

Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law

Maneesha Deckha

Le présent article étudie l'introduction de revendications culturelles en droit et demande s'il s'agit là d'une innovation intéressante—et dans quelle mesure—pour les féministes qui adoptent une théorie de l'«intersectionnalité». L'auteure identifie plusieurs approches dans les recherches féministes en droit vis-à-vis du discours culturel en droit et elle examine à fond leurs forces et leurs faiblesses respectives du point de vue de l'«intersectionnalité». Elle analyse comment le concept de la culture présente un aspect paradoxal des rapports sociaux de sexe, particulièrement interpellant pour ces féministes. D'une part, la culture sert de fondement aux revendications normatives au sujet des rôles sexués que les féministes tentent de démanteler au nom des droits des femmes. D'autre part, la culture sert de rempart, utilisé par les femmes issues des minorités à l'encontre de la culture majoritaire et des lois adoptées pour refléter les valeurs dominantes. En d'autres termes, là où se rejoignent l'oppression culturelle et l'oppression sexuelle, respecter la culture présente à la fois des aspects positifs et négatifs pour les femmes. L'auteure soutient qu'une véritable adhésion à l'analyse de l'«intersectionnalité» exige que les féministes soient réceptives à des revendications à caractère culturel lorsque ces revendications ne peuvent subordonner les intérêts des membres les plus vulnérables de ces minorités culturelles en aggravant leur situation, ni dans la situation actuelle, ni dans un avenir prévisible. Elle conclut que le droit doit permettre aux groupes marginalisés de réclamer la protection de leur culture ou inversement, de résister à des incursions culturelles et que ces revendications juridiques n'étouffent pas nécessairement la dissidence au sein des cultures minoritaires.

This article considers whether, and to what extent, feminists committed to a theory of intersectionality should welcome the introduction of cultural claims into law. The author identifies several approaches in feminist legal literature towards culture discourse in law and canvasses their strengths and weaknesses from an intersectional perspective. She discusses how the concept of culture presents a gendered paradox of particular concern for feminists committed to intersectionality. On the one hand, culture props up normative claims about gender roles that feminists seek to resist under a theory of women's rights. On the other hand, culture serves as a defence that women from minority cultures use against majoritarian cultures and the laws generated by the values within those cultures. In other words, when one adverts to the intersection of gender and

cultural oppression, giving respect to culture and multiculturalism seems to be both bad and good for women. The author argues that a commitment to intersectional analysis requires feminists to be responsive to cultural claims when such responsiveness would not actually, intentionally, or foreseeably subordinate the interests of vulnerable members of cultural minorities by worsening their condition. She concludes that the law should permit marginalized cultural groups to make claims about cultural protection or, alternatively, to resist cultural encroachments and that such legal claims need not subordinate cultural dissenters within minority cultures.

Introduction

Feminist legal and political theorists have recently grappled in divergent ways with the concept of culture and the desirability of inserting "culture talk" into legal discourse. Their consideration of just how receptive courts, legislators, human rights committees, and other legal actors should be to legal claims founded on cultural equality typically revolves around an assessment of the risk that the legal recognition of cultural identity, whether expressed by individuals or groups, may pose to women's interests. The extent to which this risk is real, illusory, or misconceived is at the centre of ongoing feminist debate.¹ This debate presents a paradox of particular concern for feminists who view gender and cultural equality as being not only in tension but also in harmony. On the one hand, culture and women's equality appear to conflict since culture often props up stifling gender roles. On the other hand, culture and women's equality appear to align because culture is important to culturally marginalized women seeking to challenge majoritarian cultures and the laws they generate. It is a debate that tests the compatibility of feminism with multiculturalism and places culturally marginalized women at its core.

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1. In addition to the authors discussed in this article, see generally Rosemary Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy," in Dan Danielsen and Karen Engle, eds., *After Identity: A Reader in Law and Culture* (New York: Routledge, 1995) 251.

Within this fraught terrain, I have three purposes. First, I explore and organize feminist legal scholarship about the real and imagined tensions between gender and cultural equality. I then argue that an intersectional praxis favours an approach to culture in law that affirms that culture matters and that law should be receptive to cultural claims that do not subordinate vulnerable internal members. Finally, I consider factors that identify which cultural claims would meet this standard. My overall goal is to consider how legal feminists committed to intersectionality and anti-essentialism—that is, to paying attention to how multiple social forces, such as race, class, gender, age, sexuality, and culture, shape our experiences²—should approach the question of culture in law.

The debate over the defensibility of the concept of group rights or multicultural accommodation for minority cultures is extensive.³ I assume the desirability of each, rather than take up the debate in its entirety, in order to consider how legal feminists should respond to cultural claims given the risk they may pose to vulnerable members of minority cultures, particularly women. My benchmark for evaluating the presence of cultural discourse within law is an ideal state of justice or order where all individuals are able to lead autonomous (but not isolated)⁴ lives, maximizing their potential for creative, intellectual, social, and sensory pursuits. My sense of the “good” is one in which subordination, particularly in the form of violence—whether physical, psychological or

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2. Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 4 University of Chicago Legal Forum 139; Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color” (1991) 43 Stanford Law Review 1241; Marlee Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 Harvard Women’s Law Journal 115.
 3. For this debate, see generally Brian M. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001) (arguing against multiculturalism and the recognition of cultural identities by liberal states); Jeremy Waldron, “Taking Group Rights Carefully,” in Grant Huscroft and Paul Rishworth, eds., *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart, 2002) 203 (arguing that, logically, the concept of rights can accommodate groups as right-bearers, but that we should be hesitant nevertheless to recognize groups rights since they often entail the oppression and inequalitarian treatment of individuals within the groups); Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative” (1992) 25 University of Michigan Journal of Law Reform 751 (arguing that multiculturalists rely on a false notion of cultural purity and authenticity). I am aware of the contentiousness surrounding the term “minority culture.” I use it not to diminish the importance of these cultures but rather to reflect the discourse of the debates I enter in this article and as a synonym for “marginalized cultures.”
 4. My use of the term “autonomy” draws from Jennifer Nedelsky’s reconceptualization of this term. Jennifer Nedelsky, “Reconceiving Autonomy” (1989) 1 Yale Journal of Law and Feminism 7 at 10–11. Nedelsky is interested in severing the associations of autonomy from an image of an unencumbered, isolated, and independent political actor unconnected and unaffected by *his* (the male pronoun is used deliberately here) relationships with others or his social location. She argues that the state of affairs we invoke when we use the term “autonomy” is one that is sustained by our relationships with others, both social and personal, who nurture, support, and generally enable us to exercise our human capacities. Thus, Nedelsky encourages us to reconceptualize autonomy as a condition enabled by human interconnectedness rather than by social isolation.

epistemic—is absent. It is a view of the “good” that is loosely captured by Drucilla Cornell’s definition of “ethical feminism,”⁵ which, at the very least, entails a commitment to intersectionality while, at the same time, affirming differentiated identities.⁶

All the theorists canvassed aspire to more or less the same end: an egalitarian social order free of oppression and exploitation based on (at least) sex or gender differences.⁷ Yet, they advocate substantially different and, at times, diametrically opposed roles for cultural discourse. Some argue for its rejection, while others maintain that cultural narratives should be respected⁸ in certain situations. Although no standard is perfect, I argue that an ethical feminism should generally

5. Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (New York: Routledge, 1991). By “loose reading,” I mean that my use of the term is a simplified version of Cornell’s in that I do not discuss its psychoanalytic significance.
6. Cornell’s feminist ethics would attend to the hierarchies of differences that constitute our experiences of injustice as well as empowerment and would ask how these hierarchies can be flattened in any given context so that physical differences are no longer ascribed negative social meanings. Adam Thurschwell, “On the Threshold of Ethics” (1994) 15 *Cardozo Law Review* 1607 (reviewing Cornell, *Beyond Accommodation*, *ibid.*, and Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992)). One may discern within Cornell’s concept of “ethical feminism” a vision of equality that unmasks the partiality of laws that privilege certain differences while masquerading as impartial. For example, Cornell wants to recognize the claims of black women who are penalized at their workplaces for braiding their hair as claims of sex-based and race-based discrimination. Such claims have typically been met with the liberal reply that braiding is not a racial or gender marker; since it is a choice and not a physical characteristic it is not about “race,” and since it is not a practice that all women do, it is not about “sex.” Cornell criticizes the legal dispositions of the braiding cases because they fail to recognize hair-braiding as an affirmation of “national, racial, and sexual pride” in the context of a society that devalues black women’s national, racial and sexual difference. In *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (New York: Routledge, 1995) at 215–16, Cornell asks:

What does it mean to degrade an African-American woman who chooses to braid her hair? What does it mean to fire her? It means that she has been denied her own power to affirm her feminine sexual difference as it is profoundly linked in her affirmation of what it means for her to be an African-American woman. It implicates sexual, national, and racial degradation and devaluation ... An analytic structure unable to analyze the connection between sex, race, and nationality cannot give adequate redress to African-American women. From within what I have called “ethical feminism,” the hair-braiding of African-American women should be affirmed as exemplary of the feminine within sexual difference in all its diversity and difference.

7. I am not invoking the original feminist distinction between sex and gender where “sex” refers to natural biological differences while “gender” refers to socially constructed meanings attached to purportedly natural sex differences. More recently, feminists have identified “sex” as a location of social construction as much as “gender,” and I impute this understanding to both terms. See Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998) at 2, n. 2.
8. I use “respect” in the sense of Stephen Darwall’s articulation of the term “recognition respect”—that is, “respect” is meant to connote the idea of “giving appropriate consideration or recognition to some feature of its object in deliberating about what to do.” Stephen L. Darwall, “Two Kinds of Respect” (1977) 88 *Ethics* 36 at 38. In this sense, “respect for culture” would mean adverting to an individual’s or a group’s culture in making a decision.

favour a "differentiated" approach,⁹ provided that refinements are made to the account of what amounts to subordination within a minority culture. This approach presents the best way forward of respecting both the deconstructive critiques of cultural discourse as well as the assertion of certain cultural identities.¹⁰ In other words, a refined differentiated approach is the position that is most responsive to intersectional sensibilities. According to this approach, the law should take seriously the complaints of minority cultures that majority norms are oppressive or otherwise problematic, and articulate a set of responses that minimizes subordination between cultural groups without enabling subordination within the minority cultures seeking legal recognition.¹¹ By "subordination" I

9. The term "differentiated" was made popular by first-wave multiculturalists such as Will Kymlicka and Iris Marion Young and, in this context, refers to a concept receptive to multicultural, group-based claims. See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 26, 174–6. See also Iris Marion Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99 *Ethics* 250, who discusses the concept of "differentiated" citizenship. Iris Marion Young, "Social Movements and the Politics of Difference," in Iris Marion Young, ed., *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) 156 (discussing state recognition of group difference generally). Ayelet Shachar has more recently explicitly reclassified their arguments for multiculturalism and the recognition of group differentiation as a "differentiated" approach to liberalism and cultural equality. Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, UK: Cambridge University Press, 2001) at 2, n. 3. Both the "postcolonial" and "differentiated" approaches that I consider are receptive to multicultural claims, but, as I will argue, the latter is the most receptive to them.
10. The argument contains two assumptions. First, it assumes that the specific cultural claim cannot be cast in a language that does not invoke culture as a concept. Second, the argument assumes the unavailability of any significant institutional redesign of the kind Shachar proposes. Shachar is interested in thinking creatively about multicultural institutional design. She does not wish to sacrifice the interests or rights of vulnerable members to the tyranny of the imagined majority culture, but searches for fresh ways to structure rights so that the potential for intra-group violation diminishes if inter-group rights are granted. Ayelet Shachar, "Two Critiques of Multiculturalism" (2001) 23 *Cardozo Law Review* 253. Shachar advocates a joint governance approach where competing jurisdictions act as constraints on cultural groups and cultivate motivations for them to eliminate intra-group subordination. This approach

strives for the reduction of injustice *between* minority groups and the wider society, together with the enhancement of justice *within* them ... Under this system, both the state and the group can no longer take the old style of jurisdictional monopoly for granted because individuals are given leeway in deciding which substantive legal systems they will be subject to in different social arenas. And since each authority must now earn the individual's continued attachment by deed, this in turn creates a more complex incentive structure, and means that the traditions and conduct of both group and state authorities are held to higher standards (at 294–5).

11. So stated, the differentiated approach would appear identical to liberal articulations of a right to culture outside of feminist literature where group rights are permissible so long as they do not threaten individual freedoms. Indeed, the differentiated approach shares this concern. However, as we shall see, the differentiated approach draws on postcolonial insights so that the result precludes any close comparisons to liberal arguments in defense of multiculturalism. Will Kymlicka's defence of a right to culture, *supra* note 9, stands out as a prime example. See Seyla Benhabib's critical discussion of his position in Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002) at 59–67.

mean activities that result in actual or foreseeable harm, which make conditions for marginalized individuals worse than they would have been without the legal recognition of the cultural claim. Note that intent is irrelevant under this test for subordination. Note also that the fact that a cultural claim does not *improve* the situation of marginalized individuals does not transform it into a "subordinating" claim.

