstration that the division serves to obscure the commonalities of the critiques.

<sup>101</sup> See Paul J. Magnarella 'Justice in a Culturally Pluralistic Society: the Culture Defense on Trial' (1991) *The Journal of Ethnic Studies* 19, 65-84

<sup>102</sup> It should be noted that there is also extensive argument surrounding the use of 'culture' as a mitigating factor in *sentencing*, rather than establishing guilt, however this will not be discussed in detail. See Phillips, 'When culture means gender', p516 and Doriane Lambelet Coleman 'Individualizing Justice Through Multiculturalism: the Liberal's Dilemma' (1996) *Columbia Law Review* 95, 1093-1166.

<sup>103</sup> The frequency with which cultural defences are used as an illustration in discussions about multiculturalism is perhaps interesting in itself. Cultural defences tend to be used infrequently and are usually dealt with appropriately – the focus on their potential to cause harm is perhaps a confirmation of Shachar's criticism that much of the literature on multiculturalism relies on ad hoc examples rather than statistical and empirical evidence.

considered by the internal critique discussed above. Secondly, given that judges will tend to come from the majority culture, they will not necessarily be (nor can they be expected to be) entirely familiar with all minority practices. Armed simply with the knowledge that ‘cultural sensitivity’ is important and desirable, and that cultures should not be judged externally, they are at the mercy of those who explain this ‘culture’ to them. If an individual and an ‘expert’ attest to the fact that culture played a mitigating role in the actions of the accused, a judge can find it difficult to dismiss this out of hand, regardless of the ‘actual’ situation in (for example) the accused’s country of origin.

The use of cultural defences creates an us/them dynamic, in which the judge is usually on the opposite side from the defendant. In this situation ‘judges seem unwilling to grasp the true complexity of cultural phenomena, whether in ‘other’ cultures or in their own. The result is that judges often construct for themselves an unhappy choice between accepting a culture while looking down on it for some problematic (and possibly criminal) practice, or requiring assimilation to some construction of (‘Canadian’) norms.’<sup>104</sup>

It is argued that this assessment is perhaps overly critical of judges, as it does not adequately consider the difficulty of the position that they are placed in when asked to assess the validity of a cultural defence. It is true however that in effect a choice has to be made between accepting that the conduct of the defendant was in compliance with his own culture, and as such can be seen to be mitigated, or deciding that, regardless of the minority culture perspective, the conduct is contrary to the majority cultural (and therefore legal) norms and should be judged as such. It has been widely pointed out that an essential difficulty in the consideration of other cultures within the legal system is the erroneous perception that the legal system is devoid of culture.

The difficulty in asking judges to make a decision about culture is that they are not qualified to do it. Having no knowledge of the minority culture they rely on the statements of ‘experts’ as to what a ‘normal’ reaction to a situation would be. It has been pointed out that ‘the cultural rights argument works best for those cultures that

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<sup>104</sup> Sonia Lawrence, ‘Cultural (In)Sensitivity: the dangers of a simplistic approach to culture in the courtroom’, (2001) *Canada J. Women & L* 13 107 p112



most (Americans) know comparatively little about’, and the same is true for cultural defences. Cultural defences are most successful in cases concerning cultures which ‘in our ignorance we can imagine as stable, timeless, ancient, lacking in internal conflict, pre-modern...’. This in turn makes it more difficult to justify ruling against cultural defences, because it seems to be an interference in an established practice.<sup>105</sup> Ultimately the danger is that such defences can lead to the accused being seen as a sympathetic figure, and the original victim becomes secondary to the ‘cultural misunderstanding’ that led to the court case.

Whether the defence is successful or not, the highlighted practices generally come to lead perceptions of that culture as a whole. Given that cultural defences are only argued when there is a supposedly mitigating factor to an otherwise illegal act, the perception of the minority is overwhelmingly damaged by the pleading of such a defence. As Lawrence asserts ‘there is something about looking at ‘difference’ that seems to make only difference visible.’<sup>106</sup>

There are several arguments for allowing individuals to plead cultural defences, and some of these have been mentioned above. The argument most relevant to the current discussion, however, is articulated by Leti Volpp. Volpp is of the opinion that cultural information may indeed be useful in providing a subjective assessment of the accused’s state of mind at the time of an offence, if there are circumstances in which the typical prejudices or beliefs of a community go some way to explaining (rather than justifying) that person’s actions. The difficulties in defining and articulating such information are addressed:

‘Even when we attempt to use cultural information to explain an individual’s oppressions or her state of mind, we are forced to label and define, in other words, to essentialise certain behaviour as ‘cultural’. This can be done in the

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<sup>105</sup> Katha Pollitt, ‘Whose Culture?’, in Okin, *Is Multiculturalism Bad for Women?*, p29

<sup>106</sup> This is possibly at odds with the post-colonial feminist conclusions on the use of cultural defences, which suggest that they in fact only work when they resonate with a hidden prejudice within the majority culture. However (regardless of the validity of these claims) it is argued that simply because a prejudice may be privately held by majority culture members, the public expression of that prejudice does not become any less shocking or negative.

spirit of what might be called ‘strategic essentialism’ – consciously choosing to essentialise a particular community for the purpose of a specific political goal. Strategic essentialism ideally should be undertaken by the affected community, which is best suited to undertake the process of selecting the appropriate circumstances in which to offer cultural information.’<sup>107</sup>

This view is problematic. Firstly, given that this ‘essentialism’ is ‘strategic’, it must be asked what this strategy aims to achieve. Volpp asserts that the aim is a specific political goal (which, she argues is the ‘essence of identity politics – naming and categorizing oneself as a means of identifying interests for purposes of empowerment’<sup>108</sup>) but in this case, whose goal is it? The goal of the state -presumably to promote social cohesion, cultural respect and uphold justice - or the goal of the minority community - to achieve greater recognition for and perhaps leniency towards their specific culture? If it is the goal of the state, then why would it be best achieved by allowing a minority community to decide on what (presumably selective) cultural information should be divulged or ‘officially’ recognised? And if it is the goal of the minority community, then how is such ‘strategic essentialism’ able to be viewed as a positive step in the wider interests of the population? The ‘essence’ of identity politics, as it is seen by Volpp, is in mobilising a group identity for the benefit of that group. The apparent ‘benefit of the group’ in this context however, seems to be to diminish their legal responsibility or culpability for otherwise (largely) unjustifiable acts. Further, it would seem that this group benefit is at best selective, given the impact that cultural defences have on vulnerable members of minority groups.

This has been argued at length in relation to the practice of ‘marriage by capture’ which has been recognised as a defence in various cases involving members of the Hmong culture in the United States. Although this practice is generally accepted in its original (geographical) context, it has been used to justify actions that would otherwise constitute kidnap and rape in other jurisdictions.<sup>109</sup> In an illustration of

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<sup>107</sup> Volpp, ‘(Mis)Identifying Culture : Asian women and the cultural defence’ (1994) *Harv. Women’s LJ* 57, p95

<sup>108</sup> Ibid. p95 fn163

<sup>109</sup> For a detailed discussion see Jennifer Yang, ‘Marriage by capture in the Hmong culture: the legal issue of cultural rights versus women’s rights’, (2003) *Law & Society Review UCSB* 3 39

Shachar's paradox of multicultural vulnerability, the acceptance of marriage by capture as a culturally defensible action places those Hmong women who might be subject to such 'capture' at a disadvantage. Although many Hmong women living in other jurisdictions (and perhaps even those who remain in their cultural 'homeland') wish to move on from the practice, which affords them little or no choice in whom they marry, or indeed when, once it is accepted as a cultural practice worthy of respect, they are given no protection against it, and as such are denied the freedom they would otherwise have, because of their membership of a culture, an aspect of which has been 'strategically essentialised'.

For individuals, the availability of 'cultural defences', or of the ability to plead that culture was justification for an otherwise illegal act, allows them to manipulate the courts' desire to be seen not to discriminate against or disregard minority cultures. In certain contexts, with strategic deployment of the cultural defence, individuals are able literally to get away with murder. Not only does a successful cultural defence help the accused in that particular case, it sets a precedent for the use of cultural defences by others in similar situations. Individuals are therefore able to 'deploy' culture as an excuse for their behaviour, and to know how likely it is to work. Phillips warns against this, and suggests that in this context there is a danger of individuals, who may have almost entirely assimilated to the majority culture in other ways, 'rediscovering' their cultural heritage in order to gain the most beneficial outcome from a court case.

Although this suggestion may seem cynical, there is evidence that it is correct. In New York, following the infamous case of *People v Chen*<sup>110</sup>, there have been fears that domestic violence has been legitimised within the Asian-American community:

'The impact of the trial and probationary sentencing resonated beyond the courtroom, sending a message to the wider community. Jian Wan Chen's life was not valued; her life was worth less than other lives; her murderer did not deserve punishment in jail. Other Chinese immigrant women living with abuse at the hand

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<sup>110</sup> A Chinese man, who had lived in the United States for several years, killed his 'adulterous' wife by bludgeoning her with a hammer - following the use of a cultural defence the charge was reduced from murder to manslaughter and Chen was sentenced to five years' probation.

of their partners and husbands identified with Jian Wan Chen and clearly understood that violence against them by their partners and husbands had the implicit approval of the state.

The *Chen* decision sent a message to battered Asian women that they had no recourse against domestic violence. One battered Chinese woman told a worker at the New York Asian Women's Centre, 'Even thinking about that case makes me afraid. My husband told me: "If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney."' In other words, her husband could afford to hire someone to testify as an expert to bolster a 'cultural defence' that legitimised his violence.'<sup>111</sup>

Regardless of the validity of the cultural claims behind each instance (because it is quite possible that given an individual's cultural background, they might lack the requisite mens rea to be considered guilty of a crime) the danger is that individuals are able to manipulate the well-meaning acceptance of cultural defences and use them as a way to secure a reduced sentence or even an acquittal, whether or not their cultural origin was actually a factor. If individuals know that the penalty for a certain crime could be or is likely to be reduced because of their background, then the incentive *not* to commit the crime is similarly reduced.

It is clear from the above that the liberal multicultural reluctance to be seen to evaluate cultural practices from an external standpoint can result in great difficulties. Vulnerable internal minorities are not protected and general perceptions of minority communities are altered by the 'accepted' cultural practices that become visible.

### Concretising cultural narratives

The concretisation of culture, sometimes tellingly referred to as fossilisation,<sup>112</sup> is widely seen as a negative phenomenon, and against the natural progression and evolution of people and ideas. Societies constantly change, develop and modernise,

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<sup>111</sup> Volpp, (Mis) Identifying Culture, pp76-77

<sup>112</sup> For example see Shachar, Two Critiques, p9

altering their priorities and standards, as well as the roles of individual members. It is argued that this development is crucial to the maintenance of a societal or cultural identity: 'If I am a Jew, I have to recognise that the tradition of Judaism is partly constituted by a continuous argument over what it means to be a Jew.'<sup>113</sup> Kymlicka warns against the concretisation of minority cultures, as a way of reducing and belittling their importance and relevance, as well as reinforcing perceptions of 'otherness' by 'rendering invisible emerging commonalities.'<sup>114</sup> In other words, the very act of attempting to define what constitutes a culture renders impossible the development that is in fact an essential part of any cultural narrative. The concretisation of culture stunts this development resulting in an 'official' form of culture increasingly far removed from reality, as well as permanently differentiated from surrounding cultures.

