

Between Intra-Group Vulnerability and Inter-Group Vulnerability: Bridging the Gaps in the Theoretical Scholarship on Internal Minorities

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Introduction

Whereas liberal multicultural theorists have pointed to structural inequalities between hegemonic cultural groups and cultural minority groups, their critics have drawn attention to inequalities within cultural minorities, and the way that these groups can oppress their own internal minorities – who might be women, children, LGBTQ+ individuals, members of a lower caste, low income individuals, and other groups of marginalized or less powerful members.¹ This body of critical work, which is known as the literature on “minorities within minorities,”² has generated different proposals for addressing concerns about the

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See Susan M Okin, “Is Multiculturalism Bad for Women?” In Joshua Cohen, Matthew Howard & Martha C. Nussbaum, eds, *Is Multiculturalism Bad for Women?* (New Jersey: Princeton University Press, 1999) 9;; Susan M Okin, “Feminism and Multiculturalism: Some Tensions” (1998) 108 *Ethics* 661 [Okin, “Feminism and Multiculturalism”]; Ayelet Shachar, “On Citizenship and Multicultural Vulnerability” (2000) 28 *Political Theory* 64;; Ayelet Shachar, *Multicultural Jurisdiction: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University press, 2001) [Shachar, *Multicultural Jurisdiction*].

² See generally, Avigail Eisenberg & Jeff Spinner-Halev eds, *Minorities within Minorities: Equality, Rights and Diversity* (New York: Cambridge University Press, 2005).

oppressive impacts of minority cultures' practices on their more vulnerable members, or what I call "intra-group vulnerability" concerns.³

These proposals offer two general categories of solutions to the problem of intra-group vulnerability. The first type advances liberal rights as inviolable. According to this interventionist position, the liberal state should rigorously and indiscriminately interfere to enforce liberal rights in minority communities by using all available means, including criminal law.⁴ The second type is the exit right solution. This approach allows the liberal state to intervene in the group's affairs only where the group restricts the right of its members to leave the group.⁵

Critical reflection on this literature reveals that it is characterized by a rigid binary choice between starkly different responses. The liberal state may take either an interventionist approach – seeking to eradicate cultural practices that contradict liberal values and norms – or a laissez-faire approach that rejects interference in cultural minorities' affairs. Yet, both options under this binary rarely align with the interests and needs of minority women and girls. *Interventionism* essentially asks the state to intervene against the group to liberate women from their oppressors, even though there are a host of reasons why minority women, if given the choice, would reject this offer of 'liberation.' Instead of improving these women's situations, putting their family members behind bars

³ See Miriam Zucker, "The Role of the State in the Intra-Group Vulnerability of Women: Revisiting Debates About Multiculturalism Through the Case of Polygamy Among the Bedouins in Israel" (2021) 40:2 *Colum J Gender & L* 313.

⁴ See Okin, "Feminism and Multiculturalism," *supra* note 1 at 12–24.

⁵ See Chandran Kukathas, "Are There Any Cultural Rights?" in Will Kymlicka, ed, *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) 228 [Kukathas, "Are There Any Cultural Rights?" (1995)]; Kukathas, "Are There Any Cultural Rights?" 20:1 *Political Theory* 105 (1992) [Kukathas, "Are There Any Cultural Rights?" (1992)]. See also Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (New York: Oxford University Press, 2003) [Kukathas, *The Liberal Archipelago*].

is more likely to inflict further financial and emotional distress upon them. The *exit right* solution purports to leave the choice in the hands of each group member to decide whether to submit to their group's demands or to leave. The concept of exit choice originates in political-economic theory and is based on a free-market (capitalist) model.⁶ According to this model customers should always have the option to leave any market if they are unsatisfied with it or the commodities that it offers. The idea of transplanting this exit choice concept into the cultural context (especially when this is done without necessary adjustments) has been widely criticized. This criticism points to the fallacy of comparing cultural communities with markets, treating cultures as commodities, and viewing their members as customers who are merely concerned with rational cost-benefit considerations and can easily leave their communities.⁷ This fallacy is especially evident when this (market-based) exit choice concept is applied to resolve the vulnerability of women within cultural minorities to oppressive treatment. As feminist critics have pointed out, women in minority cultures have restricted access to the resources and opportunities needed to successfully exit their communities, and for many of them, the consequences of leaving their communities can be grave – which may include losing property rights or custody over

⁶ The political economist, Albert O. Hirschman, conceptualized the exit choice as one of two possible responses of members of various organizations or other forms of human grouping (such as businesses, political institutions, or nations) to a perceived decrease in quality or benefit of a service or product. The other response, voice, is a political concept which constitutes an attempt to improve the offered service/commodity/relationship through communication. Hirschman's exit choice concept relies on Adam Smith's invisible hand theory according to which buyers and sellers are free to move through the market by forming and breaking relationships. See Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass: Harvard University Press, 1970); Adam Smith, *The Theory of Sentiments* (London: 1981).