My aim is not to develop a systematic theory that will apply across all contexts to all cultural claims but rather to further refine the proposals that have already been made with the goal of moving "beyond a dilemma, paradox, or inconsistency"¹² that remains in the existing proposals. Accordingly, this article discusses the body of literature that has emerged over the past decade, identifying the different responses feminists have offered to cultural claims within law. My analysis primarily addresses the work of prominent feminist legal theorists, defined as those scholars writing predominantly in law reviews.¹³ This focus allows me to concentrate on the proposals of feminists who have turned their attention to the question of what law should do with cultural claims, leaving larger, less strictly juridical issues of deliberative democracy and multicultural dialogues to the philosophers and political theorists. The first part of this article identifies two main approaches in the existing literature: the universalist and the postcolonial. The second part demonstrates why a differentiated approach is preferable to both of these approaches from an ethical feminist perspective. In the second part, I extend the current articulations of the differentiated approach by taking up the concept of subordination and the question of what a claim that does not subordinate internal cultural dissenters would look like. I identify some guidelines by which to adjudicate or determine which cultural claims should, under an ethical feminist framework, pass this "no internal harm or subordination" test.

Legal Feminist Responses to Culture

Feminist legal scholarship on the challenge that multiculturalism poses to gender equality can be grouped into three separate camps: universalist, postcolonial, and differentiated. The common strand running through the literature is a general wariness of culture discourse, but the theoretical reasons for the wariness, and the practical conclusions reached, vary. In this section of the article, I discuss the first two approaches, considering their strengths and weaknesses under an intersectionalist feminist framework. In the second part of the article, I turn to the differentiated approach to show why it should be preferred.

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12. Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton, NJ: Princeton University Press, 1997) at 5.
 13. Thus, some of the excellent feminist scholarship that I do not undertake a close reading of includes Benhabib, *supra* note 11; and Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third World Feminism* (New York: Routledge, 1997).

Universalist Approach

The universalist approach is exemplified in the work of Susan Moller Okin, most recently in her essay "Is Multiculturalism Bad for Women?"¹⁴ Okin's thesis is that the historically recent surge in the recognition of the group rights of minority cultures within Western liberal democracies under the political impetus of multiculturalism has dangerous implications for women within these minority cultures. She argues that it is wrong to regard the accommodation of group cultural difference as progressive because such accommodation often entails deference to cultural practices that are oppressive to women within the minority culture. She concludes that feminists should be exceedingly suspicious of group rights based on culture.

Okin takes issue with advocates of group rights who wish to secure the cultural survival of minority cultures, yet are insensitive to the claims of vulnerable groups within a minority culture. She also criticizes theorists such as Will Kymlicka who restrict their support for state multicultural accommodation to cultures that are internally liberal or, in other words, to minority cultures that do not internally oppress their vulnerable members. Such theorists, Okin claims, do not go far enough in ensuring that minority cultures treat their male and female members equally, because they usually only demand assurances that such cultures do not formally or overtly discriminate. Okin insists that many cultures that would pass this prohibition against overt discrimination test actually practise pervasive covert gender discrimination, which is left uncensored by multicultural accommodation policies.

Okin's position is based on the premise that the minority culture is usually more hostile to women than the majority liberal culture of which it is a part. She primarily has in mind Western liberal democracies containing minority cultures from the Third World that make troubling cultural demands.¹⁵ Although Okin

14. Susan Moller Okin, "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, eds., *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 9 at 10. Okin is a feminist political theorist more than a legal feminist, but it is imperative to consider her scholarship since it has prompted so much explicitly legal theorizing by feminists.

15. Okin, *ibid.* at 16–17, writes:

While virtually all of the world's cultures have distinctly patriarchal pasts, some—mostly, though by no means exclusively, Western liberal cultures—have departed far further from them than others. Western cultures, of course, still practice many forms of sex discrimination ... But women in more liberal cultures are, at the same time, legally guaranteed many of the same freedoms and opportunities as men. In addition, most families in such cultures, with the exception of some religious fundamentalists, do not communicate to their daughters that they are of less value than boys, that their lives are to be confined to domesticity and service to men and children, and that their sexuality is of value only in marriage, in the service of men, and for reproductive ends. This situation, as we have seen, is quite different from that of women in many of the world's other cultures, including many of those from which immigrants to Europe and North America come.

takes the view that all individuals within the West have a culture, the examples that she gives of problematic practices—veiling, polygamy, clitoridectomy, child marriage, and marriage by capture—make it clear that the cultures that she views as “bad” for women are non-Western ones. Her solution is to enculturate minority cultures into the Western liberal majority culture either by adjusting gender norms within the former so that they espouse gender equality or, alternatively, by integrating members of the former into the latter until the problematic minority cultures become extinct.¹⁶ Okin views multiculturalism as a political project opposed to the aspirations of feminism and thus would appear to answer the question she has posed—is multiculturalism bad for women?—in the affirmative. She does not seem to view multiculturalism as a potential ally for feminism in disrupting the exclusionary aspects of liberalism.

Universalist Approach and Intersectionality: At Cross-Purposes

Okin sees only peril, not promise, in the multicultural enterprise.¹⁷ She thus easily and wholeheartedly rejects it. Her critique re-universalizes the concept of citizenship¹⁸ insofar as it forces minority women, as a variant of an “at-risk” subcultural group, to choose between their cultures, on the one hand, and their citizenship in a liberal polity that threatens their cultures with extinction if they do not alter their gender relations, on the other.¹⁹ Thus, what is problematic about Okin’s approach and what makes it “universalist” is not that it makes a universal claim (that is, of course, what all the approaches, including mine, do as well). Rather, the problem lies in the imagination of citizenship in Western liberal states as reflective of a single, purportedly egalitarian Western culture opposed to alien, non-Western cultures that are oppressive of women. This liberty versus equality paradigm is a weak one.²⁰ Fundamentally, its either/or binary is unsatisfying—either a vulnerable member sacrifices liberty in favour of her cultural identity by residing in a non-liberal state where her culture is the majority one or she loses her cultural community for the liberal equality of the public sphere, which is purportedly culturally neutral but actually adopts the mainstream culture.

Not surprisingly, Okin’s provocative claims have elicited an array of responses.²¹ While a few are sympathetic to Okin’s formulation of the tense interplay between gender and culture,²² many have been critical. The strongest

16. *Ibid.* at 22–3.

17. Shachar, “Two Critiques,” *supra* note 10 at 259.

18. Ayelet Shachar, “The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority” (2000) 35 *Harvard Civil Rights–Civil Liberties Law Review* 385 at 400.

19. *Ibid.* at 403.

20. Madhavi Sunder, “Cultural Dissent” (2001) 54 *Stanford Law Review* 495 at 551.

21. Many of these have been compiled into a collection with Okin’s article as the lead: Cohen, Howard, and Nussbaum, eds., *supra* note 14.

22. See, for example, Katha Pollitt, “Whose Culture?” in Cohen, Howard, and Nussbaum, eds., *supra* note 14 at 27; Saskia Sassen, “Culture Beyond Gender,” in Cohen, Howard, and Nussbaum, eds., *supra* note 14 at 76; Yael Tamir, “Siding with the Underdogs,” in Cohen, Howard, and Nussbaum, eds., *supra* note 14 at 47.

criticism of the universalist approach points to its incompatibility with intersectionality.²³ Recall that Okin wants "us" (read: members of Western liberal democracies) to approach claims of culture with acute suspicion due to her belief that women belonging to minority cultures are more at risk of subordination from within their culture than without. This perspective violates ethical feminism to the extent that it revives colonial dynamics of Othering.²⁴ It does so in three steps.

First, Okin's perspective relies on an Enlightenment theory of cultural ranking, wherein the West's state of gender relations marks it as a superior state of political organization to which non-Western cultures should aspire. Okin's premise that non-Western cultures are more hostile to women than Western ones is reminiscent of the hierarchy-infused trajectory of social evolution on which non-Western cultures were forever lagging behind the West on all indicators of "progress," particularly gender relations. Critics charge Okin with not knowing very much about the cultures she targets and with creating a monolithic picture of all non-Western cultures as being hostile to women with no "local traditions of protest, no indigenous feminist movements, no sources of cultural and political contestation."²⁵ This lack of understanding, in turn, leads Okin, despite her assertion to the contrary, to imbue the concept of culture with foreignness and negativity.²⁶ Second, Okin's approach uncritically advances a trope of victimization for the women in these cultures, accompanied by an erasure of their agency. This trope arises out of the belief that the contested sexist practices do not hold any positive meanings for cultural minority women. Okin's resistance to alternative interpretations betrays her construction of culture as stable and the meaning of any cultural practice as consistent across time and place despite the effects of migration, dislocation, globalization, and the particular Western home to which it has been introduced. Third, this investment in the colonialist construct of gender provides the rationale for exposing non-Western cultures and peoples to

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23. Okin has been criticized by Volpp and others, and I do not wish to linger on the problems with her argument here other than to note my agreement with Volpp's critique. See Leti Volpp, "Feminism Versus Multiculturalism" (2001) 101 *Columbia Law Review* 1181. What is worth eliciting from this broad critique are the specific reasons why Okin's version violates the concept of ethical feminism as I have earlier defined it.
 24. Othering refers to the process by which First World colonial subjectivities and the justification for colonialism were formed. It is a remnant of modernity that relied on hierarchically ordered binaries to construct social and cultural differences. These perceived differences were then used to establish a relation of inferiority and superiority between the colonizer and the colonized wherein the traits or values attributed to the former were lauded and normalized and those of the latter were marginalized as "different." It is through this process of creating an "Other" and denying the Other's status as a subject that the Western Self was able to emerge and acquired meaning. Othering processes continue in current power-laden discourses about Third World peoples and other marginalized groups. Inderpal Grewal, "Autobiographic Subjects and Diasporic Locations: Meatless Days and Borderlands," in Inderpal Grewal and Caren Kaplan, eds., *Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* (Minneapolis: University of Minnesota Press, 1994) 231 at 231–4.
 25. Homi K. Bhabha, "Liberalism's Sacred Cow," in Cohen, Howard, and Nussbaum, eds., *supra* note 14, 79 at 82.
 26. Bonnie Honig, "My Culture Made Me Do It," in Cohen, Howard, and Nussbaum, eds., *supra* note 14, 35 at 39.

the social engineering efforts of Western political norms and institutions either through the partial absorption of Western gender norms or, if necessary, by cultural extinction.

In short, Okin's work is theoretically unresponsive if we choose to see culture as a verb instead of as a noun²⁷ and if we wish to write against a colonial script in our interpretations of controversies of culture. One has to undertake a meticulous reading in order to distinguish Okin's arguments from those lamenting the so-called special treatment of minorities and the resulting denigration and loss of pride in Western host cultures.²⁸ Her simplified account props up a dichotomous framework where "cultural membership and its accommodation is either good or bad for women. She refuses to consider what it most often is: both good and bad, simultaneously."²⁹ Instead of thinking about how to create intersectional experiences of equality, autonomy, and justice, Okin locates equality in a

27. Rosemary Coombe and Andrew Herman, "Trademarks, Property, Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web" (2000) 50 DePaul Law Review 597 at 601.

28. Consider how different Okin's argument is from the one presented by Minette Marrin, "At Last, a Debate That Will Penetrate the Racial Fog," [*London*] *Sunday Times* (10 February 2002) at 21, defending a 2002 white paper entitled *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (Norwich, UK: HMSO, 2001) presented to the British Parliament by the home secretary. The white paper questioned the practice of arranged marriages by South Asian immigrants and proposed that the ability to speak English and the demonstration of knowledge about British culture become requirements for citizenship. According to Marrin, the white paper attracted the "usual cries of racism and brandishings by radical lawyers of human-rights legislation." She writes:

[A]ny arranged marriage is unappealing, perhaps even shocking, to people within the host culture—yes, I know we're not supposed to say host culture, as it's considered horribly monoculturalist. But the idea of parents arranging a marriage for a British boy or girl with a virtual stranger from the Indian subcontinent causes real resentment. It is hard not to suspect that the point is to get a prized British passport for the foreigner and to enable people to jump the immigration queue ... The argument is that this is a cultural tradition and that people who believe in multicultural Britain and who celebrate diversity (an annoying phrase), should respect it ... But why? ... This [fallacy of the assumption that all cultures are equal] has at last become clear to outspoken multiculturalists over the question of women's rights; multicultural theorists in Britain have had to start calling themselves post multiculturalists, because even they can no longer ignore the fact that so many minority cultures desecrate the sacred western belief in the rights of women. Arranged marriages can still just about be overlooked but many other practices, such as female circumcision, have rather quaintly shown people the light ... Multiculturalism is an idea that has done a lot of damage. In its name the indigenous culture of Britain has been shamed, belittled and ignored.

Although Okin's comments do not stem from a sense of majority culture pride and anti-immigrant resentment as Marrin's do, the argumentation with respect to the interaction of Western feminism and multiculturalism is remarkably similar.

29. Shachar, "Puzzle," *supra* note 18 at 402.

culturally unitary public sphere and advocates cultural assimilation of all (Third World) subcultures into the majority liberal one.