The above discussion demonstrates the accidental concretisation of cultural practices through a hands-off approach, however, it must be considered that there are those who are in favour of the status quo, and have an interest in preserving the 'culture' as it is now. These individuals are often able to influence the cultural narrative that becomes concretised, so as to preserve or increase their dominance within the minority:

'Scholars who investigate ethnic conflicts that have led to outbreaks of inter-communal violence have in recent years expanded the empirical and narrative body of knowledge we possess on the ways in which cultural identity may be (ab)used by 'elites seeking to gain, maintain or increase their hold on political power'.<sup>115</sup>

This phenomenon is most relevant to the consideration of immigrant cultures, because these minorities are most likely to have the opportunity to create a narrative, compared to national and indigenous minorities, which have not had a 'joining point' or time where an official version of their culture can be negotiated.

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<sup>113</sup> A McIntyre, 'Epistemological Crises, dramatic narrative and the philosophy of science', (1977) *The Monist* 60/4 453 p460

<sup>114</sup> Kymlicka, 'The Rise and Fall of Multiculturalism', p99

<sup>115</sup> Shachar, 'Two Critiques of Multiculturalism', p292

As with cultural defences, the less that is known about a minority culture, the more internal elites are able to manipulate the construction of the concretised version of culture. The shaping of the dialogue between the minority culture and the majority falls to those who divulge the cultural information. The more that is known about a minority culture, the less minority leaders can manipulate and shape the narrative to their own ends.

Post-colonial theories or criticisms of multiculturalism often ask the question ‘who shapes the received account of culture?’. The answer is largely the ‘elite’ of the minority, which results in the perpetuation of existing power hierarchies. Shachar notes that ‘when the state must choose a particular authority within the accommodated group to which it will delegate authority, pre-existing religious or traditional leaders find themselves suddenly transformed into political figures within a definite institutional hierarchy.’<sup>116</sup> These individuals are able to shape the narrative in such a way that ensures their position of dominance, often to the detriment of the more vulnerable members as discussed above.<sup>117</sup>

If the deemed authority figures within the minority have been the ones to convey the account of their culture to the majority, then there is little or no representation of the views of marginalised groups within that minority.<sup>118</sup> In general, this account is what was or has been conveyed to the majority by deemed authority figures within the minority cultures. This leaves the vulnerable members of the community with no influence, and a state that, by sanctioning the version of a culture that marginalises them, seems to support their marginalisation and subordination.

In this way, the desire of the state to accommodate minority cultures can give those who shape the account of their culture an amount of power over the other members. The culture which is related, and which becomes the cultural narrative, tends to represent the culture in its incarnation at the time of arrival to the state, and as related by the people who hold power within that arrival incarnation. The people who relate

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<sup>116</sup> Shachar, *Multicultural Jurisdictions*, p84

<sup>117</sup> This can also be seen from the discussion of Hmong culture above, and the women who wish it to be more progressive.

<sup>118</sup> As articulated by Okin in *Is Multiculturalism bad for women?*, p12

the culture therefore have little or no interest in the development of it because their interests are best served by the maintenance of the minority culture as is.

Whereas usually 'cultural survival depends, in part, on a community's ability to adapt to the needs and interests of all its members', this ceases to be the case.

Multiculturalism, with its tendency to perpetuate difference,<sup>119</sup> creates a situation in which the narrative of a culture becomes static, and the hierarchies and prejudices become frozen in time. The minority elite have no need to listen to the qualms of marginalised members to ensure cultural survival, because their 'version' of culture has become the 'official' version that is accommodated by the state. Further, 'If what justifies accommodation is the distinctiveness of the group, then the group has a strong interest in emphasising its social differences by holding back internal changes'.<sup>120</sup> It is due to this phenomenon that the 'exit rights' strategies fail to work. A vulnerable member of a minority group has very limited power in shaping the cultural community, and this is further limited by the concretisation of that minority culture. Their voice is often marginalised. The 'elite' within the group have such power over the cultural narrative that it is highly unlikely the threat to leave will have any effect. Further, given that the power of the 'elite' (exacerbating the vulnerable individual's lack of voice in their community) comes from the state's policies of accommodation, there is no reason for an individual to suppose that the state, which implicitly sanctions their oppression, would provide a better alternative.

From the distortion of the cultural narrative, created by those who hold power within the group, it is apparent that the problem is not just that multicultural policies currently seem to concretise versions of a culture. In addition to promoting the feelings of 'otherness' associated with minority cultures, multiculturalism allows the elite within the minority to seek to shape the narrative in this way.

It must be noted that this manipulation does not always stem from an inherently negative desire to deprive vulnerable culture members of the liberation that they might otherwise be afforded by the state - although it can indeed have this aim and certainly this effect. In some circumstances the distortion of the official account of a

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<sup>119</sup> c Barry, above

<sup>120</sup> Shachar, *Multicultural Jurisdictions*, p84

culture is designed to retain separateness for more innocent reasons. Consider the position of some initial waves of Islamic immigration to Europe.<sup>121</sup> Apart from Islamic residents of France and the UK, who largely arrived due to colonial ties, ‘most other Muslim workers on the continent for example, the Turks in Germany initially came not as migrants, but as a temporary labour force. They were looked at as staying in Europe only long enough to earn enough money to return to their countries of origin with the means to start a new existence there’.<sup>122</sup>

This meant that they were afforded protections, exemptions and extensions in a way that allowed them to separate themselves from the rest of the population in certain ways. Both the majority and minority cultures viewed the minority presence as transient, and therefore the minority felt it was important to preserve their way of life, to make it easier to return to their geographical homeland, and the majority did not feel that it was important to consider a long-term plan of assimilation or even integration.

Whilst this approach may have been appropriate initially in certain circumstances, it no longer serves the interests of minority populations or of the wider society. The reality of the situation has changed, yet the approach has not. Even where the motivation was not to preserve the culture so that immigrants could re-integrate to their home country or community more easily, there has been a tendency towards the concretisation of culture. It is often suggested that liberal multiculturalism has its roots in Herder’s conception of cultural difference.<sup>123</sup> This may help to explain why it lends itself to the creation of a static conception of minority cultures. Herder was concerned with the authenticity of culture, and viewed each ‘culture’ as a self-contained whole which would only be corrupted by the intrusion of ‘foreign’ influences:

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<sup>121</sup> When discussing Muslim immigration to Europe it is important to remember that there are some 8 million native European Muslims, largely in Turkey.

<sup>122</sup> Bassam Tibi, Muslim migrants in Europe: between Euro-Islam and Ghettoisation, in AlSayyad and Castells (eds) *Muslim Europe of Euro-Islam: politics, culture, and citizenship in the age of globalization* (Lexington Books, 2002) p36

<sup>123</sup> For an in-depth analysis of this conception, see Sonia Sikka, *Herder on Humanity and Cultural Difference*, (Cambridge University Press, 2011)



‘In (Herder’s) view each culture is valuable and worth cherishing because it contributes a distinct tune to the universal symphony. This implies that if a cultural community wishes to enjoy others’ respect, it should fiercely strive to remain unique and guard against all external influences.’<sup>124</sup>

Whilst Herder recognised the influence of history in shaping the cultural narrative or ‘volk’, there was no perceived future trajectory for cultural development, as the contemporary manifestation of the culture was regarded as its purest form. In practice the conception of the minority culture has changed very little since the inception of normative multiculturalism, however the minority cultures themselves have changed considerably, and in some cases even created entirely new cultural identities.<sup>125</sup>

Whilst the development of new cultural narratives can and should be seen as a positive consequence of multicultural societies, Herder would view such development as a corruption of the authenticity of culture. Once a culture has been corrupted in this way, it ceases to be worthy of respect. Therefore, in order to remain worthy of respect cultures must be preserved in their ‘authenticity’, essentially requiring their concretisation.

This impasse is reminiscent of Barry’s argument<sup>126</sup> that liberal multiculturalism necessitates a choice between the perpetuation of difference and its erosion – with no possible middle ground. It could be suggested however, that a middle ground does in fact exist, but that its roots lie in an altogether different conception of multiculturalism. It is on this possibility that the next section will focus.

It has been surmised that there are two particular challenges or pitfalls facing the current body of ‘liberal’ multicultural thought. In the first instance, the preoccupation with being seen to value diverse cultures has led to a fear of being seen to interfere in the affairs of a minority community. It is this fear that has opened the way for

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<sup>124</sup> Parekh, *Rethinking Multiculturalism*, p74

<sup>125</sup> See the consideration of new identities (particularly Euro-Islam) in AlSayyad and Castells (eds) *Muslim Europe or Euro Islam*.

<sup>126</sup> Discussed at fn49 above

manipulation. The reluctance on the part of the state to enter into a discussion of the validity of a cultural claim means that there exists a ‘hands off’ approach, which fails to provide adequate protection for vulnerable members of cultural groups.

Secondly and leading on from the first issue, there has been a move towards ‘respect’ for culture in a way which concretises and essentialises a specific version of a minority culture, emphasising and solidifying underlying differences and inequalities within and between minority and majority groups. By seeking to define the minority cultures that might need protection, the state stunts the natural development of these cultures, and thereby perpetuates the initial inequalities that multiculturalism purports to address.

## **B: CONSTRUCTING A NEW MULTICULTURALISM**

### **Jacob Levy's 'Multiculturalism of Fear'**

#### Origins and Aims

In an attempt to provide a solution to these problems, Jacob Levy developed 'the multiculturalism of fear', which he contrasts with the generally popular forms of liberal multiculturalism. Taking its name from Judith Shklar's 1989 essay 'The liberalism of fear', Levy's work aims to change the priorities which govern the accommodation of cultural minorities within a liberal state, with the prevention of cruelty and fear taking precedence over the promotion of 'human rights'. Shklar argued that liberalism had 'only one overriding aim: to secure the political conditions that are necessary for the exercise of personal freedom'.<sup>127</sup> In order to achieve this, Shklar believes that there must be a clear distinction between the personal and the public – this distinction need not be in any particular place, but it must be present. Although liberalism may be linked more closely to certain other beliefs, it must be viewed as a standard in its own right. 'Every adult should be able to make as many effective decisions without fear or favour about as many aspects of her or his life as is compatible with the like freedom of every other adult'. Shklar identifies the state as the entity, which, through use of its unique resources of 'physical might and persuasion', has the most crucial role to play, as it can be the greatest source of social oppression. In the context of the 'liberalism of fear' therefore it is the state's responsibility to guard against the inappropriate exercise of persuasion and to ensure the conditions in which each adult can have an equal choice set.

Viewing 'acute fear' as the biggest threat to liberalism and therefore to personal freedom, Shklar argues for a political theory that addresses this threat without necessitating an absolute moral basis:

'The liberalism of fear in fact does not rest on a theory of moral pluralism. It does not, to be sure, offer a *summum bonum* toward which all political agents

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<sup>127</sup> Judith Shklar, 'The Liberalism of Fear' in Rosenblum (ed), *Liberalism and the Moral Life*, (Harvard University Press, 1989) p21

should strive, but it certainly does begin with a *summum malum*, which all of us know and would avoid if only we could. That evil is cruelty and the fear it inspires, and the very fear of fear itself.<sup>128</sup>

Drawing from this exposition, Levy develops a ‘multiculturalism of fear’ as one that justifies legal concessions or proscriptions that aim to reduce and ultimately eliminate fear. Whilst Shklar’s ‘liberalism of fear’ placed emphasis on the power of the *state* or *government* to inspire fear, or to abuse their ‘physical might and persuasion’, the multiculturalism of fear rests also on the fear that might be inspired within minority groups themselves.