⁷ For an influential critique of the fallacy of using this market-model exit solution in the cultural context in these and other respects, See Leslie Green, "Rights of Exit" (1998) 4:2 Leg Theory 165.; With regards to the futility of the idea that members of ethnic, religious, and other minority or racialized communities can choose to detach themselves from their culture and adopt a mainstream or other majoritarian culture, see Gurpreet Mahajan, "Can Intra-Group Equality Co-exist with Cultural Diversity? Re-examining Multicultural Frameworks of Accommodation" in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights and Diversity* (New York: Cambridge University Press, 2005) 90 at 102.

their children, as well as cutting ties with family and friends.⁸ Ultimately, this approach forces minority women to choose between full submission to their community's dictates or leaving 'their whole world behind.'⁹ Further, in some socio-political contexts, there is simply no general or mainstream society open to individuals who wish to leave their community. In effect, the exit right solution places the onus on women alone to find unavailable resources and transform their conditions, while allowing the state to take a laissez-faire approach and do nothing to tackle the problem.

This article shows that the rigid binary choice between these opposite responses stems from the fact that scholars have not accounted for the role of the state in the problem of intra-group vulnerability, and illuminates how when one does, one notices possible responses beyond interventionism and a laissez-faire approach. Recognizing the (partial) responsibility of the state for this problem forms a legitimate basis for demanding that it address intra-group vulnerabilities in a way that simultaneously accounts for its responsibility and responds to vulnerable members' interests and needs.

Recognizing the role of the state in the problem cannot be reconciled with a view of the state as a bystander vis-à-vis intra-group vulnerabilities. As a bystander the state is free to step in or out of this problem – namely, it can either take an interventionist approach to 'liberate' vulnerable community members or refrain from acting at all (as long as the community's membership rules allow exit). Effectively, in this (bystander) position the state can throw the entire responsibility for minority women's oppressive conditions on

⁸ See generally Susan M Okin, "Mistresses of Their Own Destiny: Group Rights, Gender, and Realistic Right of Exit," (2002) 112:2 Ethics 205 [Okin, "Mistresses of Their Own Destiny"]; Shachar, *Multicultural Jurisdiction*, *supra* note 1 at 69.

⁹ Here I use Shachar's terminology to point out the actual implications of the burden of traditional exit models on a vulnerable community member to "find the resources to leave her whole world behind (i.e. full submission or exit). See Shachar, *Multicultural Jurisdiction*, *supra* note 1 at 43.

their communities – either by focusing on sanctioning men and other powerful community members or by treating intra-group vulnerabilities as minority cultures’ private matters. However, recognizing the role of the state in creating and perpetuating conditions that render minority women vulnerable to oppressive treatments entails the state’s responsibility to account for its own share in their intra-group vulnerability. This recognition not only denies the state’s liberty to turn a blind eye to these women’s conditions, but it also offers an alternative to the interventionist approach. In other words, instead of sanctioning men or taking a ‘hands off’ approach, the state should focus on addressing its *own* contribution to the problem by taking an accountable and self-reflective approach. Ultimately, this alternative calls for using remedial measures that can support women’s agency and their ability to transform certain unfavorable aspects of their conditions.

Altering our understanding of the exit right solution in a way that gives meaning to minority women’s agency, offers a conceptual framework for addressing the state’s role in their intra-group vulnerability. This new conceptual framework, which I have defined as the *gradational exit approach*, supports other intermediate choices besides leaving the community or surrendering to all its cultural demands. In other words, this approach rejects the traditional understanding of exit as a monolithic concept, according to which the exit right can be realized only by leaving one’s community. Instead, it advances a pluralistic understanding of the exit right as a gradational concept that operates along a spectrum of multiple options. Within this spectrum, exit can be executed in many different forms – from leaving the community to withdrawing from a specific practice, tradition, or aspect of community life. This new understanding of the exit right offers women and other

vulnerable community members many different choices for transforming their conditions, yet without forcing them to adopt liberal ideals of individual autonomy and choice or to abandon their culture. Also embedded in this understanding is an unprejudicial and non-static conception of cultures and the relationships between them.¹⁰ Exit in these terms is not a single, one-way route, and embarking on this route does not lead the individual to dead ends.

However, the gradational exit approach remains a hollow paradigm unless it is integrated with a pragmatic assertion of the state's (shared) responsibility for the problem of intra-group vulnerability. As demonstrated through real-world examples in the next section (and as I have shown through a detailed account about the Bedouin-Arab community in the Israeli context elsewhere),¹¹ critical inquiry into historical and current facts reveals the role of different liberal democratic states in creating and reinforcing oppressive conditions for minority women. These facts further indicate how through various forms of colonial and post-colonial oppression – as well as ongoing discrimination against gendered, racial, religious, and other vulnerable and marginalized minority identities – the liberal state has been implicated in the intra-group vulnerability of minority women. This culpability has been manifested (and often still is) in fortifying obstacles to minority women's ability to make different exit choices for transforming their conditions. Thus, rather than placing the onus on women to find (rarely available) resources for making

¹⁰ My intention in labeling my proposal a gradational exit approach is not only to highlight the re-conception of the exit option as a spectrum of choices, but also to emphasize the contrast between traditional models' over-simplistic perception of the exit option's transformative aspect and the more realistic understanding of cultural change that this proposed approach offers. In addition to highlighting the non-dichotomic nature of this approach, the *gradational* title implies its non-essentialist ideological premises. Namely, this title indicates my rejection of the prejudicial package-picture view of minority cultures (as sites of oppression only), along with the view of liberalism as an ideal non-patriarchal framework.