Postcolonial Approach

The universalist account acknowledges the fluidity of culture but still tends to deploy the term as a stable category—that is, it treats groups as having static cultures and presents the recognition or non-recognition of these cultures as being the salient question. The postcolonial and postmodern³⁰ view of culture treats the instability of culture more seriously by targeting culture for deconstruction. Postcolonial theorists agree with Okin to the extent that they seek to refute the claims of cultural relativists that international human rights norms concerning women's equality violate the integrity of non-Western cultures.³¹ They arrive at that conclusion, however, through a postmodernist account of culture rather than the "hegemonizing and universalizing solutions posed by liberal rights discourse."³² Postcolonial critics argue against most cultural claims, but they do it

30. This is not to suggest that "postcolonial" and "postmodern" are synonymous terms. "Postcolonialism" refers to the school of thought that criticizes the racialized and sexualized modernist narratives of imperialism that revolved around the dichotomies of West/East, civilized/barbaric, reason/emotion, agent/native wherein the West was associated with all of the terms on the left-hand side and the colonies were associated with all of the terms on the right-hand side. Of course, the left-hand terms were the desirable traits while the right-hand terms were the markers of backwardness. Postcolonialism criticizes the social Darwinist view that animates past and present colonial encounters. This theory asserts that all cultures, like biological organisms, may be placed on an evolutionary path, with the West occupying the top position as the "fittest" example of the qualities that all societies should emulate. In its interrogation of dichotomies and universals based on discourses of race, sex, and nation, postcolonialism may be viewed, despite significant differences, as a prominent strand of postmodernist philosophy in general. Postmodern thought aims to deconstruct all universals and metanarratives, but particularly the rationalist doctrine and the Cartesian idea of the human subject made popular by Enlightenment thought. See generally Michèle Barrett, "Words and Things: Materialism and Method in Contemporary Feminist Analysis," in Michèle Barrett and Anne Phillips, eds., *Destabilizing Theory: Contemporary Feminist Debates* (Stanford: Stanford University Press, 1992) 201 at 207–8. My use of the term "postcolonial" does not disavow the discomfort that postcolonial scholars have with it. See, for example, John C. Hawley, ed., *Postcolonial, Queer: Theoretical Intersections* (Albany, NY: SUNY Press, 2001) at 2–3; Kwame Anthony Appiah, "Is the Post- in Postmodernism the Post- in Postcolonial?" (1991) 17 *Critical Inquiry* 336, reprinted in Padmini Mongia, ed., *Contemporary Postcolonial Theory: A Reader* (London: Arnold, 1996) 55; and Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Conquest* (New York: Routledge, 1995) at 10–14.

31. The postmodern turn in cultural critique is not the first time that feminist theory has taken up the complicated issue of the legitimacy of group claims. Iris Marion Young's groundbreaking work in thinking about rationales for differentiated citizenship is a prime example. Young considers the problems posed by the traditional universal account of citizenship for minority social groups whose ability to flourish depends on the state being able to "see" and "recognize" their differences. Young presents an impassioned defense of why justice for minority groups requires a sense of equality and citizenship that recognizes differences. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); see also Young, "Polity and Group Difference," *supra* note 9.

32. Ratna Kapur, "Imperial Parody" (2001) 2 *Feminist Theory* 79 at 81.

from a postmodern perspective—that is, with skepticism for disembodied, ahistorical, and universal claims from nowhere³³ and from an anti-racist perspective that sees the imprint of imperialist ideology on any theory of cultural hierarchy based on gender equality. These two perspectives distinguish postcolonial approaches from the universalist one. The primary postcolonial contention is that culture, whether used by proponents or opponents of multiculturalism, must receive a more nuanced meaning within these debates.

The skepticism that postcolonialists attach to cultural claims is in large part an effort to signal their disagreement with both modernist narratives that frame cultures as discrete and unified sets of relatively static traditions and practices that distinguish the “primitive” tradition-bound inhabitants of non-Western societies from the reason-bound inhabitants of the West.³⁴ Such critics see culture as a dynamic practice of making and remaking meanings that are provisional, shifting, and partial where participation in cultural acts and ongoing cultural contestation is something that all humans do.³⁵

Rosemary Coombe’s work is at the forefront of this critical engagement with culture in the legal realm. Coombe insists that we abandon all inclinations to establish one single relationship between law and culture.³⁶ To set out a single definition would be to reify these concepts as separate entities, which would replicate Enlightenment and Romantic discourses that imagined law and culture “conceptually as autonomous realms”³⁷ and would “legitimate and naturalize bourgeois class power and global European hegemonies.”³⁸ A significant element of Coombe’s project has been to unearth how the social constructions of both law and culture circulated in eighteenth- and nineteenth-century political and social thought to create the idea of the West *vis-à-vis* the colonies.³⁹ Law, which

33. Jenny Wolmark, “Introduction and Overview,” in Jenny Wolmark, ed., *Cybersexualities: A Reader on Feminist Theory, Cyborgs and Cyberspace* (Edinburgh, UK: Edinburgh University Press, 1999) 1 at 5.

34. Rosemary Coombe, “New Direction: Critical Cultural Legal Studies” (1998) 10 *Yale Journal of Law and the Humanities* 463 at 474.

35. Coombe and Herman, *supra* note 27.

36. Rosemary Coombe, “Contingent Articulations: A Critical Cultural Studies of Law,” in Austin Sarat and Thomas R. Kearns, eds., *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998) 21.

37. *Ibid.* at 21.

38. *Ibid.*

39. Other elements of Coombe’s discussion of law’s relation to culture focus on intellectual property law and its role in constraining, managing, and enabling various identities and political resistance. See, for example, Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, NC: Duke University Press, 1998); Rosemary J. Coombe, “Sports Trademarks and Somatic Politics: Locating the Law in a Critical Cultural Studies,” in David Theo Goldberg, Michael Musheno, and Lisa C. Bower, eds., *Between Law and Culture: Relocating Legal Studies* (Minneapolis: University of Minnesota Press, 2001) 22; and Rosemary J. Coombe, “Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders,” in Martha Woodmansee and Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC: Duke University Press, 1994) 101.

"develop[ed] conceptually as the antithesis of culture,"⁴⁰ distinguished the West from the lawless, culture-bound colonies. The Europeans had culture, but a culture understood as "High Culture"—art, music, and classics—which constituted the refinements of civilization.⁴¹ The only type of culture associated with the colonies was a catalogue of myths, traditions, and customs. This dichotomous concept of culture emerged through law to mark one set of peoples as constituting a higher civilization superior to the inferior "races." Non-Western cultures were presented as static and non-evolving, whereas Europeans were constantly negotiating complex and evolving institutions and identities.

To undo this genealogy of culture, Coombe asks us to imagine culture as a practice of continually emergent differentiation, contestation, negotiation, and agency and to focus on the scattered power relations that shape these actions and the dissent and resistance they generate.⁴² Within this space, individuals play and struggle with the ambiguities of any particular sign or form, reinforcing or subverting dominant meanings. The law can assist in the processes of undermining or legitimating cultural forms. Further, Coombe cautions that we cannot view law simply as a passive receptor, detached from the practice of making meanings and simply waiting to recognize cultural claims when called upon to do so by identity politics. Rather, it is more accurate to think of the law as a participant in making meanings and, further, "as a central locus for the control and dissemination of those signifying forms with which difference is made and remade."⁴³

Coombe wants to explore the cultural life of law without antiquated notions of integrated and coherent cultures. Her notions of play and struggle in relation to culture make discussions about a single culture attaching to a discrete set of people particularly suspect. Yet this deconstruction of culture does not lead her to disavow the possibility of "real" or "genuine" group identities. Instead, Coombe is concerned with charting instances of cultural claims and with exploring whether the legal recognition of such claims refashions the law as an emancipatory site or whether it results in the replication of existing hierarchies. Her aim is to encourage scholars to carry out this charting rather than to appraise normatively the equality dimensions of cultural claims in general.

Other postcolonial legal feminist critiques of culture have ventured more concretely into the area of what a nuanced vision of culture entails for law. Ratna Kapur's recent writings offer a good example.⁴⁴ Kapur's work centres on the ideologies of *Hindutva* and other conservative social actors in India—including, at times, mainstream feminists—and the ramifications such ideologies have for

40. Coombe, "Contingent Articulations," *supra* note 36 at 23.

41. Coombe, "Critical Cultural Legal Studies," *supra* note 34 at 474.

42. Coombe, "Contingent Articulations," *supra* note 36.

43. *Ibid.* at 37.

44. Ratna Kapur, "Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India" (2001) 10 *Columbia Journal of Gender and Law* 333. Uma Narayan is another notable feminist, albeit not a legal feminist, whose work matches this description; see, for example, Narayan, *supra* note 13.

cultural discourses. *Hindutva* is the ideology of the Hindu Right⁴⁵ (whose main political arm, the Bharatiya Janata Party (BJP), was, until the federal elections of May 2004, the governing party in India), which wishes to convert India from a secular to a Hindu state. Kapur argues that culture plays a key role in the Hindu Right's discourse and organization—a fact violently borne out in recent years with the staging of the Miss World Beauty pageant in Mumbai as well as screenings of *Fire*, a film charting the development of a lesbian romance between two sisters-in-law in New Delhi.⁴⁶ The Hindu Right protested these two cultural events and attempted to censor depictions of human sexuality from satellite broadcasting in general on the ground that the sexual representations within them are anathema to Indian culture. The Hindu Right has similarly invoked the "culture card" to resist the efforts of sexual subalterns⁴⁷ such as gay men, lesbians, and sex workers to mobilize for their rights. Mainstream women's groups have also opposed the proliferation of sexual images on the basis that such representations violate traditional Indian social and cultural norms.

Kapur argues that, with the assistance of law, these social actors are promoting an essentialist narrative that characterizes displays of sexuality—and, in particular, subaltern sexualities—as alien to Indian culture and as perverse Western cultural imports that should be expunged from the nation's cultural terrain. The Hindu Right has portrayed sex as "a negative, contaminating and corrupting force" of a pure, virginal, Indian culture.⁴⁸ Sex is seen as a threat to the nation's existence. Kapur contests this essentialization and naturalization. She examines culture as a discursive tool that is often used to alter collective ideas about gender relations and nationhood.

Instead of viewing cultures as complete and integrated symbol systems that unite people based on commonalities, Kapur, like Coombe, advances a view of culture that recognizes its hybridity. The hybrid view of culture emphasizes the "points of difference ... discontinuity and dispersal" over the points of commonality and its different constitution at various historical moments.⁴⁹ For Kapur, like many postmodern and postcolonial critics, culture is the contingent act of contesting and negotiating multiple meanings rather than passively following an integrated symbol or value system. Her response to the invocation by the Hindu

45. The Bharatiya Janata Party (BJP) is closely tied to the primary religious component aimed at grassroots mobilizing, the Vishwa Hindu Parishad (World Hindu Council). The third element of the Hindu Right, the Rashtriya Swayamsevak Sangh, is a para-military organization responsible for much of the training and education of Hindu communalism among the elite on which the Hindu Right relies. Kapur, "Postcolonial Erotic Disruptions," *ibid.* at 374, n. 101. See also Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage, 1996) at 235–75; Tanika Sarkar, "Heroic Women, Mother Goddesses: Family and Organisation in Hindutva Politics," in Tanika Sarkar and Urvashi Butalia, eds., *Women and the Hindu Right: A Collection of Essays* (New Delhi: Kali for Women, 1996) 181.

46. Kapur, "Postcolonial Erotic Disruptions," *supra* note 44 at 337.

47. As Kapur notes, the term "subaltern" derives from subaltern studies where the term is used as shorthand to signal the "disparate range of sexual minorities within postcolonial India, without suggesting that it is either a homogenized or stable category" (*ibid.* at 357, n. 61).

48. *Ibid.* at 340.

49. *Ibid.* at 341.

Right and mainstream women's organizations of a shared Indian culture in need of protection from sexual expression is to interrogate the presumed shared valuation of cultural meanings, to expose the dissent within a particular group, to reveal the social construction of purported "traditions" and "practices," and to resist proposals that would attempt a totalizing definition of a culture or freeze its meaning.⁵⁰

Notwithstanding her unrelenting criticism of recent cultural discourse in India, Kapur recognizes that "culture talk" has its advantages. She is aware of the benefits that might accrue to sexual subalterns if they can successfully cloak their arguments for the right to pursue a particular activity under the persuasive covering of "culture." Kapur ultimately resists such a move, preferring strategic deployments of culture only when they are "based on the idea that culture is never stagnant and fixed, but is constantly shifting and fluid."⁵¹ Kapur is wary of the proclivity of even the strategically essentialist use of culture—that is, the use of essentialist notions of culture by marginalized groups to subvert hegemonic cultural narratives—to marginalize dissident expressions of culture. Strategic use of essentialism, she argues, generates its own exclusionary discourse.⁵² She is only open to discourse that makes way for new cultural expressions and retains a provisional and contingent identity.

Madhavi Sunder⁵³ further uses a postcolonial concept of culture to focus on the property implications of arguments opposing "cultural dissent" on the basis that dissent or subversion will taint or otherwise pollute the "real" (in this case, Hindu) culture. Sunder identifies such arguments, while not expressly invoking intellectual property law, as seeking to "own" the culture and to exert control over its meanings, values, norms, and interpretive boundaries—much like a property owner would control his or her home and access to it.⁵⁴ She is aware that not only reactionary politicians and their followers make such claims asserting property rights to culture. More and more equality-seeking minorities are pressing for intellectual property rights in their own cultures in order to guard against what they view as the unethical appropriation of their cultural resources by agents of Western imperialism.⁵⁵ In particular, Sunder notes that feminists also make

50. *Ibid.* at 371–84.

51. *Ibid.* at 377.