In doing so, Levy aims to avoid the difficulties of defining or essentialising a specific culture as ‘the multiculturalism of fear counsels against spending our time trying to define what it is in cultures that we respect or recognise. The political actors being asked to judge, respect and recognize belong to cultures of their own, and may be all too ready to take advantage of the paradox of standards in order to reject the cultures of others’.<sup>129</sup> The structural problems which liberal multiculturalism faces due to the difficulty of reconciling the primacy of individual liberal rights with a focus on a wider group or cultural community are largely avoided by placing the elimination of fear at the fore. Rather than focusing on the primacy of a ‘right to culture’ Levy concentrates on the eradication of fear, followed by the elimination of cruelty and humiliation, and only then by liberal rights. This allows the focus to be on the consequences of a practice, rather than its intrinsic ‘cultural value’.

Levy argues for respect of both the fluidity and durability of cultural membership and ethnic identities. ‘Levy’s model of multiculturalism seeks to steer a course between those theories that condemn cultural identification and long for all minorities to become good Millian liberals and those that condemn liberalism for failing to be sufficiently hospitable to diversity.’<sup>130</sup> The importance of culture to the individual should not be underestimated – it is instrumental in the construction of the self, and

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<sup>128</sup> Shklar, ‘The Liberalism of Fear’, p29

<sup>129</sup> Jacob Levy, *The Multiculturalism of Fear*, (Oxford University Press, 2000) p32

<sup>130</sup> Kukathas, ‘The Multiculturalism of Fear (review)’, (2003) *Ethics* Vol.113 4 891

shapes the way that the individual interacts with the rest of society. At the same time, there should be recognition of the fact that cultural identities are fluid: both in terms of an individual's personal relationship with that identity, and in terms of the evolution of the culture itself. Cultures are in a constant state of development. In spite of this fluidity, the *durability* of culture is just as important. Through all processes of cultural change and development, the culture remains 'intact' as a whole construct. The essential elements may evolve and be adapted over time, but the culture itself endures. Because of this durability, it is, Levy argues, a mistake to attempt to drastically change or disregard a cultural practice all at once. To do so only creates tension between the state and that community, and is likely to lead to 'proscribed' cultural practices being continued in secret.<sup>131</sup> The suggestion that culture can be defined or changed at will is, according to Levy, the worst kind of supremacy that a state can practice.

Rather than attempting to concretise and preserve identities, or to eradicate them and assimilate minority populations, Levy suggests that these communities should be left to develop naturally, with intervention only where practices fail to meet the minimum standard of prevention of fear and humiliation.

The aim of this version of multiculturalism, in contrast to liberal multiculturalism, is not necessarily to preserve cultural difference. Nor is the goal to remove or disregard that difference. Rather, Levy's multiculturalism aims to ensure that diverse cultures are able to coexist with minimal prejudice and for their members to have equal footing within society - whether culture is preserved or not is entirely dependent on its compatibility with the standard of the prevention of fear, rather than any inherent value derived from simply being 'cultural'. Once 'fear' has been eliminated, there is a genuine possibility for universal mutual tolerance,<sup>132</sup> effectively creating a level playing field for members of all cultural communities:<sup>133</sup>

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<sup>131</sup> This will be discussed in more detail below.

<sup>132</sup> The difficulty of universal mutual respect will be discussed below.

<sup>133</sup> Difficulty naturally arises in the definition of the applicable standard of fear – this will be addressed below.

‘Whether or not minority cultures ought to be helped in sustaining themselves, whether assimilation or diversity is desirable, whether and how to forge common identities – the multiculturalism of fear insists that these are secondary questions. Neither identities nor groups are the centres of attention... The treatment that persons are given because of their group membership, or that they are accorded when they try to belong to their groups, takes priority.’<sup>134</sup>

### The creation of cruelty in multi-ethnic societies

Levy identifies four ‘dangers’, points vulnerable to the creation of cruelty and conflict, which commonly arise within multi-ethnic societies: forced incorporation and secession; forced exclusion; internal cruelty; and the lack of adequate frameworks for intercultural interaction.<sup>135</sup> These dangers are neither exhaustive nor mutually exclusive, and the relationship between any minority and the state ‘may include elements of each’.<sup>136</sup>

Forced incorporation and secession, from Levy’s point of view, is generally related to processes of what he terms ‘nationalising states’.<sup>137</sup> In this way it is concerned particularly with the treatment and definition of national minorities within a state. He considers the debate between John Stuart Mill and Lord Acton, over whether nationalism can support liberty: Mill argued that ‘a pluralistic state would lack fellow-feeling and political sympathy among its people’ whereas Acton supported the idea of

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<sup>134</sup> Levy, *The Multiculturalism of Fear*, p39

<sup>135</sup> The danger of internal cruelty is perhaps the most relevant to the current project and will be considered separately.

<sup>136</sup> Articulating a complete theory of multiculturalism, Levy begins by examining large-scale conflicts.

<sup>137</sup> The concept of a nationalising state, as coined by Rogers Brubaker in ‘*Nationalism Reframed*’ (Cambridge University Press, 1996) is one which is closely related to the idea of a ‘nation-building state’, that seeks to create a homogenous national identity, often at the expense of minority communities or nations. The use of the term ‘nationalising’ as opposed to ‘nation-building’ is in part intended to acknowledge that such states often damage or destroy other ‘nations’ in their bid for homogeneity. Examples of nationalising states would include Spain during the Franco regime which prohibited the use of minority languages such as Catalan, as well as suppressing regional practices in order to foster a unitary national identity.

plural loyalties as a way of ensuring scepticism of the state. Whilst Levy is sympathetic to both opinions, and concedes that they each seem to be right sometimes, he suggests that the evaluation of a particular manifestation of nationalism should begin with a presumption against its desirability, but that this presumption must be refutable:

‘Liberalism is properly sceptical of any demand to put loyalty to a group ahead of particular persons or universal moral duties. But when faced with a choice between loyalty to a state and loyalty to a nation, it is a mistake for liberalism to mechanically prefer ostensibly patriotic loyalty to the state. Both can be dangerous, and which poses the greater danger is an empirical question.’<sup>138</sup>

Levy therefore (in the context of nationalising states and the incorporation of national minorities) favours a negative presumption against the desirability of the absorption of a minority, but is adamant that this presumption should be refutable. In this way there is greater protection of the minority, as the presumption is in favour of the vulnerable group. The refutability of this presumption ensures that there is not undue prejudice against the nationalising group.<sup>139</sup>

The danger posed by forced exclusion of a disfavoured minority is considered to be slightly different. Levy considers a wide range of policies and behaviours to constitute forced exclusion, from on-going stigmatisation to ethnic cleansing and even genocide. ‘If we fear violence and cruelty then we must greatly fear expulsions and the creation of refugees. The stateless are outside anyone’s official protection and are almost necessarily subject to rule by simple force.’<sup>140</sup>

Where the excluded minority remains within the boundaries of a state, there is a risk of both state and private violence against them, and the line between the two can be blurred – with inaction by the state being seen as tacit approval for private actions.

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<sup>138</sup> Levy, *The Multiculturalism of Fear*, p44

<sup>139</sup> This discussion is perhaps not immediately relevant to the present argument; however it provides a useful starting point for the possible application of a negative presumption on a smaller scale.

<sup>140</sup> Levy, *The Multiculturalism of Fear*, p45

Forced inclusion (incorporation) and exclusion can overlap, Levy suggests, in cases such as that of the Roma. Where Roma populations have been ‘resettled’ and therefore *included* by a state they have often been treated as outcasts and second-class citizens (*excluded*) by their new neighbours and local authorities.

The two final ‘dangers’ arising in a multi-ethnic society are more nuanced and relevant to the present discussion. The lack of adequate frameworks for intercultural interaction refers to the difficulties of creating and promoting understanding and cross-cultural dialogue between groups (minority or majority). ‘If forced incorporation is the failure to adequately recognise the degree of separateness of two communities, the lack of a framework is insufficient recognition of the fact of togetherness.’<sup>141</sup> There needs to be a wider, overarching framework within which cultural loyalties and narratives are played out, one which takes into account that there can be no inherently superior group:

‘Because our claims and our demands and our beliefs about what is right collide with one another, no one group’s demands or identity or beliefs about justice can, by themselves, provide sufficient reasons for decisions of law and public policy in favour of the group.’<sup>142</sup>

There need to be impersonal institutions and a framework that transcends cultural membership. This belief echoes the liberal preoccupation with the importance of not making value judgements about other cultures; however its focus is on the impersonality of standards rather than valuing and maintaining cultural difference:

‘...conventions regarding intercultural exchanges and transactions cannot simply codify the traditional internal morality of one group or the other; and they cannot simply pretend that such exchanges will not exist. Interactions will take place, as will *changes in cultural identity and migrations across communal lines*.’<sup>143</sup>

Levy argues that intercultural mixing and development is inevitable within a multi-ethnic society. The existence of an intercultural framework is designed to mitigate any

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<sup>141</sup> Ibid p48

<sup>142</sup> Ibid, p49

<sup>143</sup> Levy, *The Multiculturalism of Fear*, p50 (emphasis added)



danger or tension between communities that might arise as the result of such mixing. Whereas a direct negotiation between cultural communities might result in a formal agreement of separateness - stemming from the desire (often predominantly of group leaders) to retain the perceived purity of their culture – given the inevitability of mixing between cultures, whether benign or aggressive, an impersonal framework is necessary to protect those who cross the divide.<sup>144</sup> There is a risk that the ‘impersonal’ framework imagined by Levy is not a realistic prospect, however this will be discussed below.

### Internal cruelty and the Multiculturalism of Fear

The final danger, and the one to which Levy devotes most thought, is that of internal cruelty: of the treatment of vulnerable individuals and groups within minority communities. Cultural communities have the potential to promote, endorse or practise coercive or cruel behaviours, and this should be protected against. This is one way in which Levy believes his multiculturalism, based on the avoidance of fear and cruelty, is superior to traditional liberal multiculturalism:

‘Traditional cultural norms are coercively enforced, or the norms themselves sanction coercion or violence. If multiculturalism is properly grounded in the avoidance of these evils rather than in any distinctive moral status of cultural groups, then there isn’t any particular moral difficulty (whatever practical difficulties there may be) in restraining such practices.’<sup>145</sup>

There is a fine line to be drawn between cultural practices that are cruel, and ones that are simply alien to another culture, in other words ‘it’s worth pausing to discuss the difference between preventing internal cruelty and simply remaking internal cultural practices that we don’t like.’<sup>146</sup> Where liberal multiculturalism might simply avoid this distinction by taking the hands-off approach discussed above, Levy proffers a solution (albeit an incomplete one) in the form of a doctrine of consent.

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<sup>144</sup> Levy combines this point with a discussion of the danger of statelessness – see *The Multiculturalism of Fear*, p51

<sup>145</sup> Levy, *The Multiculturalism of Fear*, p51

<sup>146</sup> Ibid p52

### *Marriage and the doctrine of consent*

The difference between a forced marriage and an arranged marriage provides an illustration of the importance of the standard of consent. The practice of parents or other individuals arranging a marriage for their child (assuming for the moment minimum age requirements are met) is common in some cultures. It is not a familiar practice in many Western cultures, and it may be one which some find hard to understand, but that in itself does not make arranged marriage inherently 'bad'. When the parties *consent* to the arrangement and to the marriage, there can be no objection, however when the parties do not consent, the marriage becomes a forced marriage; a practice that cannot be justified under the multiculturalism of fear.