52. *Ibid.* at 377–81, drawing from Gayatri Spivak's discussion of the term in Gayatri Chakravorty Spivak and Ellen Rooney, "In a Word: Interview," in Naomi Schor and Elizabeth Weed, eds., *The Essential Difference* (Bloomington: Indiana University Press, 1994) 151 at 153.

53. Madhavi Sunder, "Intellectual Property and Identity Politics: Playing with Fire" (2000) 4 *Journal of Gender, Race and Justice* 69.

54. *Ibid.* at 75–6.

55. *Ibid.* at 73. Although this is not the reason that Sunder uses to denounce property rights in cultural forms, she also signals her discomfort with the property framework by noting that minority groups make such demands despite the historical denial of property rights to minority groups.

progressively oriented claims for protection that rely on such stable notions of culture.⁵⁶

Such reliance is a fantasy in Sunder's view, given a global landscape characterized by multiple and constant criss-crossing "culture flows facilitated by technology, diaspora, globalization, and liberalization," such that "it is increasingly difficult to distinguish what cultural changes are part and parcel of modernity and what changes are spurred by a culture falling prey to cultural imperialism."⁵⁷ Accordingly, she rejects claims about the appropriation of culture premised on a belief that culture is capable of being, and should be, controlled by a distinct set of people.⁵⁸ Moreover, culturally protectionist arguments curtail individual freedom to play with culture and dissent from internal norms.

Sunder's concern about the power of cultural elites to continue to monopolize cultural meanings to the exclusion and oppression of vulnerable internal cultural members leads her, like Kapur, to advocate a legal doctrine of cultural dissent.⁵⁹

56. In particular, Sunder describes the response to the feature film *Fire* by Madhu Kishwar, arguably India's most prominent advocate for women's rights and the editor of *Manushi*, a pure donor-funded periodical addressing issues of social justice affecting women. Kishwar criticized the film and its Indian-Canadian director, Deepa Mehta, for her repeated references to "tradition" and the disposition of Indians—especially Indian women—to follow it. Kishwar viewed the representation of Indian women as not radical (as its supporters and critics claimed), but as fundamentally wedded to colonial representations that portray Indian women as tradition-bound unless such women are dramatically challenging heterosexist or gender roles. Kishwar accused Mehta of pandering to the tastes of a Western market expecting to commiserate with the archetypal oppressed Indian woman. Madhu Kishwar, "Naïve Outpourings of a Self-Hating Indian" (1998) 109 *Manushi*, available online at <<http://free.freespeech.org/manushi/109/fire.html>> (date accessed: 14 July 2004). Sunder ("Intellectual Property," *supra* note 53 at 84) describes Kishwar's criticism as "too sweeping" for insisting that, to be anti-imperialist, one must reject all things Western and favour all things Indian. Yet this in itself seems to be too sweeping a criticism of Kishwar, who does not denounce the film for glorifying behaviour that audiences will associate with being Western—wearing jeans, rebelling from one's family, having extra-marital and lesbian sex—but criticizes it for relying on colonial narratives about tradition-bound India to illustrate its themes. For Kishwar, Mehta may have succeeded in showing two Indian women as cultural agents, but did so by casting all other Indian women as tradition-bound. Sunder does not engage the nuances of the problem identified by Kishwar.

57. Sunder, "Intellectual Property," *supra* note 53 at 94.

58. Indeed, Sunder divests "cultural appropriation" of its negative connotations among progressives sympathetic to the claims of subordinated peoples seeking to preserve what little cultural heritage they perceive remaining after repeated instances of others profiting from their cultural resources. Sunder states:

In contrast to the view that cultural appropriation constitutes a "taking" from a culture that is not one's own, another view is that "cultural appropriation encompasses a very broad and pervasive phenomenon as cultural influences blend and merge in constantly layered ways." This understanding of cultural appropriation is premised upon a view of "culture as contested, historically changing, and subject to redefinition" through culture flows and challenges to status quo interpretations of culture, rather than a view of culture as "a bounded and integrated system of meanings" (*ibid.* at 91–2, citing Sally Engle Merry, "Law, Culture, and Cultural Appropriation" (1998) 10 *Yale Journal of Law and the Humanities* 575 at 586, 602).

59. Sunder, "Cultural Dissent," *supra* note 20.

This doctrine is in contradistinction to the doctrine of cultural survival, which Sunder argues prevails in the United States and elsewhere. Under the doctrine of cultural survival, the law, in the name of multiculturalism, protects traditional reified and totalized ideas of culture advanced by cultural elites seeking to preserve their stronghold over "meaning-making" within a culture. By upholding the view of culture as a static construct imposed from the top down by cultural authorities and texts, law privileges the interpretations of cultural elites as "authentic." Conversely, law constructs the interpretations of cultural dissenters as "political" rather than as legitimate active participation in cultural contestation, which is itself a form of cultural "meaning-making." Sunder's insight is that "[c]urrent law elides cultural dissent in [every sense] of the word."⁶⁰ She makes the same argument as impressively with respect to the law's delicate treatment of the private sphere of religion despite the injustices that routinely occur therein.⁶¹

As a result of her concern with the discrimination perpetrated by cultural and religious elites, Sunder proposes that the law should resist cultural claims, with the exception of those articulated by cultural dissenters in such a way as to emphasize the dynamic, shifting, and hybrid nature of culture and the plurality of perspectives, interpretations, and meanings within any given culture.⁶² Sunder has little or no tolerance for cultural survival claims resting on totalized accounts of culture even when cultural survival is at stake and the threat is from an external source rather than from internal subalterns. While she does not share Kapur's advocacy of the elimination of culture from legal discourse,⁶³ and even encourages the use of law to promote equality within cultural and religious spheres, Sunder, like Kapur, would only allow those dissenting cultural claims that envision cultural agency and hybridity and do not stifle other subcultural voices themselves. The postcolonial penchant is for cultural claims that diversify, modernize, and accelerate the pace of equality and justice within cultures.

Intersectionality and the Postcolonial Approach: Cultural De(con)struction?

There is much to commend in the postcolonial approach. My main reservation is not in relation to its theoretical insights, with which I agree, but with its ultimate resignation to the practical political consequences of its cogent critique for minority cultures. The balance it strikes between extra-cultural (for example, gender) equality and cultural equality is too uneven, and the primary reason for this balance—an insistence on anti-essentialism at any cost—is too extreme.

Although at a conceptual level, Kapur portrays culture less problematically than Okin, her reading of its instabilities leads her towards a path of inaction, potentially letting culture in only where it is strategically useful in enabling

60. *Ibid.* at 549.

61. Madhavi Sunder, "Piercing the Veil" (2003) 112 Yale Law Journal 1399.

62. *Ibid.* at 557–60.

63. See *infra* note 65 and accompanying text.

cultural subalterns to speak. Even then, Kapur is skeptical of the wisdom of the argument and views claims cast in cultural discourse as a last resort. She gives the example of gay and lesbian advocacy—cultural dissent in India as elsewhere—and notes that this cultural discourse too reverts to essentialism. That is, the countercultural discourse advanced by gays and lesbians “is overwhelmingly a Hindu rendition. Their story for the inclusion of gays and lesbians can be said to be at the cost of the exclusion of another minority—a religious minority, namely the Muslims.”⁶⁴ Kapur’s point is that even the most subversive of cultural discourses will entail the undesirable result of essentialism—freezing cultural interpretation that should be free-floating.

As a way out of this essentialist dilemma, Kapur suggests recognition of sexual subversion irrespective of its relation to culture. In other words, the evaluation of sexual practices should not be based on rankings of cultural authenticity but rather on their ability to provide pleasure to the recipient. She explains:

[The female subject at the point of orgasm] can assist in moving beyond the cultural essentialist/anti-essentialist divide. Cultural essentialism that is used for either dismissing or validating issues of sexuality is not in and of itself helpful. The use of culture to argue against the existence of female sex and sexuality or against the existence of the sexual subaltern reinforces dominant sexual ideology and the idea that there is just “one way to do it” and “live it.” Similarly, cultural explanations that try to prove the existence of these “contaminants” within Indian culture can become their own exclusionary discourses ... In the sexuality debates, the sexual subject is a site of cultural contest, where the cultural legitimacy entails making a claim of authenticity. And these claims rest, albeit momentarily, on cultural essentialism.

Shifting the focus onto the location and desire of the sexual subject creates the possibility of disrupting both the sexual and cultural script.⁶⁵

Kapur thus proposes a focus on sexual pleasure to assert rights to what is currently sexual cultural dissent without relying on cultural claims. The only claim this subject-in-pleasure makes is that Indian culture(s) should embrace pleasuring activities (which presumably do not inhibit the sexual or other cultural dissent of others) not because this cultural hybridity is a cultural value but rather because

64. Kapur, “Postcolonial Erotic Disruptions,” *supra* note 44 at 378.

65. *Ibid.* at 381.

cultural hybridity enables more people to experience sexual pleasure. Sexual pleasure, not whatever is authentic culturally, is the inherent good for Kapur. She favours this view over a strategic use of culture because it does not entail the use of essentialist claims even for salutary strategic ends—the pleasure claim is particular to the individual.

While the subject-in-pleasure does the work that Kapur wants it to do, namely disentangle the issue of sexual rights from the tentacles of culture, it would seem to resolve the cultural conundrum only in situations where physical pleasure is involved. What is the alternative to culture in situations where there is no other available principle on which to rest claims? The subject-in-pleasure is not of much use to indigenous groups who want to protect their cultural resources from non-indigenous ownership, whether physical or discursive. Kapur would presumably resist the cultural claims of these groups, even if she were to construe them as strategically essentialist, because they make a claim about cultural authenticity and thus enact the reifying essentialist move, which may then turn into a “unifying, essentialist and exclusionary discourse.”⁶⁶ Since this cultural battle is not about sexual pleasure or even pleasure in the general sense, I doubt that Kapur would intend her subject-in-pleasure to perform any work in this situation. She limits her comments about “moving beyond the cultural essentialist/anti-essentialist divide” to sexuality debates.⁶⁷ Yet this limits her disentanglement from the essentialism quandary to controversies involving activities that provide sexual pleasure and returns us in all other contexts to the question of how to intervene in the problematic discourse of culture if we are unable to leave it behind.

Nor are indigenous peoples resisting colonialism likely to find support in Sunder’s position. In applying her proposed doctrine of cultural dissent to concrete legal controversies, Sunder discusses its implications for the related question of tribal sovereignty over membership—an issue that is closely associated with the United States Supreme Court decision in *Santa Clara Pueblo v. Martinez*.⁶⁸ In this decision, the court upheld a Pueblo membership rule even though it discriminated against women. The court justified its decision in part on the right of the Pueblo, as a sovereign tribal nation, to “maintain itself as a culturally and politically distinct entity.”⁶⁹ Sunder explains how her doctrine of cultural dissent would have found in favour of the Pueblo woman and her daughter who claimed that the rule infringed the equality provisions in the federal *Indian Civil Rights Act*.⁷⁰

[A] cultural dissent approach recognizes that, in the modern world, cultural distinctiveness and sovereignty are often attained only by actively suppressing claims for greater autonomy and equality within a culture. A cultural dissent approach rejects easy acceptance of a notion of

66. *Ibid.* at 378.

67. *Ibid.* at 381.

68. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) [hereinafter *Santa Clara Pueblo*].

69. *Ibid.* at 72.

70. *Indian Civil Rights Act*, 25 U.S.C.S. § 1301.

Pueblo culture as static and hermetically sealed, instead viewing native cultures as exposed to modern ideas from inside and outside of the culture ... Complicated issues of tribal sovereignty aside, a cultural dissent approach puts pressure on the notion that cultural distinctiveness requires protection from modernization and mainstreaming—indeed, cultures remain distinctive even as they change.⁷¹

Although this extract, and her larger argument to replace the doctrine of cultural survival with the doctrine of cultural dissent, focuses on what law should do in contests between cultural elites and cultural dissenters, Sunder does not appear to restrict her cautions against cultural essentialism to this particular type of dispute. Her position seems to entail a commitment to anti-essentialism even where cultural dissent is absent and the contest between cultural meanings is between a minority culture and its hegemonic counterpart.

The theoretical and practical contributions of Kapur and Sunder to this debate cannot be overstated. Yet their proposals invariably foreclose essentialist cultural claims made by cultural groups with whom they otherwise empathize. Kapur and Sunder suggest that we cannot make cultural claims because such claims rest on an inaccurate understanding of the term and constitute a misrepresentation that the law should not support. Turning against all essentialist claims begs the question of how helpful theoretical support is when it does not offer practical or legal support. Kapur has sympathy for strategic essentialist claims that challenge dominant cultural scripts, but she still retreats from such claims since they will often entail subordination. Her preferred solution—favouring practices based on sex rather than culture—applies to only a handful of activities currently regarded as “cultural.” The potential of an ethics of pain or pleasure is circumscribed by its limited scope. It leaves dangling scores of cultural practices unrelated to physical pain and pleasure. Is it desirable for feminists and others who care about issues of social justice to work for the complete abolition of culture talk within political and legal discourse because of the essentialism it entails? Might claims about culture be entertained in certain instances, animated by our desire for a more egalitarian social order, despite our postcolonial critique of the essentialism that culture tends to generate? I argue that they should be.

Essentialism Reconsidered

Postcolonial theorists concerned with issues of social justice have typically met cultural claims with the insistence that the concept of culture that cultural protectionists would like to preserve is a fiction.⁷² Yet is the misrepresentation of culture in essentialist terms the right issue on which to focus? Certainly, it is important to debunk essentialism, but it is not clear that doing so disposes of the

71. Sunder, “Cultural Dissent,” *supra* note 20 at 559–60.

72. Martin Chanock, “‘Culture’ and Human Rights: Orientalising, Occidentalising and Authenticity,” in Mahmood Mamdani, ed., *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (New York: St. Martin’s Press, 2000) 15 at 18.

issue of whether we should support, tolerate, or condemn culture talk in legal discourse. Perhaps we need to step back from asking what we should "do" about essentialism to ask why "essentialism" is *so* troubling when it comes to us in its *cultural* form. If the inaccurate claim results in a more just redistribution of goods, does it matter that the right result (a more egalitarian social order) was achieved through the wrong means (reliance on an essentialized concept of culture)? After all, prominent moral theories such as utilitarianism are based on such instrumental logic.

Of course, consequentialist theories have fallen sharply out of favour in the last century due to harsh criticisms from rights theorists who insist that the means do matter—that certain things should not be done simply to arrive at a laudable result.⁷³ Yet relying on an essentialist concept of culture does not necessarily amount to a human rights violation. Certainly, feminists and others have viewed some practices justified through cultural discourses, whether false or not, as human rights violations. Girls being forced to wear headscarves, girls having their sexualized body parts painfully and permanently cut, and women being pressured into marriages they do not want, or being denied certain rights because of whom they marry,⁷⁴ are all common examples of the harm feminists worry will be enacted on vulnerable members of minority cultural groups if the latter were to receive jurisdiction or other special rights over certain aspects of their members' lives. However, human rights violations do not inhere within many cultural claims. Nobody suffers acute physical pain or emotional trauma if indigenous groups, for example, are permitted to assert rights in their cultural resources. On the contrary, recognizing such claims might be a balm for collective psychic pain. Surely, the benefit of preventing hegemonic cultural onslaughts from the state, multinational corporations, and other elites outweighs the harm that misrepresentation through cultural essentialism represents.

In reply, the postcolonial "culture-skeptics" would likely respond that what is at stake is not just a question of misrepresentation. The harm in cultural claims arises not only from misrepresentation *qua* misrepresentation but also from the remaking of social reality and the attendant injuries that misrepresentation will impose on the individuals of cultural groups bound by these misrepresentations. Martin Chanock's work linking the articulation of cultural claims to the process of branding within advertising is especially instructive in drawing out the contours of the harms inherent in the manipulation of social reality.

73. See generally Samuel Scheffler, ed., *Consequentialism and Its Critics* (Oxford: Oxford University Press, 1988).

74. The famous example of this multicultural danger is *Santa Clara Pueblo*, *supra* note 68. Julia Martinez's daughter, Audrey, who grew up on the Pueblo reservation, was denied membership in her Pueblo tribe because of the tribe's family law rules that denied membership to the children of female members who married outside of the tribe. The United States Supreme Court reversed the Court of Appeal, which had struck down the rule as discriminatory, and upheld the tribe's rules of membership. For a discussion of this case, and its implications for the gendered effects of group rights, see Shachar, *Multicultural Jurisdictions*, *supra* note 9 at 18–20.

Chanock is a culture-skeptic for reasons similar to those of Kapur and Sunder. He uses a different tactic, however, to highlight the ephemeral nature of culture and the dangers of trying to "pin it down." Chanock invites consideration of the efforts of cultural protectionists to assert cultural claims as a type of branding similar to the marketing strategies of advertising agencies. Branding refers to the process by which advertising agencies attach cultural meaning to a particular product.⁷⁵ They want a product to hold a particular meaning for the consumer, whether functional, emotional, or otherwise, and this meaning is commonly generated through an essentialized cultural identity that is attached to the brand.⁷⁶ Increasingly, branding attempts to form emotional attachments between consumers and products they otherwise may not need. It tempts the consumer with the promise of clarifying his or her unsettled identity, or, frequently through the projection of fantasy, it offers the consumer the promise of a coveted new identity.⁷⁷

The success of advertising depends on how well campaigns tap into the consumer's aspirations and create preferences to associate with the brands. Chanock asks us to consider to what extent the cultural protectionist claim about a discernible unified identity is an attempt to create brand recognition for a culture or cultural product. In his words, "[c]ultures, like brands, must essentialise, and successful and sustainable cultures are those which brand best"⁷⁸—that is, promote attachments and identities with which their targeted consumers/members may identify and which other non-member consumers of their culture will respect.

To say that cultures are like brands is to imbue cultural claims with the deception, manipulation, and preference-creation commonly associated with advertising—as "selling" people something they do not need or as trafficking in untruths and fantasy. Yet one of the other problems with branding is the extent to which this manipulation is soon forgotten, and the massaged social identity it has cultivated to sell a particular product is taken to represent reality. In the context of culture, the harm lies not just in the fact that culture is essentialized but instead in the notion that an ideal and imagined version of culture is put forth as truth. These cultural truths, then, more than products, encourage or even coerce people to behave in a certain way.

When cultural protectionists perform this branding function to "sell" the public and the government on the "product" of cultural rights, the distortion of social reality receives the power of law to lend it credibility and quash other interpretations of cultural identity. Culture-skeptics do not want to suppress new configurations or interpretations of culture for fear of the tyranny of minority cultural elites. The harm they see in cultural claims is not just the

75. Kris Gautier, "Electronic Commerce: Confronting the Legal Challenge of Building E-Identities in Cyberspace" (1999) 20 Mississippi College Law Review 117 at 141–2. Conversations with Nityanand Deckha have greatly benefited my understanding of branding.

76. Think of the Marlboro Man and cigarettes, the Gerber Baby and baby food, or the Ivory Girl and bath soap.

77. Chanock, *supra* note 72 at 26.

78. *Ibid.*

misrepresentation but also the stifling of alternative interpretations by the very members of minority cultures in whose name cultural protectionists advance their claims. To the extent that these doubled Others are at risk, we may have to refuse the claims of some other Others. Although culture-skeptics are sensitive to claims by vulnerable groups, they nevertheless resist cultural claims in order to avoid these dangers.

Yet does this mean that we can never attend to cultural claims? Are we not unfairly singling out the concept of "culture" for critique when we highlight its unfitness as a legal concept because of its instability and fluid character? After all, the law is full of other contested terms that easily lead to misrepresentation. Similar destabilizing critiques have been lodged against such concepts, yet these terms are dispersed liberally in statutes, cases, and policies. Consider the term "women."⁷⁹ Arguably, over the last decade or so, the anti-essentialist critique has constituted the predominant debate in feminist theory. Many feminists demonstrated how feminist theory used the term "women" in a universal sense, purporting to speak for all women when it actually referred only to experiences of middle-class, white, Western, heterosexual, and able-bodied women. They showed how the universal woman was as much a myth as the universal man since the experiences of non-elite women were not associated with the term "women,"⁸⁰ but rather were subsumed in identity categories dealing with non-gendered differences such as "blacks," "the poor," or "the disabled." Yet, just as "women" invoked only a fraction of female experiences, these non-gendered categories took male experiences as their referent, resulting in a discursive slippage that stranded "different" women at the intersections of gendered and non-gendered categories.⁸¹ In addition to noting the marginalization that such discourse effected, many feminists argued that the terms "woman" or "women" were incapable of definition because there was no natural essence of womanhood and thus no generalizable element of being a "woman." One's experience of "being a woman" was contingent on one's race, age, ability, sexual orientation, religion, and perhaps a host of other factors.⁸² To claim that "woman" meant anyone with female sexual organs was to conflate gender, race, class, and age, at least, with sex and to ignore

79. One can similarly consider the term "race:" see, for example, Deborah Ramirez and Jana Rumminger, "Race, Culture, and the New Diversity in the New Millennium" (2000) 31 *Cumberland Law Review* 481; Steven A. Holmes, "Ideas and Trends: The Politics of Race and the Census," *New York Times* (19 March 2000) (4)3.

80. McClintock, *supra* note 30 at 11.

81. See, for example, Crenshaw, *supra* note 2; Kline, *supra* note 2; Angela P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 *Stanford Law Review* 581. Similar arguments have been made outside of legal scholarship as well. See, for example, Elisabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988); bell hooks, *Feminist Theory from Margin to Center* (Boston: South End Press, 1984); Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, NY: Crossing Press, 1984); Trinh T. Minh-Ha, *Woman, Native, Other: Writing Postcoloniality and Feminism* (Bloomington, IN: Indiana University Press, 1989).

82. See Young, *Intersecting Voices*, *supra* note 12 at 12-37.

how womanhood was a constitutive rather than a natural process informed by multiple axes of power.⁸³

Despite the widespread recognition of the instability of the category "women," one does not encounter elegant arguments and passionate pleas to remove this concept from legal discourse as one does with the "culture" concept. Indeed, the law usually defines "women" as a universal category, that is, as including all female persons (read: persons born with female sexual organs). If law is reductive in this way, why do we permit the concept of "women" to remain in legal discourse, *especially* discourse about human rights, where the culture concept is most contested? One argument is that issues of legal justice do not commonly require the law to entertain questions of what being a "woman" or "women" means.⁸⁴ In other words, adjudicating gender does not raise the tortuous problem that adjudicating culture does. While it may be unclear what cultural sign the term "women" is supposed to invoke, legal responses to gender only require that we know what a female is, as opposed to a male, because all females suffer discrimination as "women." Even if there is no single experience of being a woman, it still makes sense to deploy "women" as a legal term, because it captures all females who are subject to discrimination simply by being socially marked as "women." In other words, it is not problematic for the law to use this term because law itself is not suggesting or condoning an essentialist understanding of "women" but merely trying to stop gender discrimination.

This response seems unsatisfactory. Although the law ideally could work to equalize gender relations without relying on stable notions of who women are, it rarely does. In fact, the law participates in entrenching the unitary concept of "women" that has proven so problematic. This problem has confounded adjudicators hearing sex and race discrimination complaints. When a woman, whose case is not based exclusively on either gender or race, nonetheless claims either sex or race discrimination, adjudicators have a difficult time "seeing" her claim. The woman's experience does not match the contours of the imagined referent for either sex or race discrimination—it does not fit the conceptualization of gender and race discrimination as entirely separate and unrelated phenomena.⁸⁵ Further, courts *are* adjudicating questions of gender in trying to define what sex

83. Several types of critique brought about this destabilization of "women" in much of feminist theory. One line came from American women of colour, non-Western women and lesbians focusing on the implicit whiteness, imperialism and heterosexism of gender analyses (*ibid.* at 12–16). Another prominent impetus for destabilizing feminism's classic terms stemmed from the adoption of the Foucauldian insight regarding the dispersal of power and from the academic project of deconstruction arising from Derrida's concept of "différance." Finally, many feminist poststructuralists sought to unearth the plurality of the femininities and masculinities repressed in the broad categories of "men" and "women." Sylvia Walby, "Post-Post-Modernism? Theorizing Social Complexity," in Barrett and Phillips, eds., *supra* note 30, 31 at 34–5. The trend in this multi-pronged destabilization was to refuse the unqualified "woman" or "women" as a category of social analysis. Young, *Intersecting Voices*, *supra* note 12.

84. However, see *Vancouver Rape Relief Society v. Nixon* (2003), 22 B.C.L.R. (4th) 254.

85. See Cornell, *Imaginary Domain*, *supra* note 6 at 214–15; Crenshaw, "Demarginalizing the Intersection," *supra* note 2 at 139–52; Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Canadian Journal of Women and the Law 25.

discrimination is and in trying to ascertain whether a particular practice amounts to sex-based discrimination. These are the same routine types of adjudications legal feminists are wary of when "culture," rather than "gender" or "women," is the term at issue.

To be sure, feminists do criticize the formalistic logic of discrimination laws, but one would be hard-pressed to find anyone calling for the removal of "women" as a category from statutory language or judicial decisions. Yet, as we have seen in the postcolonial approach, these are precisely the calls being made with respect to "culture." It is not easy to think of wording to insert into a statute or an international rights document that would adequately describe what culture is, how it should be measured, and how to evaluate whether someone has a legitimate claim. Unless the law permits everyone to assert a cultural claim, it will have to enter the messy terrain of deciding whether the claimant is a member of the culture from which the claim arises. While judges may have less difficulty with the term "women" than the term "culture," it is still unclear why theorists reject the latter and accept the former. If we do not "know" what either term means, it is inconsistent to normalize the presence of one in legal discourse while stigmatizing the other except in tightly circumscribed situations.

This arbitrariness is troubling in the face of urgent claims by vulnerable cultural groups. Eliminating cultural claims at this historical moment would leave many vulnerable groups without any legal tool to guard against cultural disintegration, extinction, or exploitation. To the extent that our belief in the fluidity of cultures prevents the unmitigated bombardment of minority cultures with majoritarian norms, we will have to respect cultural formations. To the extent that we want to provide this relief now and not suspend justice for minority cultural groups until an ideal time when legal definitions do not domesticate the concept of culture, some essentialism in cultural claims must be tolerated. It will be a trade-off of potentially essentializing means for egalitarian ends.