A more delicate argument is presented relation to polygyny. Whereas there is some discussion over whether polygyny is *necessarily* oppressive towards women, it certainly commonly has been. The question then arises of how to deal with polygyny, legally speaking. Levy suggests that the natural response would often be to criminalise polygyny, or to refuse to recognise subsequent plural marriages. 'But the appropriateness of that kind of response depends on the relationship between law and social practice. If polygyny is a continuing realist, if it continues to exist on the ground, then non-recognition or criminalisation may harm the women they are designed to protect.'<sup>147</sup> Levy further argues that the law has more leverage to promote reform if the state recognises polygamous marriages. This recognition can be conditional, and therefore allows the state a measure of control over the practice. If the state imposes (as in South Africa) a requirement that all existing spouses consent before an additional wife can be taken, then polygyny cannot be used as a threat within a marriage, and wives will still gain legal rights that they would not have had were the practice not recognised.

Although the standard of consent does have potential to be a useful tool in the avoidance of internal cruelty, it has not perhaps been completely thought through. Levy suggests that a requirement of consent protects those who might otherwise be vulnerable; however this assumes that the vulnerable individuals are in a position to

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<sup>147</sup> Ibid, p57

give this consent freely. Much as with the exit rights thesis, care should be taken to ensure that withholding consent is a practicable option, otherwise there is no protection gained from requiring it. It might be argued however, that this difficulty could be overcome with a proper framework for consent, and whilst Levy does not develop the practicality of his suggestion, it should not be disregarded for this lack of development.<sup>148</sup>

Setting aside the concerns relating to the authenticity of a declaration of consent, Levy points out that the real power of a criteria of consent is that it allows the state to unambiguously take the side of the vulnerable party. This gives (particularly) women in conservative cultural communities more rights and greater power than they would otherwise have had, were (for example) their marriage not recognised. In so far as a practice is not inherently cruel, Levy believes that recognition is a far better option than proscription, and that through recognition gradual change might be achieved. In the context of practices that are clearly contrary to standards of prevention of fear and humiliation (as opposed to those which might be justified or consented to) Levy finds himself mainly in agreement with the feminist critiques of multiculturalism, as far as the existence of danger is concerned. He does, however, offer a slightly different solution to those suggested by Okin and others above:

‘A multiculturalism justified in terms of preventing violence and cruelty offers no cultural shield to protect violent and cruel internal practices.

Accommodating the law to multicultural social realities in some way, however, is often in the interests of women in the minority culture. This means that a legal system which refuses to acknowledge cultural difference will not effectively protect the interests of women in minority cultures. Sometimes this accommodation of law to multicultural realities will be directed at change of minority cultural practices, but when it is, proscription of those practices should be used only in fairly extreme cases – cases of real cruelty – and often partial or constrained recognition of cultural practices will be more conducive

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<sup>148</sup> It might also be suggested that the obvious practical difficulties in recognising polygyny would outstrip the benefits.

to cultural reform and the protection of women's rights than will proscription or non-recognition.'<sup>149</sup>

Whereas several have argued that the best way to help vulnerable individuals within minority groups is to refuse to recognise the authority of the group, to legislate against discriminatory practices, or even to attempt to eradicate the culture all together, Levy offers a more tempered approach. Levy attributes this methodology to Montesquieu's view that 'laws are a bad method of changing manners and customs; it is by rewards and example that we ought to endeavour to bring that about. It is however true at the same time, that the laws of a people when they do not grossly and directly affect to shock its manners must insensibly have an influence upon them, either to confirm or change them.'<sup>150</sup>

Whilst culture cannot be used as a shield against interference or a justification for treatment against the accepted standards of fear, violence or humiliation, it is recognised that proscription is rarely the answer. It might be suggested that the current approaches seem to leave two options - either to wholly accept a minority culture and its practices in some official, concretised form, or to explicitly refuse to recognise that minority culture or practice, thereby removing all possibility of control or reform. Levy's approach provides a far more realistic method of dealing with minority practices which are detrimental to vulnerable individuals or which fall foul of the standard of prevention of fear.

Where laws are unrealistic, idealistic or aggressive in their treatment of a minority issue or practice, individuals will be less likely to abide by them, continuing the practice behind closed doors. Ultimately an approach to difference that is based on proscription of illiberal actions will lead to higher levels of self-segregation and cultural differentiation, as well as the perpetuation of inequality. On the other hand, if those who make the laws acknowledge both the durability and fluidity of culture, it becomes easier to guide change in a more organic way. Whilst this may not have the immediate consequences desired, it does allow for progressive change, of a kind that

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<sup>149</sup> Levy, *The Multiculturalism of Fear*, p52

<sup>150</sup> Ibid.

is more likely to 'stick' and to be accepted by all members of the wider state community.

### **Evaluating the 'Multiculturalism of Fear'**

#### Levy and the 'key flaws' of liberal multiculturalism

Levy's multiculturalism of fear is framed as an alternative to the contemporary popular forms of liberal multiculturalism. Levy claims to recognise the difficulties facing liberal multiculturalism, and offers a theory in which the priority is on the elimination of fear, rather than the primacy of individual rights.

His exposition is, however, not immune to criticism, and there are several ways in which it can be and has been attacked. By examining these shortcomings, it is possible to arrive at an idea of how one might move beyond such limitations and establish a complete idea for a multicultural future. Given the extensive discussion above of the flaws of liberal multiculturalism, and the identification of two key failings, (of the hands-off approach failing to protect internal minorities, and of the concretisation of culture) it is necessary to consider how Levy's theory might provide an answer to these particular problems.

With regards to the first flaw - that of the hands-off approach - Levy's work certainly fares better than that of other liberal multiculturalists. The extensive discussion of the risk of internal cruelty in a multi-ethnic society suggests that Levy is keenly aware of the importance of ensuring that cultural practices do not have a negative impact on members of that group.

By re-prioritising, and ensuring that the emphasis is on the elimination of fear, rather than on the individual's right, there is less of an emphasis on allowing cultures to remain independent. Whereas liberal multicultural models may have difficulty in dealing with cultural practices, due to the belief that cultures cannot be fully understood by those external to them, Levy relies on the existence of a 'summum malum' to legitimise interference.

Placing the prevention of fear and humiliation *above* the preservation of the ‘right to culture’ means that Levy is able to circumvent the preoccupation with being seen to interfere with cultural practices. Further, this approach largely eliminates the tension between the rights of the group and the rights of the individual, allowing the state to avoid accusations of supremacy. Where the liberal multicultural models have followed a hands-off approach which in certain (albeit extreme) circumstances has allowed individuals to literally get away with murder; the definition of a *summum malum*, the avoidance of which takes priority, allows the state to define boundaries more clearly, and directly oppose cultural practices which fall foul of this standard. Levy believes that ‘there’s certainly no legitimate cultural defence for murder’. The suggested doctrine of consent is a means of placing cultural discussions in the public domain. As discussed above, the requirement of consent would allow the state to unequivocally take the side of the vulnerable party, without opening itself to accusations of imperialism where the cultural practice is one alien to the majority culture.

Whilst there are several positive differences between Levy’s work and that of many liberal multiculturalists, ‘The Multiculturalism of Fear’ sometimes fails to follow through on its own ideas. Levy’s vision of setting aside the primacy of a ‘right to culture’ is tempered slightly by his warning against hypocrisy and judging the culture of others:

‘Cultural difference should not prevent a state from both criticizing and taking action against violence and cruelty against women. It should, however, remind members of a majority culture to look inward as well as outward for abuses. It’s easier to notice someone else’s patriarchal or illiberal actions than it is to notice our own; and that ease makes hypocrisy too tempting. Moreover, we should be wary of criticizing cultural norms, values, and traditions as quickly as we do acts of violence and abuse. We are, all of us, born into cultures and socialized into norms. Living in a cultural community – as with belonging to a family, holding a job, joining a voluntary association, or participating (in) any of the other intermediate groupings in which we lead our lives – means, in part, living under rules which would be violations of liberty if imposed as laws by the state. That fact in itself is not a restriction of our freedom or rights; but

it is easy and tempting to see the norms and socializations of other cultures as such restrictions. Again, that tempting hypocrisy should be resisted. <sup>151</sup>

Whereas the primacy of the prevention of fear should allow the state to interfere where there is legitimate suspicion that a cultural practice has a negative effect, Levy appears to back track and echo some of the reluctance of liberal multiculturalism. The above quote demonstrates three important truths: firstly that the state and legal system are not free from culture, secondly that all cultural practices should be questioned, minority or majority, and thirdly that the existence of a 'right' does not require an individual to activate it. These observations however, appear to lead Levy towards a more tempered approach than might initially have been the case, and the result is reminiscent of the liberal multicultural models: reluctance to interfere. Levy (rightly) cautions against interfering in cultural practices simply because they differ from our own, but his caution must be interpreted carefully so as to avoid the risk of legitimising and providing an excuse for behaviour which might cause fear. In a system where the primary standard is the prevention of fear, there should be no sensitivity towards 'interfering' with a practice – there can be no intrinsic merit derived from the fact that a practice is 'cultural'. Where there is hesitation to enquire into a practice, there is a risk of legitimising a practice that may induce fear. Non-interference can suggest tacit approval. <sup>152</sup>

No state or legal system can be free from culture, however it does not follow that the state/law is unfit to have anything to do with culture:

'The neutrality of the law with regard to ethical differentiations within a given society is necessary if only for the following reasons: in complex societies the totality of the citizens can no longer be bound together by a substantive value consensus, but only by a consensus on what the procedure for the legitimate legislation and execution of power is.' <sup>153</sup>

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<sup>151</sup> Levy, *The Multiculturalism of Fear*, p62

<sup>152</sup> It is of course important that a cultural practice be considered objectively, but over-emphasis of cultural merit can obscure the consequences of the practice that is in question. A potential method for dealing with this difficulty will be discussed below.

<sup>153</sup> J Habermas, 'Struggles for recognition in the democratic constitutional state' (1993) *European Journal of Philosophy* 1.2 128, p144. This call for procedural integrity will be discussed further below.

Levy's proposal has the potential to build towards an impartial framework that could safeguard vulnerable members of cultural groups. Given that he recognises the importance of creating frameworks for intercultural interactions, and that he acknowledges the dangers that vulnerable members of cultural communities can face, his reluctance to develop his proposal is frustrating.

Whilst it is wrong to require all individuals to choose to activate every right that they have – being free to bind themselves to the social and cultural norms of their choosing – it would be equally wrong to assume that all individuals who do not 'activate' their freedoms, or who submit to behaviour which might be thought to inspire fear or humiliation, do so willingly. Such an assumption creates exactly the same difficulties as those found in liberal multicultural models, as it removes any legitimate basis that the state might have to interfere in cultural practices.

With regards to the second 'key fault' of liberal multiculturalism, Levy's Multiculturalism of Fear is largely successful in avoiding the concretisation of cultures. As discussed above, the multiculturalism of fear rests on the recognition of both the fluidity and durability of culture. Following Montesquieu's ideas on the limited ability of law to change behaviour, Levy makes the case for gradual, progressive change where there are cultural sensitivities in place. Whereas the danger with liberal multicultural models is that they rely too much on the preservation of a 'genuine' culture, Levy recognises that cultures are in a constant state of development, and that they should not be seen as concrete and unchanging.

The Multiculturalism of Fear seeks to take a 'long line' view of cultural development and social cohesion. Immediate benefit may not be as apparent, however change must be in a positive direction, in a manner which is realistic, and which does not offend the durability of culture.