Of course, protectionist accounts share the problematic reliance of universalist accounts on a fairly static notion of culture and thus expose themselves to the sharp critiques of postcolonial theorists. An insistence on complete cultural anti-essentialism, even absent cultural dissent, may facilitate the destruction of the very cultural communities integral to the personhood of women the world over. When the postcolonial approach does accept culture talk (as opposed to, say, a discourse of pleasure), it insists on the extreme, possibly utopian, standard of no essentialism even though feminists have not applied this extreme standard even to the central term "women." Serious consequences for cultural equality can result.

The first part of this article showed that the universalist approach, which constructs culture as an undesirable entity, is not a plausible alternative for anyone interested in practising ethical feminism. It also analyzed the promise and perils of the postcolonial approach. The second part will present the differentiated approach as the preferred route out of the postcolonial quandary of trying to affirm the importance of cultural identities to women without affirming essentialism. I then qualify the meaning of "subordination" within the

differentiated approach so that it does not unwittingly revert to the postcolonial position of equating essentialism with subordination.

The (Refined) Differentiated Approach to Culture: The Preferred Route

The differentiated feminist legal view of culture offers a subtle but significant variation on the postcolonial one, leading to a difference in political efficacy between the two. The differentiated approach shares the postcolonial view's skepticism about the truth of arguments resting on totalized and ahistorical understandings of cultural "traditions" and "practices." It is ultimately more receptive to cultural claims, however, due to its higher tolerance for cultural essentialism. This tolerance results from the sharper distinction it draws between the law's response to cultural claims arising from external disputes and those arising from internal disputes. Leti Volpp, who has interrogated both universalizing claims such as Okin's and the potential political passivity that inhabits some postcolonial accounts, exemplifies the approach.⁸⁶ She has illustrated her arguments by focusing on the controversy surrounding the use of the cultural defense:⁸⁷

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86. Volpp, "Feminism Versus Multiculturalism," *supra* note 23; Leti Volpp, "Blaming Culture for Bad Behavior" (2000) 12 *Yale Journal of Law and the Humanities* 89; Leti Volpp, "Talking 'Culture': Gender, Race, Nation, and the Politics of Multiculturalism" (1996) 96 *Columbia Law Review* 1573; Leti Volpp, "(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'" (1994) 17 *Harvard Women's Law Journal* 57. Another differentiated scholar is Ayelet Shachar, who builds upon the critiques of theorists such as Volpp by taking up the pragmatic question of how to design political institutions that could reconcile complicated cultural claims. Shachar is critical of the potential abuses of culture, but ultimately argues for its robust retention within legal circuits. Shachar attends to how both the concept and materiality of jurisdiction structure entitlements related to cultural affiliations. Since individuals can choose, at different points in their engagement with a particular practice, which norms and bodies will be able to regulate their behaviour, the competition created between jurisdictions serves to check the inclinations of any single set of institutions to act oppressively. Shachar clearly wishes to preserve state recognition of cultural attachment as well as the concept of culture. Her approach is better classified as "differentiated" rather than "postcolonial" because she does not insist that the rules or principles of minority cultures be anti-essentialist or even that they mirror liberal ideals of gender and other equality before they receive legal sanction. In this latter regard, she goes even further than Volpp. While Shachar would prefer all cultures to be egalitarian, her proposals for institutional design accommodate cultures that decidedly are not ("Two Critiques," *supra* note 10). I prefer Volpp's approach, which strikes me as more amenable to generalization given the absence of opportunity to engage in grand institutional redesign through the joint governance approach Shachar advocates.
87. This is not to say that other issues are not equally compelling or as widely discussed by other legal feminists who adopt a differentiated view. Indeed, the issues of veiling and female genital surgeries/mutilation were arguably two of the most popular topics of discussion in Western and postcolonial feminism in the last decade. For a sample of the legal literature on female genital surgeries/mutilation, see generally David Fraser, "The First Cut Is (Not) the Deepest: Deconstructing 'Female Genital Mutilation' and the Criminalization of the Other" (1995) 18 *Dalhousie Law Journal* 310; Isabelle R. Gunning, "Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries" (1992) 23 *Columbia Human*

The "cultural defense" is a legal strategy that defendants use in attempts to excuse criminal behavior or to mitigate culpability based on a lack of requisite *mens rea*. Defendants may also use "cultural defenses" to present evidence relating to state of mind when arguing self defense or mistake of fact. The theory underlying the defense is that the defendant, usually a recent immigrant to the United States, acted according to the dictates of his or her "culture," and therefore deserves leniency. There is, however, no formal "cultural defense"; individual defense attorneys and judges use their discretion to present or consider cultural factors affecting the mental state or culpability of a defendant.⁸⁸

The cultural defense has been used in various types of crimes typically involving violence against women and children. Examples include husbands accused of acts of domestic violence against their wives, mothers accused of killing their children, men accused of rape, and parents accused of mutilating their minor daughters or forcing them to marry against their will.⁸⁹

Volpp's critique of the cultural defense is multifaceted, yet, notwithstanding her criticisms of its deployment, she wants to recuperate culture for the courtroom. Volpp points out that arguments precluding the judicial recognition of culture forget that the "legal system already has a culture."⁹⁰ Thus, the effort to eliminate culture from the judicial calculus really serves to maintain the hegemony of the values and norms of the majority culture as the standards against which all individuals are measured. However, she argues that "any testimony about a defendant's cultural background must embody an accurate and personal portrayal of cultural factors used to explain an individual's state of mind and should not be used to fit an individual's behavior into perceptions about group behaviour."⁹¹

While Volpp is sympathetic to the reasons feminists frequently give to bar cultural claims from the judicial arena, she notes that the tendency to believe that this is the "right" position fades once the picture of man as aggressor and woman as victim is complicated. It is easy for feminists to denounce culture as a basis for assigning criminal liability when the defendant is imagined to be a man who beats his wife. It is less easy to dismiss culture as a ground of defense or mitigation when the defendant is imagined as a poor recent immigrant woman who kills her son in order to protect him from his abusive father.⁹² After all, in large part, the

Rights Law Review 189. Since space does not permit discussion of all such legal issues, I have chosen to highlight the differentiated approach to the gender/culture question through the responses to the "cultural defense."

88. Volpp, "(Mis)Identifying Culture," *supra* note 86 at 57-8 [footnotes omitted].

89. Volpp, "Blaming Culture," *supra* note 86 at 105-6; Volpp, "(Mis)Identifying Culture," *supra* note 86 at 60, n. 13-14.

90. Volpp, "(Mis)Identifying Culture," *supra* note 86 at 78.

91. *Ibid.* at 58.

92. Volpp illustrates her point with the case of *People v. Wu*, 286 Cal. Rptr. 868 (C.A. 1991), rev'g (1990), Riverside County ICR 12873 (Super. Ct.), rev. denied 23 January 1992 (opinion ordered not published). In this case, Helen Wu strangled her nine-year-old son, Sidney, after repeated emotional abuse by the son's father, Gary, with whom she had a tumultuous relationship that

feminist project has been about exposing the importance of context, whether social, political, economic, or cultural, in influencing women's choices and limiting their autonomy. How, Volpp asks, can feminists continue to attend to the totality of the inequalitarian power dynamics framing the woman's circumstances and her choices if they disregard cultural defense theories outright?⁹³

Volpp would permit the use of culture when it is used strategically to achieve anti-subordination ends. She advocates the reception of cultural information where such information is necessary to properly locate the agency of the defendant, but only where the defendant's actions did not exploit the marginality of another, however marginal the defendant may be, by asserting claims that advance or perpetuate discriminatory ideas or practices against a vulnerable subgroup. Thus, a claim by a husband that he is culturally permitted to beat his wife does not fulfil the anti-subordination prong of Volpp's analysis and could not attract cultural consideration, because the beating would be an act that constrained his wife's choices and, presumably, exploited her marginality. In contrast, a claim by a despairing mother who killed her children out of respect for cultural ideas of motherhood (rather than a belief, for example, that her children are her property), might be legitimate to the extent that the woman acted from an anti-subordination animus in the option she eventually chose from a limited set of choices.⁹⁴

Volpp advocates a very particularized use of culture, which should elicit the contingent, the provisional, and the historic for any particular social location and not favour grand generalizations and stereotypes, colonial or otherwise. She recognizes the challenge and danger in translating this type of cultural representation for the courtroom, but she is willing to compromise conceptual simplicity—and risk cultural misrepresentation—for political progress. Volpp's position demonstrates the merits of the differentiated approach for an ethical feminism. It permits cultural claims on the basis of strategic essentialism, except where such claims would harm vulnerable members of this group. The differentiated approach's strategic cultural essentialism is appropriate under an ethical feminist framework because it secures, for the minority cultural group,

culminated in a loveless marriage shortly before Sidney's death. Helen lived apart from Sidney for the first nine years of his life. Soon after their marriage in 1989, Helen realized that Gary had a girlfriend and that he beat Sidney. Helen wanted to leave Gary, but shortly after the marriage, she strangled her son and cut her own wrists. Expert witnesses for the defense testified that Helen's actions had to be understood within a particular Chinese cultural context; she believed it preferable to be with her son in the afterlife than to leave him alive with a father who did not want him, and who would beat him and force him to be raised by one girlfriend after another. The experts testified that Helen's culturally motivated actions stemmed from her love as a mother for Sidney and not from any evil intent. They tried to portray her actions as reasonable from the perspective of a culture wherein a mother who committed suicide without killing her children beforehand, thus leaving them exposed to ill treatment in her absence, would be considered irresponsible: Volpp, "(Mis)Identifying Culture," *supra* note 86 at 85–8.

93. *Ibid.* at 81.

94. Acknowledging the relative vulnerability of Wu's son, Volpp writes: "While I do not intend to justify Helen Wu's killing her son, an antisubordination analysis would consider her position in relation to her family and the narrow options she perceived to ameliorate her suffering" (*ibid.* at 99).

political gains that improve the egalitarian balance of society. It is thus less oppressive than the universalist approach, which sublimates marginal cultural identities by way of problematic colonial narratives. It is also more effective than the postcolonial approach, which sets the threshold for cultural claims so high as to negate them altogether.

Operationalizing Subordination

One feature of the differentiated approach needs some fine-tuning: the meaning of the term "subordination." If any essentialist claim amounted to "subordination," then the main difference between the postcolonial and differentiated approach, namely the latter's acceptance of strategic essentialism, would be erased. To specify that not all essentialist cultural claims are subordinating gives us some precision, but we need an independent account of the type of harm that counts as "subordination." Do cultural claims that privilege the needs of some internal vulnerable members over others necessarily violate the anti-subordination principle? I have argued that an ethical feminism should prefer a differentiated approach to gender and cultural justice over universalist and postcolonial approaches. In this section, I build on the differentiated approach by defining more precisely the type of harm or subordination of which we should be wary when claims concerning culture are made.⁹⁵ I thus offer a refinement of the differentiated approach articulated by Volpp as a preferred ethical feminist position. This refinement is consistent with Volpp's approach while making more precise the meaning and scope of the anti-subordination principle.

Subordination: An All or Nothing Game?

Short of dispensing with all essentialist claims, no matter how politically pathbreaking, we must specify what counts as "subordination." Put simply, stating that a claim is somewhat essentialist cannot mean that it necessarily subordinates vulnerable members. Ideally, we would imbue the term "subordination" with as expansive a meaning as possible in order not to exclude any marginalized groups, taking care, of course, to craft a definition of "marginalized group" that excludes the claims of cultural elites.⁹⁶ Yet to do this in the realm of multicultural accommodation would eliminate even those cultural claims that may privilege certain non-elite voices without actually or foreseeably marginalizing other non-elite members of the group. Given the improbability that a claim articulated by a minority culture in its encounter with the state will reflect the views of all cultural

95. I am indebted to Kimberle Crenshaw who encouraged me, and others, as her students to rethink our anti-essentialist critique given that most progressive political organizing has been, and continues to be, essentialist in some respect.

96. Here, we may wish to rely on Iris Marion Young's discussion of who legitimately counts as an "oppressed group." An ethical feminism would engage those cultural claims that emanate from marginalized groups and not those from groups seeking to cement privilege: Young, *Justice and the Politics of Difference*, *supra* note 31 at 39–65.

subalterns within it to constitute a fully inclusive discourse, we should distinguish between those cultural claims that actively marginalize other cultural dissenters and those that would benefit some vulnerable cultural members but not all.

A high profile example of gender essentialism—the issue of political reservations for women in India—will serve to illustrate the cost of a purist insistence on no subordination in any debate about essentialism, whether gender, cultural, or another kind. The most recent attempt to reserve one-third of the seats at the state and federal level for women in India was the *Constitution (Eighty-Fourth Amendment) Bill, 1998*,⁹⁷ which is commonly referred to as the *Women's Reservation Bill*. Significantly, the 33 per cent reservation would have applied evenly across the number of seats already reserved for members of the lower castes and tribal groups (called Scheduled Castes (SC) and Scheduled Tribes (ST) respectively) as well as the unreserved seats. Thus, the bill would ensure representation of SC and ST women but not necessarily women from other marginalized groups. Prior to the May 2004 elections, women held fewer than 7 per cent of the seats in the Indian Parliament (Lok Sabha).⁹⁸

The Parliamentary debate with respect to the bill did not centre on the desirability of these reservations—at the time of the debate, of the fifteen political parties, all but two were in favour of some reservations for women.⁹⁹ Rather, the controversy centred on whether reservations should be set aside *within* the reservations themselves along caste and, to a lesser extent, religious lines. In 1998, five parties supported the bill as it was, that is, in so far as it contained a global reservation clause for women that would apply to the 33 per cent of the seats already reserved for SC and ST. Nine parties wanted a clause inserted that would have set aside some number of the allotted seats for women from another disadvantaged caste and class sector of society—the Other Backward Classes (OBC)—and a few also called for sub-reservations for Muslim women.¹⁰⁰

The main proponents of the sub-reservations for OBC were from the parties whose constituents are predominantly OBC themselves as well as from OBC politicians from supportive parties.¹⁰¹ They claimed that without sub-reservations, elite women would primarily benefit from reservations earmarked for women since they possess the social capital to stand for and win elections. Accordingly,

97. *Constitution (Eighty-Fourth Amendment) Bill, 1998*, Bill 71, 12th Lok Sabha, 1998 [Bill]. Efforts to introduce the bill in Parliament were met with antics by members of parliament who opposed it. These incidents included the formation of body brigades, the snatching of a copy of the bill from the minister's hand and flinging it to the ceiling, as well as "jostling and pushing." "Women's Bill Tabling Blocked Physically," *The Statesman* (13 July 1998). See also "Women's Bill Tabled in LS," *The Statesman* (14 December 1998).

98. Martha C. Nussbaum, "India: Implementing Sex Equality through Law" (2001) 2 *Chicago Journal of International Law* 35.

99. "Run-down on Political Party Positions on the Women's Reservation Bill" (2001), available online at <<http://www.altindia.net/gender/readings/partypositions>> (date accessed: 21 November 2001).

100. *Ibid.*

101. Sumita Ray, "The Women's Reservation Bill of India: A Political Movement towards Equality for Women" (1999) 13 *Temple International and Comparative Law Journal* 53 at 65.

they labeled the bill as anti-caste and anti-minority, asserting that it unjustly privileged gender over caste and minority status.¹⁰² The parties who strongly supported the original bill without sub-reservations claimed that these male-dominated parties were raising caste as a pretext to stall the bill.¹⁰³ The lack of consensus caused a stalemate, and the bill has not been implemented.¹⁰⁴

The *Women's Reservation Bill* did not intentionally or foreseeably worsen the situation of any women. Rather, it would have empowered some women by placing them in political office. The fact that these women would have been elite women, as argued by those calling for sub-reservations for minority women, may very well have been the case. This concern explains the insistence on a more inclusive reform measure. Yet how many different sub-reservations would have been required for the bill to be truly inclusive, non-essentialist, and non-subordinating? Should there have been sub-reservations for women who are oppressed on grounds other than gender, religion, class, and caste, such as lesbians, women with disabilities, or women over a certain age? At what point do we stop identifying sub-groups and making sure that the bill would ensure representation of all subaltern women and contain no scope for essentialism? The insistence that the gender-ameliorative measure be redesigned to better include minority women, while laudable, fragmented support for any ameliorative measure at all. In this instance, the all-encompassing view of subordination was impractical for achieving political results of any kind. As in most situations, it was impossible to attend to every single dimension of subaltern difference.¹⁰⁵

Two Cultural Applications

It is worth teasing out the implications of my version of the differentiated approach to discern the difference it might make in cultural contests. To reiterate, my objective is to refine the meaning of subordination. The meaning I advocate would include epistemic, psychological and physical subordination, but cultural claims that attend to some, but not all, vulnerable members who could be affected would not be considered "subordinating." To demonstrate how this concept of subordination would play out in concrete circumstances, I briefly analyze the headscarf controversy in France and the efforts to use culture-based arguments to combat biocolonialism.

102. "Women's Bill Tabling Blocked Physically," *supra* note 97.

103. Ray, *supra* note 101 at 65.

104. This stalemate, and the disruptive behaviour it elicited from politicians, is especially interesting given that most other affirmative law measures claiming to protect women's rights have met with little resistance by the Indian polity. Indeed, the constitutional amendment introducing a similar percentage of reservations in the local and municipal electoral bodies passed on its second introduction. Madhu Kishwar, *Off the Beaten Track: Rethinking Gender Justice for Indian Women* (New Delhi: Oxford University Press, 1999) at 135-7.

105. I am indebted to my colleague Jeremy Webber for this particular phrasing of the problem.

Headscarf Affair

On 17 December 2003, following years of heated public controversy, the French president announced a plan to ban all conspicuous religious symbols from public schools, including the wearing of headscarves by Muslim girls.¹⁰⁶ Let us assume that there is at least one Muslim girl who wishes to continue to wear a religious headscarf to her state school and that she is a first-generation Turkish Muslim. In addition to her religious reasons for wearing the headscarf, let us assume that she has a cultural reason as well. Given the tide of anti-Muslim sentiment in France and elsewhere in the aftermath of 11 September 2001, marking herself as belonging to a cultural group within France that is not ethnically French is an important political statement for her to make about cultural identity and cultural equality. Imagine then that she makes the following cultural claim against the ban: "I should be allowed to wear a headscarf to school because it is a traditional part of my cultural identity as a female ethnic Turk from a certain class, which is an identity that is marginalized and even despised in France and needs to be affirmed." How should the law treat this cultural claim?

The first question is whether the cultural claim actually or foreseeably harms—epistemically, physically, or emotionally—vulnerable cultural members by impairing their equality or autonomy in any way. It does not, as the parents are not forcing their child to wear the headscarf. (In this case, the differentiated approach, even with its refined understanding of subordination, would be unresponsive.) Where a girl has chosen to wear the headscarf, the harm to other girls or other vulnerable members of her culture seems unlikely. Up to this point, the postcolonial and qualified differentiated approaches converge (the universalist approach would likely dismiss the desire to wear headscarves at the outset as false consciousness or an uninformed choice based on sexist socialization).

However, they are likely to diverge at the next step. What comes of the harm implicit in the suggestion that a headscarf is a "traditional part" of "Turkish identity"? Both phrases smack of essentialism. What is "Turkish identity" and what are its "traditions"? Whereas postcolonialists would correctly critique the essentialist view of Turkish cultures perpetuated by such a claim, the differentiated approach would tolerate it since essentialism is not a sin in and of itself. The differentiated approach would reject only essentialism so broad as to exclude the possibility of other vulnerable members of the culture from making their own dissenting claims. The girl is merely asking the law to recognize headscarves as a traditional part of the identity of Turkish females of a certain class. She is not suggesting that all girls like her must wear headscarves. Recognizing her claim does not entail suppression of the autonomy or equality of vulnerable members or communication of any message about their inferiority. To

106. "Chirac Backs Ban on Head Scarves," *BBC News* (17 December 2003), available online at <<http://news.bbc.co.uk/2/hi/europe/3325573.stm>> (date accessed: 2 February 2005). For a discussion of the decade-long politics behind this announcement, see Benhabib, *supra* note 11 at 94–100.

this end, the claim, assuming it is accurate, is acceptable to the qualified differentiated approach.

Now imagine another Turkish girl who agrees with the ban. She does so not for secular reasons but because she shuns conventional gender identities from any culture and thinks that preventing girls from wearing headscarves reduces gender differentiation and brings her one step closer to a genderless world. Would the refined differentiated approach, by supporting the first girl's claim for cultural equality, subordinate the second girl's claim to gender equality? The answer is no. Supporting the cultural claim is acceptable, since its implied essentialism does not actually or foreseeably subordinate or exclude any vulnerable internal member. The claim may not assist the second girl in changing Turkish, French, and other cultures to become less gendered, but neither does it preclude her from engaging in cultural dissent. The first claim does not require all females to adopt a feminine gender or to aspire to be "girls."

To be sure, institutional support for the first girl's claim ranks her interest and privileges her cultural dissent over those of the second girl. Yet insisting on advancing only those claims, cultural or otherwise, that would assist or empower all affected subalterns at once, might produce an impasse similar to the one regarding political reservations for women in India. To encourage all forms of cultural dissent *vis-à-vis* minority and hegemonic cultures, the better response would be to accept all cultural claims that do not preclude other forms of dissent. We can still challenge the essentialism in these claims and strive for particularization and contingency, but we need not insist on the absence of essentialism.

Biocolonialism—Cultural Rights in Genetic Resources

Another appropriate cultural context in which to apply the refined differentiated approach arises from the burgeoning field of human genetic research. The completion of the Human Genome Project—the "mapping [of] the roughly three billion nucleotide pairs that comprise the human genetic profile"¹⁰⁷—has incited a sort of genetic hubris in the United States and elsewhere.¹⁰⁸ The increasing faith in the lucrative potential of human genes has led to unparalleled efforts in genetic research,¹⁰⁹ one variant of which has been the desire of biotechnology companies to study, harvest, and patent the genes of indigenous groups.¹¹⁰ The genes of certain indigenous groups are particularly valuable because of the relatively endogamous nature of the groups. This "uncontaminated" gene pool provides a highly concentrated pool of research

107. Colin S. Diver and Jane Maslow Cohen, "Genophobia: What Is Wrong with Genetic Discrimination" (2001) 149 *University of Pennsylvania Law Review* 1439.

108. Lori B. Andrews, *Future Perfect: Confronting Decisions about Genetics* (New York: Columbia University Press, 2001).

109. Henry T. Greely, "The Revolution in Human Genetics: Implications for Human Societies" (2001) 52 *South Carolina Law Review* 377 at 378.

110. Andrews, *supra* note 108 at 93–4.

subjects that improves a researcher's ability to pinpoint how a particular gene may affect the incidence of certain diseases. The resulting information is useful to biotechnology companies manufacturing pharmaceuticals and other bioengineered products.¹¹¹

Indigenous groups have criticized the Human Genome Project, as well as attempts to harvest and patent genes, as a form of biocolonialism and have asserted cultural rights to ownership in their own genes.¹¹² The mission of the Indigenous Peoples Council on Biocolonialism (IPCB) is to protect indigenous groups from "gene prospecting" by biotechnology companies obsessed with finding "genetic gold" and creating a monopoly in these resources through Western intellectual property rights regimes.¹¹³ An IPCB press release provides several examples of "gene prospecting" involving the DNA of indigenous peoples.¹¹⁴ In 1994, the United States Patent and Trademarks Office granted a patent to the United States Department of Health and Human Services and the National Institutes of Health on the cell lines belonging to a Hagahai man from Papua New Guinea. Although these agencies abandoned the patent in 1996, the cell line is nevertheless for sale. The IPCB press release also describes transgenic experiments in which Maori DNA was inserted into sheep—on the consent of one elderly tribal member—to the horror of many of the affected individuals. Such examples underscore concerns regarding informed consent, the commercialization of life, the alteration of cultural identities, and the exploitative practices of biotechnology. The IPCB is concerned that such instances will only increase in the future unless appropriate laws are established to protect indigenous genetic resources.

In fact, the IPCB has made available a model statute to assist tribes in protecting themselves from the adverse effects of genetic research. The *Indigenous Research Protection Act*,¹¹⁵ which is available at the IPCB website, sets out ethical standards for prospective researchers, whether academic or commercial, conducting genetic and other research within tribal jurisdictions. Its

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111. Debra Harry, Stephanie Howard, and Brett Lee Shelton, "Indigenous Peoples, Genes and Genetics: What Indigenous People Should Know about Biocolonialism" (2000), available online at <<http://www.ipcb.org/publications/primers/index.html>> (date accessed: 14 July 2004) 16; Annie O. Wu, "Surpassing the Material: The Human Rights Implications of Informed Consent in Bioprospecting Cells Derived from Indigenous People Groups" (2000) 78 Washington University Law Quarterly 979 at 983–4.
 112. Indigenous Peoples Council on Biocolonialism, Press Release, "Indigenous Peoples Critical of the Human Genome Project" (26 June 2000), reprinted online at <<http://www.treff-raum-espaciotime.com/englisch/Articles/indigenous.html>> (date accessed: 14 July 2004) [hereinafter IPCB Press Release].
 113. Debra Harry, "Biopiracy and Globalization: Indigenous Peoples Face a New Wave of Colonialism" (2002), available online at <http://www.ipcb.org/publications/other_art/globalization.html> (date accessed: 14 July 2004).
 114. IPCB Press Release, *supra* note 112; see also Debra Harry, "The Human Genome Diversity Project: Implications for Indigenous Peoples" (14 March 1995), available online at <<http://www.hartford-hwp.com/archives/41/024.html>> (date accessed: 14 July 2004).
 115. *Indigenous Research Protection Act*, available online at <<http://www.ipcb.org/publications/policy/files/irpa.html>> (date accessed: 14 July 2004).

purpose is to assist tribal leaders and their attorneys in controlling the research conducted on their respective reservations and thereby "protect the people, culture and natural resources of the Tribe."¹¹⁶ The overall aim is to "chang[e] the paradigm [of indigenous peoples] being research 'subjects' to research 'partners.'"¹¹⁷

The Act has twenty-one sections dealing with such topics as factual findings; the logistics of research review committees and the principles by which they are to be guided; the content of research proposals and the timeframe for their review; the issuance of permits to researchers; subsequent modifications to agreements; the regulation of genetic resources; prohibited conduct in the name of research; and penalties for violation of the Act or any resulting agreements.¹¹⁸ The Act presumes that no research will be conducted on a reservation unless the researcher obtains a permit pursuant to a written agreement reached between the researcher and the tribe. An agreement may only be concluded after a committee of tribal members considers a detailed research proposal accompanied by a tribal impact statement and an administrative fee.¹¹⁹ The Act gives the tribe the right to withdraw consent at any time as well as the right to prevent the release of data "which is unauthorized, insensitive, misrepresents or stereotypes Tribal people or will harm the health, safety or welfare of the Tribe or the Tribal environment."¹²⁰ The Act prohibits the patenting or commercialization of any biological materials obtained from the tribe.¹²¹ The Act is a model statute that may be modified as any particular tribe sees fit.