An example of this is found in Levy's discussion of female circumcision in the United States. The analysis offered centres around the proposals made by the Harborview Medical Centre in Seattle<sup>154</sup>, which suggested, in light of the high

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<sup>154</sup> For the full discussion see Levy, *The Multiculturalism of Fear*, pp53-57



numbers of requests from Somali and other African immigrants from countries where female genital cutting is common, that they provide an operation termed ‘sunna circumcision’, which might fulfil the symbolic function of female genital cutting, without risking complications during childbirth or sexual intercourse, or impairing sexual pleasure. The hospital and many members of the community viewed this as a positive suggestion, given that it would most likely lead to a reduction of the number of illegal operations, and in the number of young girls who were sent to their parents’ country of origin to have the more drastic versions of the operation performed there. On the other hand there was an outcry from other members of the community, who viewed this as legitimising a practice that represented a ‘particularly brutal kind of repression’. In the event the proposals were abandoned following the passage of a federal statute criminalising female genital mutilation.<sup>155</sup>

Levy argues that the proposal would in fact have been an appropriate step, and that the federal ban may in fact have been counter-productive:

‘...we do not make the world *de novo*, and passing a law does not simply remake the world according to the law’s intent. If their families carried out their original intentions, if they brought their daughters back to east Africa and had them mutilated, then the girls clearly were not made better off by the ban. This is true even if we suppose that a federal ban means that the practices of female genital mutilation will die out in America in another generation or two; we are still sacrificing the well-being of some real, living girls.’<sup>156</sup>

This example provides an interesting insight into Levy’s convictions. Under the Multiculturalism of Fear, there is not the same ‘choice’ created between perpetuating and eradicating difference. There is simply an encouragement of gradual progression away from the *summum malum*.

In the context of liberal multiculturalism there is a danger of concretisation arising from the fact that the received account of a culture is often delivered by those who have an interest in preserving the status quo. The primacy of the ‘right to culture’

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<sup>155</sup> Levy himself is skeptical as to whether this law would have applied to the proposed operation; however the hospital did not pursue the matter.

<sup>156</sup> Levy, *The Multiculturalism of Fear*, p56

creates a special status for the received account of culture, and that account becomes the official version, which is then protected and preserved by the state and legal system. Due to the perceived importance of cultural sensitivity, as well as the tendency towards a ‘hands-off’ as discussed above, there is no room left for the development of or progression of the culture. In contrast, the primacy of the elimination of fear and humiliation opens the way for multiple dialogues, and an organic process of development. This process itself, however, is not above the risk of manipulation.

### The dangers of negative consequentialism and moral blackmail

The multiculturalism of fear is not free from dangers itself, and Levy identifies one in particular which arises due to the use of negative morality. Whilst in theory a focus on the avoidance of fear is an appropriate way to deal with cultural difference, he suggests that there is a danger that, in the application, the use of a negative standard will create a ‘perverse incentive’ for individuals or groups to manipulate this to their own ends. Where the Multiculturalism of Fear dictates that the best course of action is that which creates least ‘fear’, there is the potential for moral blackmail - a threat to *create* fear if demands are not met:

‘The rule of preventing an evil creates an incentive to threaten or create that evil to gain an advantage. The best-known example of this kind of problem is hostage taking and terrorism. If a government puts saving the lives of its citizens first, then those who are willing to take hostages or threaten acts of terrorism can extort any concessions they want from that government.’<sup>157</sup>

Levy identifies two types of incentive – one to threaten violence or injustice now or in the future (moral blackmail) and the other to overstate wrongs from the past (exaggerated victimhood). Neither of these threats can be allowed to have power within the Multiculturalism of Fear, and it is in this context that the ‘long-line’ view of culture becomes important. Following a principle of non-negotiation, Levy argues that the long-term consequences must take priority over the accommodation of demands for temporary relief or benefit. As with policies of not negotiating with

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<sup>157</sup> Levy, *The Multiculturalism of Fear*, p63

hostage-takers/ kidnappers/ terrorists, there is a long-term benefit to resisting moral blackmail, whatever the short-term consequences. Further, Levy argues that claims of injustice should be evaluated to determine where the fault lies, and that there should be no reluctance to do this. Whilst liberal multicultural models tend to avoid the evaluation of cultural practices and of claims of injustice, preferring to take them at face value, the Multiculturalism of Fear would aim to engage with these claims. Levy acknowledges that this engagement would be difficult, and require particular effort, but that critically evaluating claims rather than simply caving in to threats would be beneficial in the long term.

### The applicable definition of fear

Levy's work has been criticised for seeming to rely on and apply only to extreme examples of cultural conflict. The lack of examination of more nuanced examples could be attributed to Levy's reliance on Shklar's Liberalism of Fear. Shklar's work deals with fear on a larger scale, generally emanating from the actions of the state itself, rather than from smaller cultural groupings. Shklar believed that one of the roles of the liberalism of fear was to address issues on a wider scale and to move 'away from the more exhilarating but less urgent forms of liberal thought.'<sup>158</sup> In other words other lines of liberal thought were *too* preoccupied by the minutia to address the real issues. Whilst she accepted that the 'less urgent' forms of liberal thought might be more interesting, she believed that the larger picture should be addressed first. In the transposition towards multicultural theory, Levy retains much of the frame of reference used by Shklar, rather than scaling down to more subtle issues. This provides a difficulty, because the Multiculturalism of Fear is supposedly framed as an alternative to the more common forms of liberal multiculturalism, which tend to deal with (for better or worse) specific case studies of cultural difference.<sup>159</sup> It is at times hard to compare the two theories when they operate on different scales. Further, it is suggested that Levy has constrained himself to more extreme examples due to the difficulty in defining the concepts of fear and humiliation. Kukathas identifies this as a key weakness in Levy's work, stating that 'the crucial problem is

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<sup>158</sup> Shklar, 'The Liberalism of Fear', p38

<sup>159</sup> This was, in fact, one of the criticisms of liberal multiculturalism raised by Shachar.

what to do (or think) when the dispute is about what is and is not humiliating, or what constitutes cruelty, or what is the nature of evil.’<sup>160</sup>

Within the context of the liberalism of fear, Shklar attempts to address this:

‘Of fear it can be said without qualification that it is universal as it is physiological. It is a mental as well as a physical reaction, and it is common to animals as well as to human beings. To be alive is to be afraid, and much to our advantage in many cases, since alarm often preserves us from danger. The fear we fear is of pain inflicted by others to kill and maim us, not the natural and healthy fear that merely warns us of unavoidable pain. And, when we think politically, we are afraid not only for ourselves but for our fellow citizens as well. We fear a society of fearful people.

Systematic fear is the condition that makes freedom impossible and it is aroused by the expectation of institutionalized cruelty as by nothing else.’<sup>161</sup>

This fear of systematic or institutionalised cruelty is believed by Shklar to be universal, and therefore the prohibition of cruelty represents the expression of a moral standard that cannot be argued against. Whilst this might hold some water in terms of the examples suggested by Levy, it ceases to be sufficient when considering more sensitive cultural claims. What is considered to be cruel, and what therefore can be said to be ‘systematic cruelty’ naturally varies from culture to culture, and even person to person. Whereas certain acts of violence might be supposed to be considered ‘cruel’ by most standards, it would be impossible to state that they were *universally* thought to be so. The less ‘extreme’ the act of cruelty that inspires fear or humiliation, the harder it is to even suggest that *most* people must find it to be cruel. Once again there is a difficulty in defining the real standards on which the theory can operate, and it is this difficulty that poses the greatest challenge to Levy’s ‘Multiculturalism of Fear’.

By subscribing to the same fear of being seen to make judgements about other cultures (as discussed above) Levy confines his argument to the more extreme

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<sup>160</sup> Kukathas, Multiculturalism of fear (review), p894

<sup>161</sup> Shklar, ‘The Liberalism of fear’, p29

examples – however, if it were to be accepted that fear and humiliation are subjective standards, the definition of which is key to a successful multicultural theory, it is suggested that the modified ‘Multiculturalism of fear’ could provide a viable solution to the current challenges facing multicultural thought.

In Levy’s case, the avoidance of any clear statement of what might constitute cruelty on a more subtle level is frustrating. Whilst the theory focuses on ‘fear’, rather than any ‘right to culture’, in the examples given by Levy he seems loath to commit to this view. In spite of this reluctance, it is apparent that Levy does indeed accept the subjectivity of belief and of values:

‘Not all religions make exclusionary claims to the truth, though many do; but no religion can be completely accepting of other faiths and retain any content... The same impossibility is evident for culture. Non-cruelty, non-humiliation, and genuine tolerance are possible if not always easy. Public affirmation of respect and recognition, though, cannot be available to all cultures simultaneously. Ethno cultural groups develop in contrast to others; all too often a particular trait is valued precisely because it makes members seem better than some neighbouring group. To recognise what a group values in its own culture is to accept a standard by which some other groups fail to be worthy of respect. To give recognition and respect based on standards external to the culture similarly sets up a measure by which some will fail, and moreover includes the (hardly respectful) assumption that one’s pre-existing culture includes the resources for judging all others in the world.’<sup>162</sup>

The unfortunate impossibility of universal respect of and between cultures provides a difficulty for multicultural theories. It is clear that Levy would be uncomfortable with the establishment of a (necessarily *not* universal) standard of ‘fear’, as it would seem to contradict the liberal roots of his theory, specifically by removing some people’s choice to pursue elements of their own culture. This reluctance leads him to limit his focus, and therefore opens the theory to criticism. If it is impossible for there to be universal mutual respect between cultures, then, rather than claiming to strive towards

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<sup>162</sup> Levy, *The Multiculturalism of Fear*, p32

this impossibility and opening the way for manipulation and perpetual inequality, it might be preferable to accept the inherent subjectivity of values, and to proceed on that basis. Currently, on the surface it seems that there is an aversion towards ‘cultural relativism’, but that any move in the other direction, towards the creation of a set of universally applicable standards and values, is seen as a sign of Western Imperialism. It is suggested that in reality, even though theorists carefully avoid any explicit statement of support for value judgements, the theories themselves rely on them.

Falling at the same hurdle as liberal theories of multiculturalism, Levy is limited by the reluctance to make any specific statements about what might be considered to inspire fear. Where the examples of cultural conflict are discussed at an internal state level, they are examples of forced marriage, polygamy and female genital mutilation. These are all practices that clearly fall foul of the aim of the prevention of and eradication of fear. Whilst the way in which Levy approaches these practices is novel and promising, this does not follow through into the more ‘everyday’ practices which might constitute fear or oppression.

#### Disparity between theory and application

A further difficulty that Kukathas points out in Levy’s theory is the disparity between the aims of the Multiculturalism of Fear and its application. For Kukathas, this disparity is most apparent in the discussion of female genital cutting. Whilst Levy’s conclusion is well reasoned, his support for the alternative procedure rather than complete proscription might seem at odds with the principles of his theory as previously set out. It is clear that by many standards of fear and cruelty even a mild form of genital cutting would be considered intolerable. As such, it would naturally follow that this would not be allowed under the multiculturalism of fear, and yet Levy argues in favour of it. Whilst Kukathas finds this position to be inconsistent, it might be suggested that this has more to do with the difference between the aim and the process by which that aim is achieved.

The aim of the law would have been to move towards ending the practice entirely, by providing a halfway point, where a (comparatively, although not completely) harmless procedure could be offered, in a safe environment. This is consistent with

Montesquieu's view on the realistic approach to law making; however it is perhaps inconsistent with other elements of Levy's argument. Specifically this application of the Multiculturalism of Fear raises questions about the avoidance of moral blackmail, as discussed above. If the 'mild' procedure is favoured because otherwise some girls will be taken out of the country to have the 'full' procedure performed, or it will be done as a 'backstreet' operation, thereby placing lives in danger, then this surely comes under the heading of 'moral blackmail'. The multiculturalism of fear counsels against reacting to this kind of manipulation, yet Levy seems to favour a position that takes into account this danger. To raise this as a criticism is not particularly helpful however, because it points to a difficulty in application of the values of the Multiculturalism of Fear. The gradual change of cultural norms that has to take place per Montesquieu will always come into conflict with the possibility of moral blackmail. It is simply the case that decisions will have to be made in each specific situation. Moral blackmail aside, there is a general discrepancy between the elimination of fear, cruelty and humiliation, and the long-line view of gradual change. If the elimination of fear is the primary aim and focus of the Multiculturalism of Fear, then taking a long-term view rather than favouring immediate change proves difficult. Ultimately however, this is not necessarily detrimental to Levy's theory, because the compromise between the immediacy and the efficacy of a measure that is designed to eliminate cruelty allows room for reflection and to adapt the process for each specific norm that is called into question. This flexibility, which is not justifiable under the rubric of 'rights', is a benefit that allows organic and realistic change to take place.

For Kukathas this disparity between theory and practice is a direct consequence of the reluctance to adequately define what might constitute the standards of prevention fear and cruelty to be upheld. In the context of FGM, Levy suggests that 'the interests of women and girls may be better served by drawing a distinction between what is cruel and intolerable and that which is wrong but tolerable.'<sup>163</sup> This is not a particularly easy distinction to make, however, because of the likely discrepancy between the opinions of the cultural group and the state:

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<sup>163</sup> Levy, *The Multiculturalism of Fear*, p57

‘This distinction is crucial for the multiculturalism of fear. Yet, in the Harborview case, a very clear argument can be made that even the mild genital cutting proposed falls on the “cruel and intolerable” side of the distinction. The general public and federal legislators clearly took this view. Equally, the immigrant parents, if they were among those who hoped the practice would eventually be eradicated, would surely argue that mild cutting fell on the “wrong but tolerable” side of the distinction. (And this is not to mention those parents who insist that full cutting is essential to maintain girls’ dignity and marriageability and who would consequently deny that even infibulation is “cruel and intolerable.”) In these circumstances, such distinctions themselves cannot do the work demanded of them.’<sup>164</sup>

It therefore appears, that even in the apparently extreme case of female genital cutting, there is a difficulty in agreeing whether it is immediately contrary to the *summum malum* that the Multiculturalism of Fear seeks to avoid. It is apparent that there needs to be a clearer definition of cruelty, or a suitably impartial mechanism for deciding whether a practice constitutes cruelty or humiliation:

‘Levy’s recommendation seems to be that the state should “decline the culturally relativist path” (p. 57) and assume that there is a difference between right and wrong. It should criticize and take “action against violence and cruelty” (p. 62). Yet the crucial element in this recommendation remains undefended: that when there is disagreement about what constitutes cruelty; the state’s view should prevail and be enforced. Perhaps it should. But if so, it cannot be on the basis of the principles of the multiculturalism of fear. After all, from the viewpoint of those whose cruel and intolerable practices are suppressed, it is the behaviour of the authorities that is in fact cruel and intolerable. What reply is to be made in response to this challenge? One must surely be found.’<sup>165</sup>

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<sup>164</sup> Kukathas, ‘Multiculturalism of Fear (review)’ p894

<sup>165</sup> Kukathas, ‘Multiculturalism of Fear (review)’ p895



This discrepancy between the reluctance to approach the evaluation of cultural practices from the view point of the state, and yet at the same time refuse to establish a viable alternative, is possibly the key difficulty in Levy's work. An alternative approach must be found, one that fulfils the criteria of being both complete enough to protect vulnerable parties, and flexible enough to allow intercultural dialogue and development of all cultures. It is argued however that Levy's difficulty in establishing an alternative approach is largely due to a lack of development, rather than any fundamental flaw.

Were the multiculturalism of fear to be used as a starting point for a new approach to cultural diversity and multi-ethnic states, it would have the potential to provide a viable solution that has so far eluded common forms of liberal multiculturalism. The difficulties in establishing an adequate definition of fear, cruelty and humiliation, can be overcome and a possible approach to this will be discussed below.

### **Beyond Levy: the potential expansion of the Multiculturalism of Fear**

The basic premise of Levy's work (the primacy of fear as opposed to individual rights) marks a strong shift in multicultural thought, and one which has the potential to be developed as an effective and realistic answer to the difficulties of more popular liberal multiculturalism, however the delivery and application of this premise are lacking slightly, both in substance and conviction.

### **Redefining cultural standards**

The difficulty in adopting an approach based on the Multiculturalism of Fear lies in the appropriate definition of fear and cruelty that is to be accepted. Kukathas's assertion that there is a discrepancy between the values of the multiculturalism of fear and the seemingly inevitable prevalence of the majority definition of fear and cruelty is correct. In arguing for gradual change in the direction of the norms of the majority culture (particularly in the context his discussion of FGM), Levy seems to suggest

that the majority culture's definition of cruelty or fear should be the relevant marker. Whilst he is advocating change in a gradual and 'culturally sensitive' way, it might be suggested that this has more to do with the belief in Montesquieu's argument that gradual change is a more effective way of changing behaviour in the long term, than it has to do with a deep respect for the cultural practice.

Whatever Levy's personal convictions, following the negative construct of the Multiculturalism of Fear in the way it is presented leads to a different conclusion. Whilst a society strives towards universal tolerance for diverse cultures (accepting the impossibility of universal respect), it cannot do so on the basis of supposed 'majority' values. To refuse to engage in discussion and compromise between cultural groups undermines the principle of tolerance, and – for the Multiculturalism of Fear – creates a type of oppression antithetical to the theory itself. Where the cultural practices of 'minority' groups are suppressed because they are contrary to the values of the majority, their cultural beliefs are being disregarded and devalued, therefore creating oppression and humiliation. This must be avoided if the Multiculturalism of Fear is to be followed correctly.<sup>166</sup>

It follows that there must be another standard by which to evaluate cultural practices, and that this standard must represent as impartial a *summum malum* as can be found. This statement of the *summum malum* would need to be both detailed enough to provide a legitimate basis on which the state could act against a practice which was suspected of inspiring fear, even on an apparently minimal basis, and flexible enough that it would be open to intercultural dialogues, discussion and development.

To begin to approach this standard, it is necessary to consider the common division of cultures into 'minority' and 'majority' – specifically 'minorities' and 'the majority'. As discussed above, Levy cautions against the supremacist attitude that can lead to a lack of introspection on the part of the majority culture. Where cultures are categorised as either being the 'majority' or something 'other', then there is a

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<sup>166</sup> It may well be that following this alternative standard would lead to the same conclusion, however it is Levy's justification, not his result, that is in question.

temptation to judge all ‘other’ cultures by the values of the majority.<sup>167</sup> In order to move away from this tendency, the relevant comparator needs to change.

Parekh believes that the overemphasis of the minority ‘racialises’ multiculturalism and ‘becomes a site for thinly veiled racist sentiments. This is most unfortunate...multiculturalism is not about minorities; for that implies that the majority culture is uncritically accepted and used to judge the claims and define the right of minorities. Multiculturalism is about the proper terms of relationship between different cultural communities. The norms governing their respective claims, including the principles of justice, cannot be derived from one culture alone but through an open and equal dialogue between them.’

The division between minorities and (the) majority is problematic for a number of reasons. The differentiation creates an inevitable ‘us’ and ‘them’ approach to cultural difference, and when so divided there is a democratically defensible view that the majority should prevail over the minority. This view creates hostility between cultural groups:

‘The affective and moral meaning of ‘us’ – what might be called ‘we-ness’ - is a fundamentally structuring force. The other side of ‘we-ness’, equally potent, is difference: who are they and why are they here?’<sup>168</sup>

The division of people into minority and majority runs the risk of effectively creating two classes of citizen: those whose cultural practices are subject to scrutiny, and those whose practices are above scrutiny. If multiculturalism is approached from the perspective of the majority, then it is difficult to arrive at a place of social cohesion.

Parekh is entirely right that multiculturalism should not be defined on these terms. Were it not for the existence of minorities, both cultural minorities and internal minorities within cultural groups (including the majority culture), there would be no

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<sup>167</sup> This thesis uses the terms minority and majority to discuss multicultural theory because they are those most commonly used in the literature.

<sup>168</sup> J C Alexander, ‘Struggling over the mode of incorporation: backlash against multiculturalism in Europe’, (2013) *Ethnic and Racial Studies* Vol. 36 4 531 p534

need for multiculturalism, but that does not lead to the conclusion that it should inevitably be defined in those terms. The over-emphasis of the minority (as being *other* than the majority) both places the majority on a pedestal and undermines the value of a 'minority' culture. The 'majority' is erroneously seen as a single, homogenous group and the unique nature of each 'minority' culture is devalued by being grouped together with all others which happen not to be that of the majority. The dynamic between 'us' and 'them' defines 'us' as one and 'them' as many, whose individual importance is side-lined by their collective label of 'minority'.

The emphasis on multiculturalism being purely about minorities, as opposed to the whole society, has led to the unattractive choice that Barry identified: between the progressive erosion of minority culture towards the culture of the majority, and concretising such cultures, forever preserving them as something 'other' than the norm. This emphasis, as Parekh points out, seems to contain the assumption that the 'majority' is above judgement, and that it represents the best possible form of culture. This echoes the common liberal fallacy, derived from, amongst others, the work of Herder, which suggests that culture is the product of continuous development up to this moment, but that in this moment it exists in a permanent and perfect state.<sup>169</sup> There is a middle ground to be found however and 'we ought to recognise that cultures are permanently changing and developing and that there is no reason to 'freeze' a culture in order to preserve it'.<sup>170</sup> The majority culture, just as much as any minority culture, is a fluid structure, and it needs to evolve in order to retain any meaning. Even if it is recognised that culture is fluid, the emphasis on the 'protection' of the minority culture creates tension:

'A great deal of paternalism is embedded in the assumption that while 'we' can survive change and innovation and endure the tensions created by modernity, 'they' cannot; that 'we' can repeatedly reinvent ourselves, our culture, our traditions, while 'they' must adhere to known cultural patterns.'<sup>171</sup>

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<sup>169</sup> c Barnard, Frederick M. *Herder's social and political thought: from enlightenment to nationalism*. Clarendon Press, 1965, p50, also Sonia Sikka, *Herder on Humanity and Cultural Difference*, (Cambridge University Press, 2011)

<sup>170</sup> Yael Tamir, 'Siding with the Underdogs', in Okin, *Is Multiculturalism Bad for Women?* p52

<sup>171</sup> Ibid p51

It is likely that minority cultures, particularly immigrant cultures, will come to resemble majority cultures more closely over time, however change will occur in both directions, and the majority culture is as likely to absorb some of the values and attributes of minority cultures. This flexibility makes it difficult to justify basing an assessment of a minority practice on the values of the majority, as they are likely equally difficult to define, and transient themselves.

Even accepting that the ‘majority’ will develop just as much as the minorities, where minorities increase in number due to immigration or any other factor, there is increasingly less of a ‘majority’ to be identified. In the context of a dwindling majority, a society that bases the legitimacy of all cultural practices on their compatibility with majority norms faces a difficulty. These norms become less relevant to the actual society, and increasingly do not represent the norms of the population. Where the legal norms are so removed from those of the actual population, both their effectiveness and legitimacy are called into question.