Ownership of culture and cultural resources figure centrally in the act, which states that the "natural and cultural landscapes ... located on aboriginal and present day Tribal lands are owned by the Tribe and the disposition, development, and utilization thereof are under the Tribe's full control and supervision."¹²² The researcher must recognize the tribe "as the exclusive owner of indigenous traditional knowledge"¹²³ or intellectual property, which is defined as "cultural information, knowledge, uses, and practices unique to the Tribe's ways of life maintained and established over tribal homelands and aboriginal areas since time immemorial."¹²⁴ Even more broadly, the act declares that the "integrity and orientation of past, present, and future generations of the [named tribe] is founded upon a unique and invaluable cultural ... ethic," which "defines and perpetuates a

116. Indigenous Peoples Council on Biocolonialism, Press Release, "New Model for Tribal Protection in Scientific Research Released: Changing the Paradigm from Being Research 'Subjects' to Research 'Partners'" (30 September 2002), reprinted online at <<http://csf.colorado.edu/medsoc/2000/msg00277.html>> (date accessed: 14 July 2004).

117. *Ibid.*

118. *Indigenous Research Protection Act*, *supra* note 115 at sections 1, 4-7, 9-11, 13-14.

119. *Ibid.* at section 6.

120. *Ibid.* at section 12.1(a).

121. *Ibid.* at sections 11.7, 13.7.

122. *Ibid.* at section 1.1.

123. *Ibid.* at section 1.3.

124. *Ibid.* at section 3.14.

communal identity, language, history, and value system which involves an irrevocable cultural attachment to the native landscape ecology."¹²⁵

The Act demands that researchers "respect the integrity, morality, and spirituality" of cultures and traditions; that they "avoid the imposition of external conceptions and standards;" and that they undertake cultural sensitivity training in certain circumstances.¹²⁶ Although the Act does not define "culture" or "cultural," it does define "indigenous" as referring "to people descending from the original inhabitants of the Western Hemisphere who have maintained distinct languages, culture, or religion from time immemorial."¹²⁷ The Act is clearly a culturally protectionist document, replete with assertions of ownership of a unique and distinct culture and cultural resources. Although biogenetic materials are not explicitly defined as cultural materials, their inclusion in the Act invokes the cultural claim—an association that is troubling to understandings of culture even mildly inflected with postcolonialist sensibilities. Equally clearly, the rigid and essentialist assertion of property rights in culture is a serious attempt to prevent non-indigenous researchers from exploiting the genetic and other resources of indigenous groups for their own professional and monetary gain. Is the Act, with all of its essentialism, a form of cultural claim that ethical feminists should favour?

First, the larger issue of whether culture should be understood as a property right is beyond the scope of this article. Let us assume for the purposes of argument that it is problematic, along the lines that Sunder argues,¹²⁸ to assert property rights in culture.¹²⁹ What is novel about the IPCB's draft act is that it builds upon the protections—both legal and international—governing genetic research on individual human subjects and extends those rights to groups, specifically indigenous peoples.¹³⁰ The Act raises the additional claim that a minority cultural group can protect its resources, including the genetic resources of its individual members, as *cultural* resources.

Recalling the test I have formulated for whether legal feminists should respect cultural claims, such claims cannot actually or foreseeably subordinate vulnerable internal members. Applying this test, we see that the Act does not rely on any subordinating discourse or practice except to the extent that it sustains the idea of

125. *Ibid.* at section 1.2.

126. *Ibid.* at sections 5.1(d), 5.1(h), 6.2(h), 8.1.

127. *Ibid.* at section 3.8.

128. See *supra* notes 53–5 and accompanying text.

129. If an individual had asserted property rights in her own genetic tissue, then we would be faced with ethical claims about the proper boundaries of property rights and the cultural meaning of what it means to be human. We would not confront the question of what culture "is" or whether there are property rights in culture including cultural property rights to genetic resources. See *Moore v. Regents of University of California*, 793 P.2d 479 (Cal. Sup. Ct. 1990), cert. denied, 111 S. Ct. 1388 (1991). Moore unsuccessfully asserted a property right in his own body tissue after it came to light that his treating physician derived a cell line from his spleen for profit-making research without obtaining his informed consent. For a discussion of the novel property issues raised, see James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard University Press, 1996) at 98–107.

130. IPCB Press Release, *supra* note 112.

"irrevocable cultural attachments" and defines cultural practices as existing from "time immemorial."¹³¹ These concepts, while not defining specific practices or discourses, arguably discourage the development of different cultural interpretations and new cultural forms proposed by cultural dissenters. Such wording could be replaced with text that signals the fluid nature of culture without undermining the ability of the tribe to control research and assert cultural rights.

A skeptic might still be concerned that despite the removal of such references, the fundamentally essentialist language of the act could give tribal elites exclusive license to define which practices constitute the tribal culture. Would such language bar alternative interpretations by cultural dissenters in internal contestations between tribal members? This concern is real, but nowhere does the act give tribal elders, or any segment of the tribe, the power to determine the tribe's culture. Had it done so, the qualified differentiated approach would support the removal of such a provision from the act. While it might be prudent to quell rigid approaches to culture to prevent problematic cultural power plays, the price of this abundance of caution is the dilution of the efforts of vulnerable cultural minorities to resist and reverse centuries-old patterns of resource-related exploitation.¹³²

Conclusion

Under my re-articulation of the differentiated approach, a cultural claim such as a cultural defence that advanced gendered stereotypes would be impermissible. However, a claim that did not advance such stereotypes or otherwise impugn the autonomy or equality of vulnerable internal cultural members, but was nevertheless essentialist at a discursive level, might be permissible if it was presented as contingent and particularized. The differentiated approach I advocate, like the universalist and postcolonial approaches, would not permit this statement: "Wife-beating is a common practice in my culture and thus I should be exonerated of criminal charges if this multicultural state respects cultural equality." It would, however, tolerate this very different statement: "Cremating a dead body on a funeral pyre in the open air is a common practice in my culture and so statutory regulation against outside cremations should not apply to me if this multicultural state respects cultural equality." The universalist approach would not tolerate this claim of culture because it claims multicultural difference. The postcolonial approach might also challenge the claim because it presents culture unproblematically and, possibly, conflates it with religion. The differentiated

131. "Time immemorial" is a legal term, defined as a "point in time so far back that no living person has knowledge or proof contradicting the right or custom alleged to have existed since then ... At common law, that time was fixed as the year 1189, the year that Henry II of England died." *Black's Law Dictionary*, 8th ed., s.v. "time immemorial."

132. For recent examples of First World corporate profiteering from indigenous resources and knowledge, see Boyle, *supra* note 129 at 128-30; Emily Marden, "The Neem Tree Patent: International Conflict over the Commodification of Life" (1999) 22 *Boston College International and Comparative Law Review* 279.

approach permits distinctions between essentialist claims that the other approaches would not be able to distinguish.

While my proposal for feminist engagement with law is relativist in that it encourages the recognition of cultural differences and accepts the invariable degree of essentialism that will accompany such recognition, it definitely does not condone a belief in reified or totalizing cultural differences or the presumption of neatly separated distinct cultures. It accordingly does not rely on the classic colonial logic of irreconcilable cultural differences. As Uma Narayan has conceded in her impressive critique of cultural essentialism, "[i]t would be foolish to deny that there are practices in certain contexts that are absent in others, and values that are endorsed in some quarters that are not endorsed in others."¹³³ Put simply, culture matters. Humans are cultural beings. My proposal recognizes this "acceptable" universal to denounce grand generalizations that expressly subordinate some members of the group being generalized about in order to sustain the power of others, while supporting or tolerating other generalizations that potentially subvert cultural hegemonies. Narayan, in discussing the problematic parallels between gender and cultural essentialism, puts the point well:

I believe that antiessentialism about gender and about culture does not entail a simple-minded opposition to all generalizations, but entails instead a commitment to examine both their empirical accuracy and their political utility or risk. It is seldom possible to articulate effective political agendas, such as those pertaining to human rights, without resorting to a certain degree of abstraction, which enables the articulation of salient similarities between problems suffered by various individuals and groups.¹³⁴

Narayan's criteria of empirical accuracy and political utility accord with the differentiated approach I advance. Under the differentiated approach, an individual or group contemplating pursuing legal action based on a cultural claim must assess the subordinating potential of the claim. Few political strategies are discursively innocent. The goal of the revised differentiated approach is to permit feminists to find strategies that are minimally, instead of centrally, invested in power hierarchies.¹³⁵

133. Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism" (1998) 13(2) *Hypatia: A Journal of Feminist Philosophy* 86, reprinted in Uma Narayan and Sandra Harding, eds., *Decentering the Center: Philosophy for a Multicultural, Postcolonial, and Feminist World* (Bloomington, IN: Indiana University Press, 2000) 80 at 96.

134. *Ibid.* at 97-8.

135. I want to briefly address one further line of argument: why should we address cultural claims at all? If what we are really concerned about is undoing the effects of past injustice against cultural minorities, why do we not simply effect redistribution based on a sense of compensatory justice? For example, states do not have to justify exceptions to hunting and fishing laws for indigenous groups on some problematic account of that indigenous culture, but could ground them in the discrimination experienced by the indigenous cultural group. The justification for the exemption

I have argued in favour of a differentiated approach to culture because feminist faith in intersectionality requires that law and legal institutions attend to cultural differences. This differentiated approach exhibits the following features in its acceptance of "culture talk" within legal discourse:

1. it would reframe cultural claims as justice, sexual, or pain claims where feasible according to the judgment of the cultural actors advancing the legal claim;
2. where reframing is not possible, it would permit cultural claims that are strategically essentialist, as long as the claim does not impair the autonomy or equality of any internal cultural minorities and thereby subordinate them;
3. cultural claims that privilege the interests of some vulnerable members and not others would be permissible as long as the framing of the claim does not impair the autonomy or equality of any internal cultural member; and,
4. both epistemic and physical harm matter in the calculus of subordination.

The second and third features refine the differentiated approach advanced by Volpp and clarify the meaning of anti-subordination.

A refined differentiated approach to cultural claims is appealing from the perspective of intersectionality and ethical feminism because it is able to respond to the exigencies of minority cultural groups without subordinating their vulnerable members and largely avoids the promotion of an essentialized concept of culture. Invariably, some essentialism will occur, but it is defensible under an ethical feminist framework to trade some essentialism for some political gain, particularly when other unstable concepts freely circulate within legal discourse. In short, the differentiated approach strikes an appropriate balance between the postcolonial and protectionist approaches. It rejects modernist narratives about non-Western women and their hyper-misogynistic cultures as the rationale for eschewing culture talk within the law. It also rejects the relatively uncritical embrace that protectionist accounts accord to a static and unified concept of culture, sheltering internal differences for the benefit of the group *vis-à-vis* the

is not the group's "distinctive culture," but its distinct history of injustices. The advantage of this approach is that it avoids the first set of problematic definitional inquiries that cultural claims occasion. Since the right to an exemption is grounded in justice rather than culture, the concern over whether certain practices are culturally authentic—which may lead to essentialism—is reduced. Since adjudicators would still have to determine whether a particular claimant is properly a member of the culture that is receiving the benefit, such claims may still generate debates over authenticity. If claims can be articulated in a manner that does not invoke categories susceptible to reification, so much the better. Where other concepts, such as Kapur's subject-in-sexual-pleasure, or a general principle of compensatory justice, can avoid cultural snares, we may deploy them. To the extent that such principles do not apply to specific cultural claims or cannot dissociate completely from cultural queries, it is necessary and desirable to grapple with culture within the law. Furthermore, we should not be too quick to abandon "culture" before we have examined the discursive baggage that may weigh down alternative concepts just as heavily. Given the likelihood that it will still be necessary and even preferable to speak in terms of "culture" when attempting to correct or prevent injustices, the differentiated approach is most suited for this task.

state as a whole. Most importantly, it crafts a way to advance the postcolonial critique of culture while retaining responsiveness to the concerns of both individuals and groups with cultural affiliations seeking state recognition.

This approach does retain some of the practical messiness canvassed earlier with respect to the other approaches legal feminists have proposed. It still calls for first-order assessments of what constitutes a practice that actually or foreseeably stifles cultural dissent, is sexist, or impairs the equality and autonomy of vulnerable members of the culture. I have suggested some limits on the anti-subordination principle—for example, only censoring those practices and discourses that actually or foreseeably worsen the situation of marginalized members—but many more questions remain. Invariably, even among members of the majority culture there will be disagreement as to which minority cultural claims raise the risk of in-group subordination. The proposed approach needs to be augmented by discussion of the appropriate bodies and procedures to settle such disputes and by the development of an ethic of whose views to solicit and how to balance them. However, since all of the other approaches involve this complicated inquiry into how “we” “know” which cultural practices qualify as manifestations of in-group subordination, its presence in the modified differentiated proposal is not a reason to dispense with it. Rather, it is a call for further theorization.

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