It is undeniable that the legal system and institutions of the State are products of the historical culture of the state, and that this will usually be the majority culture.<sup>172</sup> However, when the cultures present in a state are increasingly diverse the impartiality of these institutions is key. As the breadth of cultural influences expands, it is impossible even to identify a homogenous majority. The majority culture is not free from the constant conflict and development that marks the fluidity of cultural dialogue. Where a society is committed to multiculturalism and the support and equal value of diverse beliefs and cultures it is difficult to approach the creation of laws and of norms solely from the perspective of the majority culture. This is even truer of a society based on the Multiculturalism of Fear, as pointed out by Kukathas above. Oppression is inextricably linked to fear and humiliation, and therefore oppression by the state of a minority culture is contrary to the aims of the Multiculturalism of Fear. The prevention of fear, cruelty and humiliation applies equally to that created within and between cultural groups and to that created by the state and its treatment of

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<sup>172</sup> Former colonies provide the most common exception to this

groups and individuals. Preventing a minority cultural practice purely because it is contrary to the norms of the majority is not justifiable under the Multiculturalism of Fear; therefore the basis on which the legitimacy of a practice is assessed must be something other than the norms of the 'majority culture'. Rather than continuing to consider multiculturalism and values in the context of majorities and minorities, it may be beneficial to search for an alternative standard – a 'reasonable man' test for cultural practices. This would not work in the context of a positive theory for a multicultural society, because that would involve the establishment of a positive concept of the good life, which might be held by a 'reasonable man'. Given the subjectivity, and particularly the cultural subjectivity of any concept of the good life, the establishment of such a marker would inevitably betray the cultural persuasions of those creating it. Within the context of the negative theory of the Multiculturalism of Fear however, it is entirely possible to create a 'reasonable' standard of prevention of fear and humiliation.

The emphasis on the avoidance of a *summum malum*, which might reasonably be supposed to be universal, gives the state the ability to accommodate different conceptions of the good life, rather than inevitably steering towards that of the 'majority'.

Habermas observed that 'the neutrality of the law vis-a-vis internal ethical differentiations stems from the fact that in complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedures for the legitimate enactment of laws and the legitimate exercise of power.'<sup>173</sup> Where there is no discernable agreement on values, there can only be agreement on the way in which to determine the right course of action. This creates a demand for the construction of impartial frameworks for intercultural interaction, where members of all cultures are able to be heard and to justify their practices. The nature of these frameworks and institutions and their remit needs to be established with great care. The importance of the existence of appropriate frameworks for intercultural interaction is acknowledged by Levy, yet he does not elaborate particularly on what these might be or how they would work in practice.

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<sup>173</sup> Habermas, *Struggles for Recognition*, p135

The Multiculturalism of Fear has an advantage over more common multicultural theories in that it is constructed as a theory of negative morality. The best course of action is that which creates the least harm, specifically the least fear or humiliation (moral blackmail notwithstanding). This places it in a unique position regarding the move away from a language of minority and majority cultures. The Multiculturalism of Fear does not require a conception of the good life, it merely requires an idea of the ‘bad life’; the *summum malum* which should be avoided. Something might reasonably be thought to be part of a *summum malum* without itself being a statement of the good life. Such a theory is better able to come to a neutral statement of values, and to evaluate all cultures from the same perspective. There is no claim of the universality of values, just the idea that there are certain things that should be universally avoided – the creation of fear, humiliation and oppression.

#### Assessing cultural practices

Levy goes some way towards suggesting how a practice might be evaluated, through his doctrine of consent; however in general there is a lack of development in this area. In terms of the doctrine of consent, it is indeed important, and placing emphasis on the fact that there is no requirement to ‘activate’ all liberal rights allows for a flexibility within cultural practices, and for the individual to pursue those that they desire.

Where there is an adequately defined *summum malum* there will be certain cultural practices which are clearly contrary to this – genocide, ethnic cleansing, honour killings and so on. There are other practices, however, which fall closer to the line of acceptability. Whilst they may be clearly intolerable from the point of view of one culture, they are equally clearly tolerable from another, and it is these practices for which the establishment of adequate frameworks for intercultural interaction is essential. Even practices such as female genital cutting are defensible from certain cultural perspectives – the legal treatment of these practices requires great care.

Before there can be an assessment of the compatibility of a cultural practice with the avoidance of the *summum malum* these cultural practices which may be contrary to

the prevention of fear and humiliation have to be identified. Levy does not raise any suggestions as to how that might be approached; however there are certain aspects of his work which may be helpful. In the context of nationalising states, Levy advocated a (refutable) negative presumption, that the actions of the nationalising state *would* create fear and humiliation. By ensuring that the presumption was that the practice of nationalising was harmful, the practice becomes a legitimate subject of discussion. The refutable nature of the presumption allows for flexibility, and the consideration of incidences on a case-by-case basis.

This use of a refutable negative presumption could be extended to apply to all cultural practices that are close to the ‘line’ of the prevention of fear and humiliation. Where a ‘reasonable man’ might suspect that a practice inspires fear or humiliation, there could be a presumption that it does. This presumption would then place the practice within the ambit of the state, and the impartial mechanisms established. As with the negative presumption against nationalising states it would be important to emphasise that the negative presumption is entirely refutable, as it may be that a greater understanding of the practice is required in order to alter the ‘reasonable’ view of it. The multiculturalism of fear itself is a negative construct – one that rests on the elimination of fear rather than the promotion of the ‘good life’. As such, in order to be effective, it has to look for instances of fear and of humiliation, manipulation or coercion, and either rectify them, or satisfy itself of its own misinterpretation. Whilst it may seem counterintuitive to be deliberately suspicious of cultural practices, it is in fact beneficial to all members of the community. If the suspicions are correct, then fear and humiliation are able to be eliminated in that context. If the suspicions are refuted, then this is because there is greater knowledge about a cultural practice, which otherwise would continue to be mistrusted.

The creation of an impartial framework for the discussion of cultural practices which are presumed to fall foul of the requisite standard of fear would inevitably involve a great deal of care, and the format of such a framework will not be discussed in the present project, however there are a number of ways in which such a framework could represent a positive (negative) step towards social cohesion, intercultural and intracultural understanding.



Whereas currently there is a tendency to pursue a hands-off approach to cultural difference, even where there is extreme mistrust of a practice, the negative presumption would enable discussion and dialogue. The hands-off approach, stemming from the idea that individuals out with a culture are not well-suited to evaluating practices within it, does not protect vulnerable individuals from harm which may occur within their own cultural group. In contrast, a negative presumption necessitates dialogue and explanation, allowing practices to be scrutinised both by those outwith and within the group that they originate in. Not only does this provide a safeguard for vulnerable individuals within groups, who would have a platform on which to express their opinions, it also promotes social cohesion by fostering a greater understanding between cultural communities.

Creating a forum in which cultural practices can be examined and discussed on a case-by-case basis<sup>174</sup> allows members of cultural communities to have a voice in the determination of the legitimacy of that practice. Where, under a hands-off approach, vulnerable members or internal minorities might be side-lined, and the direction decided by those with authority in the group, an open discussion could allow these members to have a meaningful input into the evolution of their culture. As discussed above, Okin is of the opinion that no received information about a culture can be considered accurate unless it comes from a representative sample of the group, including those who are oppressed within it. The hands-off approach, working on received information from cultural leaders fails this test; however a framework operating on a negative presumption would be able to seek the input of these members.

Once a practice is deemed to be within the state's/ framework's legitimate area of inquiry, there are certain factors which might be taken into account. The doctrine of consent would play a role, as individuals subject to the practice in question are often those best placed to assess whether there is a risk of fear and/or humiliation. Whilst the hands-off approach uses this fact to justify non-interference on the basis of the subjectivity of culture, the suggested framework would consider this as a factor in the

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<sup>174</sup> Case by case here denoting each different practice, not each individual case of the manifestation of that practice.

impartial assessment of the practice. Equally, because there can be no requirement for individuals to actively pursue their rights (in other words individuals are free to bind themselves to whatever norms they desire), where a practice is deemed acceptable by those who are affected by it, there might be a higher threshold of fear to be met in order to interfere with that practice.

It is noted that consent cannot be the determining factor in all circumstances. In many cases, such as those involving a high degree of suspicion of coercion or a vulnerable party such as a child, consent would have little importance. The doctrine of consent is entirely fallible, and as such it is perhaps unwise to use it as an entire justification for any one practice, rather as a contributing factor in a wider decision making process.<sup>175</sup> There cannot be consent to a practice that is clearly contrary to the universal *summum malum*, only to those that are closer to the line between acceptable and unacceptable practices, and where the parties in question have the capacity to consent. A child's consent to female genital cutting, for example, could hardly be considered an acceptable waiver of their rights. Vulnerable members of cultural communities, and of society in general, require additional protections, and as such the doctrine of consent would not always be a sufficient safeguard. Rather there would need to be a thorough consideration of the merits of each practice, from the perspective of those within and out with the cultural community in question.

Whilst more common forms of multicultural theory rest on a liberal idea of a 'right to culture', the multiculturalism of fear as proposed would require a cross-cultural discussion of each practice. Whereas liberal multicultural models rely on the idea that those within a culture are best suited to evaluate it, Levy correctly points out that it is far harder to see flaws in our own culture than it is in someone else's. Where there is a suspicion of incompatibility with the avoidance of the *summum malum* both those within and out with the culture in question have a right to be involved in the discussion. Those out with the culture are able to provide an alternative perspective, allowing engagement with the cultural practice, and those within the culture are able

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<sup>175</sup> It may be that a practice is deemed acceptable *only when* the individuals in question explicitly consent, however the assessment of the legitimacy or permissibility of the practice *in general* would be more wide-ranging.

to provide their justifications, helping to shine light on the practice for those who may have misunderstood it.

At first glance, a system that endorsed all suspicions against cultural practices would seem overzealous; however it is argued that this would not be the case. By creating the real possibility that cultural practices will be examined on the basis of the avoidance of fear and humiliation, the state can ensure that it is in the interests of cultural communities themselves to internally assess practices. Communities seek freedom to exercise their norms, and in doing so will take increased care to avoid the *summum malum*. In the context of a positive theory that advocates a conception of the good life, there is the risk of reactive culturalism, where those who feel that their culture is being devalued, disregarded or marginalised become more extreme and entrenched in their views.<sup>176</sup> On the contrary, a negative presumption gives greater freedom, and fosters positive change. ‘Everything is allowed, unless it falls foul of this standard’, rather than ‘nothing is allowed, unless it meets this standard’.

The existence of such a framework would have benefits reaching much further than simply those stemming from its decisions. Cultural groups would be more inclined to listen to each other and to the views of all members within their own group, knowing that they would have weight within the assessment of a cultural practice.

Although the exit rights thesis aims to give voice to otherwise marginalised group members it falls on the difficulty of ensuring that exit from the cultural group is a realistic possibility. The threat of an impartial assessment of a cultural practice lends an official weight to the opinions of these members. As opposed to the hands-off approaches, which leave power within the hands of a small number of figures within a cultural group, the negative presumption would give power to those otherwise oppressed in their own groups. This has additional benefits, which cannot be matched by the exit rights thesis alone. Whilst the exit rights thesis requires the victim of any negative impact of a cultural practice to leave their community – a great personal sacrifice - the negative presumption allows them to have power within their community, without having to threaten to abandon their life there. As with the

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<sup>176</sup> See Shachar, *Multicultural Jurisdictions*, pp35-37

doctrine of consent, there is a requirement to value the opinions of all members of a cultural group, and the state is therefore able to unequivocally support the marginalised members. Given that the presumption is towards negativity and the avoidance of fear and humiliation is the primary concern of the state, those claiming that the practice is harmful have an amplified voice. This creates a situation where those in power have to compromise to find an acceptable medium, or risk the entire practice being assessed and found to be incompatible with the state's aim to avoid the *summum malum*.

### *The multiculturalism of fear and non-domination*

The proposed structure of a modified multiculturalism of fear has much in common with the neo-republican idea of freedom as non-domination, however the two positions differ crucially. Both stem from negative conceptions of liberty,<sup>177</sup> supporting the idea that the individual is free in so much as they are free from interference, however, the multiculturalism of fear being derived from the liberal tradition, the two theories diverge on the measurement of this interference. Pettit distinguishes these views:

‘One would say that the important thing is not to suffer interference, whatever the basis on which you escape it, in the actual world; the other would say that the important thing is to enjoy such protection that you are not particularly susceptible to interference in the actual world or in any of those counterfactual worlds where others conceive hostile intentions: you are as secure against interference as you can be made, consistently at least with others enjoying the same security.’<sup>178</sup>

The liberal school of thought is broadly aligned with the first view, and the republican with the second.<sup>179</sup> The concept of freedom as non-domination as set out by Philip

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<sup>177</sup> See ‘Pettit, Philip. "Liberalism and republicanism." *Politics* 28.4 (1993): 162-189, p165; also Isaiah Berlin on positive and negative liberty; ‘Four Essays on Liberty’, London, OUP, 1969.

<sup>178</sup> Pettit, *Liberalism and Republicanism*, p165

<sup>179</sup> *ibid* p166

Pettit in *Republicanism*<sup>180</sup> (and in *A Theory of Freedom*<sup>181</sup>) suggests that freedom from interference is not sufficient in itself to constitute freedom, and that there must also be freedom from domination – that is, no *potential* for interference. The commonly used example is one of slavery – a slave whose master does not choose to exercise power over them still has the capacity to do so, therefore whilst free from interference, the slave is not free from domination. Whilst another has the capacity to interfere arbitrarily – even though they choose not to – there is no freedom.

The idea of ‘arbitrary’ interference is crucial to Pettit’s concept. In this context there are two dimensions or definitions of ‘arbitrary interference’ in play; firstly the common definition that an act is arbitrary when it is chosen or not chosen on the whim of the actor, and secondly ‘chosen or rejected without reference to the interests, or the opinions, of those effected. The choice is not forced to track what the interests of those others require according to their own judgements’.<sup>182183</sup>

The ability to ‘interfere’ on what Pettit would call an arbitrary basis is in fact crucial to the multiculturalism of fear. Although the negative construction of the multiculturalism of fear means that the state will refrain from interfering where possible, and that groups are therefore ‘free’ to follow their cultural practices, the remaining *potential* to interfere is equally important as a safeguard. The modified multiculturalism of fear has two important advantages derived from the ability to interfere – firstly it allows vulnerable members of cultural groups a voice, and secondly it facilitates discussion and intercultural dialogue.

Were the multiculturalism of fear to be designed along the lines of a neo-republican concept of non-domination, there would be far less protection available for vulnerable group members. Where there is *no* power to interfere on an arbitrary basis (taking the second definition of ‘arbitrary’ used by Pettit) vulnerable group members are

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<sup>180</sup> Pettit, Philip. *Republicanism: A Theory of Freedom and Government: A Theory of Freedom and Government*. Oxford University Press, 1997.;

<sup>181</sup> Pettit, Philip. *A theory of freedom: from the psychology to the politics of agency*. John Wiley & Sons, 2013.

<sup>182</sup> Pettit, *Republicanism*, p55

<sup>183</sup> See Markell, Patchen. "The insufficiency of non-domination." *Political theory* 36.1 (2008): 9-36. for a critical analysis of Pettit’s definition.

essentially left to fend for themselves, perhaps relying on the ‘exit rights’ theory discussed above.<sup>184</sup>

The *act* of interference in this context must be considered to be the calling in to question of, and the imposition of a negative presumption against, a specific cultural practice. Following this ‘interference’ it has been suggested that all concerned parties would be given a voice, and indeed the guarantee of that voice, within the impartial framework mentioned above. At that point the definition of arbitrary as offered by Pettit would cease to apply, as the interests and opinions of *all* those affected become crucial to the evaluation of a cultural practice. That this would take place within a recognised impartial framework in fact gives further weight to the voice of those concerned, in addition to facilitating intercultural dialogue. The initial interference, however, would indeed be deemed arbitrary by the standards established by Pettit, and thus not consistent with the ideal of non-domination.

This difference between the multiculturalism of fear and the idea of non-domination is one of the greatest strengths of the modified multiculturalism of fear. The ability of the state to interfere and call into question a cultural practice - on the basis of a ‘reasonable’ suggestion that it may induce fear - allows both for the more effective protection of internal minorities and for the promotion of intercultural understanding.

Although it is difficult to arrive at a statement of how a theory based on the Multiculturalism of Fear would work in practice, it is clear that it has the potential to constitute an effective system for the handling of cultural difference. Based on a negative construct, it is able to create a remit that allows questioning and discussion of cultural practices in a way that systems based on the primacy of rights, and particularly the concept of a ‘right to culture’, cannot. Vulnerable members within cultural groups are better protected by a system that guarantees them a voice, and is dedicated to the avoidance of fear, humiliation and oppression, rather than to the ‘preservation’ of culture. Cultures too are better ‘protected’ by the Multiculturalism of Fear, as it recognises the futility both of attempting to freeze or to re-make a culture. The emphasis on the fluidity of culture (of all cultures, not simply minority cultures),

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<sup>184</sup> Were this ‘arbitrary interference’ not possible under the modified multiculturalism of fear the theory would face the same problems created by the ‘hands-off approach’ fostered by an over-emphasis of a right to culture.

and the potential for discussion and intercultural interaction, allow for a move towards greater social cohesion and continued natural development of cultures.

## **Conclusion**

This thesis has aimed to explore the present state of and difficulties facing traditional forms of liberal multiculturalism as well as present the foundations for a possible alternative approach.

The development of the contemporary notion of multiculturalism stemmed from a number of factors, including the development of international human rights standards and increases in immigration. Liberal multiculturalism itself came to be as an answer to the dilemma of how to ensure that all individuals were able to exercise their liberal rights, including the freedom to belief and their way of life. Unfortunately, stemming as it does from the belief in the primacy of the individual, this form of multiculturalism has faced certain hurdles.

The criticism of liberal multiculturalism has been damning, and from some accounts it would seem that there was no hope at all for multiculturalism. It has been suggested however that these accounts are somewhat exaggerated, and that liberal multiculturalism has had some success, predominantly in areas concerning indigenous and national minorities. It is not possible to dismiss the criticisms entirely, and it should not be attempted, because they stem from legitimate statements of the consequences of pursuing a liberal multiculturalist agenda. Both the internal and external critiques raise valid and important points about the failings of liberal multicultural models, and these cannot be ignored. Two key flaws of the liberal arguments were identified, flaws that were shared between both the internal and external critiques, suggesting that they are in fact fundamental difficulties which might not be able to be remedied by liberal means.

The difficulty in constructing a theory of multiculturalism which places importance on the individual's right to their own cultures is that it reduces the ability of the state to interfere with the life of a community where a practice might be considered 'cultural'. If there is a right to culture then there cannot simultaneously be a right to interfere in a culture, therefore practices are largely left alone. A further consequence is that individuals are able to manipulate the state by claiming cultural justification for their actions. Given that no-one out with the culture in question is thought to have a



deep enough understanding of that culture to make a statement about the validity of this claim, the state is left to rely on the received account of a culture. This account is most usually received from those with a position of authority within the group, and whose interests largely lie with preserving the status quo and reducing external interference with the culture.

Additionally there is a tendency for groups to self-segregate when they are encouraged to pursue a concretised version of culture. Whilst early liberal thinkers recognised that culture was the product of centuries of progress and evolution, they tended to assume that its present incarnation must be the ultimate and best version, and should be preserved in its authenticity. Liberal multiculturalism therefore stems to some extent from a belief that culture is only corrupted by outside influences.

By avoiding a statement of the good life, but retaining a statement of the *summum malum*, Levy's theory of multiculturalism is able to legitimately enquire into cultural practices which might reasonably be suspected of falling foul of this standard, and in doing so opens up the barriers to inter and cross cultural communication. Whereas the hands-off approach of liberal multiculturalism - stemming from both a misguided respect for the 'right to culture' and the awareness that cultures are inherently subjective - fails to protect vulnerable parties within cultural groups, as it effectively cedes responsibility for them to those already in charge; Levy's theory allows the vulnerable members to have a voice, and in fact tends towards the presumption that they do not wish these practices to continue.

An approach that resists the temptation to concretise cultural practices or to 'freeze' them in order to protect their integrity will also have more success at promoting social cohesion and cross-cultural understanding. The liberal approach has left the door open for caricatures of cultural stereotypes, and the apparent '3 S' model of multiculturalism. If the concern is moved away from preserving specific cultural attributes, and towards the promotion of the prevention of fear and humiliation, then these attributes and related practices will be free to develop and change naturally.

The criticism of multiculturalism, particularly liberal multiculturalism as it relates to immigrant populations, has been damning. Although it is important to explore these criticisms in depth, it is undeniable that in some contexts at least, multiculturalism has not been very successful. There is still ingrained racism, mistrust of cultural communities, a tendency towards self-segregation and a lack of knowledge about other cultures. Although the vocabulary may have changed, and 'integration' might not be a word currently in favour in multiculturalist circles, Roy Jenkins' 1966 statement remains true:

'Integration is perhaps a rather loose word. I do not regard it as meaning the loss, by immigrants, of their own national characteristics and culture. I do not think we need in this country a 'melting pot', which will turn everyone out in a common mould, as one of a series of carbon bodies of someone's misplaced vision of the stereotyped Englishman... I define integration, therefore, not as a flattening process of uniformity, but cultural diversity, coupled with equality of opportunity in an atmosphere of mutual tolerance... If we are to maintain any sort of world reputation for civilised living and social cohesion, we must get far nearer to its achievement than is the case today.'<sup>185</sup>

Following the trail of liberal multiculturalism has worked only for some groups, and even then not completely. The diverse cultural groups within states require as much support as ever, and it is perhaps time to reconsider the approach. The evident structural difficulties with liberal multiculturalism are possibly too fundamental to be remedied, and an alternative needs to be tried. Levy's *Multiculturalism of Fear*, although somewhat embryonic in his own exposition, has the potential to meet this demand, and to rebalance the approach to cultural diversity within societies. A plethora of cultural identities in almost every state means that there is little agreement on what might constitute the 'good life' however the negative morality proposed by Levy draws upon arguably universal (and largely instinctual) values: the avoidance of fear, cruelty and humiliation. In many countries there is not really a discernable 'majority' culture – just as Jenkins warned against turning everyone into the 'stereotyped Englishman', it is important to ensure that the historical culture of the

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<sup>185</sup> c Rattansi, *Multiculturalism*, p9

state is not assumed to be superior to that of other groups. Although Levy's theory itself needs work, it has the potential to provide a solution to the difficulties facing liberal multiculturalism. There needs to be less of an emphasis on the 'majority' and 'minority', rather an acknowledgement that each individual in a liberal society has as much of a role to play in the development of culture as the next. Where it might be counterintuitive to seek a person's views on the practices of another culture, if there is to be a socially cohesive society then this type of dialogue and discussion need to take place. A cultural practice is not solely the concern of those who practice it, but also of anyone in the same society. With greater understanding between cultures, there will be increased tolerance (and in some cases respect) for the practices and beliefs of others.

It remains to be seen what the best way in which to implement a multicultural theory based on negative morality might be, but certainly it has the potential to provide an answer to the difficulties facing more common lines of thought. Vulnerable internal minorities, the victims of Shachar's 'paradox of multicultural vulnerability', are better protected in a context where the state has a legitimate remit to enquire into cultural practices and to require their voices to be heard. These individuals no longer need to rely on the 'exit option' to make their point audible, and are able to find a balance between their culture and their own wishes. There is a long way to go before any theory based on the Multiculturalism of Fear could provide a definitive answer to the problem of multiethnic and multicultural societies, but it is suggested that it is an excellent place to start.

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