¹¹ See Zucker, *supra* note 3.

and pursuing transformative choices – or alternatively relying on the goodwill of community leaders to promote cultural change to the benefit of their vulnerable members¹² – the gradational exit approach requires the state to account for its *own* responsibility and bear at least some of this burden, first and foremost by addressing its contribution to impediments to minority women’s ability to make transformative choices. For example, removing discriminatory barriers to minority women’s access to public resources and services, like welfare assistance or legal aid services – which are essential for allowing them to break away from an unfavorable marriage or family arrangement (and supporting them and their children in the aftermath) – could serve as a useful starting-point-strategy for implementing this approach.¹³

Critical reflection on various injustices, including colonial and post-colonial oppression of ethnic and Indigenous communities, religious prosecution of religious minorities, as well as racial discrimination against black people and ethnic or religious immigrant populations,

¹² Deliberative models, which seek to propose a democratic alternative to the liberal approaches, demonstrate such an approach. By relying on reforms from within the community, these models place the onus for addressing intra-group vulnerabilities on the community alone and discharge the state from its responsibility. The only role that some of these models assign the liberal state is ensuring that the deliberation procedure abides by democratic rules. As long as these rules are kept, any resolution to these issues, which they perceive as intra-group conflicts, should be accepted. However, deliberative models fail to acknowledge that the same obstacles that limit the ability of women to make different exit choices are also likely to impact their ability to participate in the deliberation, as well as voice their positions and interests. Further, as Mahajan’s observation about the workability of the deliberation alternative in the Indian context suggests, this “reform from within the community” framework has been useful only in the least confrontational contexts. Namely, in communities where male group leaders were the ones who led such progressive reforms. For example, this was the case among the Parsi community, where several liberal men have initiated changes in their community’s Personal Laws to make them fairer for women. As Mahajan points out, Parsi women were completely absent from this transformative process. See Mahajan, *supra* note 7 at 107.

¹³ As I have highlighted in another place, the application of this approach depends on the context and the different ways in which the state has been involved in the relevant instance/case of intra-group vulnerability, as well as the available means for mitigating these harms in ways that could support women’s agency. This is especially true because the role of the state in minority women’s intra-group vulnerabilities is typically related to structural and often intersectional inequalities, such as colonialism, racism, economic marginalization, etc., which may take different shapes in different contexts, and thereby might require unique (context-sensitive) strategies to address. See Zucker, *supra* note 3 at 321.

clearly indicates the relations between injustices done to minority groups and intra-group vulnerabilities. As demonstrated next, acknowledging these relations is critical for understanding the various ways that liberal states have been implicated in creating and reinforcing oppressive conditions for minority women. It is thereby also (ultimately) crucial for mitigating these harms. Part I, which traces the development of the theoretical scholarship on internal minorities, indicates how these relations have been overlooked by multicultural theorists and their critics. It sheds light on the overwhelming difference between scholars' recognition of the state role in the injustice *toward* minority cultures (or 'inter-group vulnerability'), and its absence in scholars' discussions on injustice *within* them (or 'intra-group vulnerability'). Part II canvasses the solutions scholars suggest for this problem to show how a rigid binary choice between starkly different responses characterizes this literature. It further reveals evidence of scholars overlooking the state's role in the problem, and indicates how this oversight underlies the presumed binary implicit in their proposals. Part III outlines my proposal for breaking out of this binary. I show how my proposed understanding of the exit right solution as a gradational concept both addresses the pivotal criticisms of the exit school of thought and serves as a useful conceptual framework for the state to account for its responsibility while respecting women's agency. I conclude by indicating how the gradational exit approach, integrated with a recognition of the role of the state in the problem of intra-group vulnerability, responds to intersectional and critical race feminists' call to move beyond reductionist accounts of the location of minority women's subordinations.¹⁴

¹⁴ This call echoes through critical accounts of many different feminist scholars. See for example the following prominent works: See Leti Volpp, "Feminism versus Multiculturalism" (2001) 101:5 Colum L Rev 1181 at 1211; Sherene Razack, "Imperilled Muslim Women, Dangerous Muslim Men and Civilized European" (2004) 12:2 Fem Leg Stud 129; as well as the reoccurrence of this call and its more recent

I. *The Gap of Recognition: The Role of the State in the Inter-Group Vulnerability of Minority Cultures vs. the Role of the State in Intra-Group Vulnerability*

Examining the subordination of different cultural minority communities throughout the history of the industrialized world – which has been a common experience for many national-ethnic, Indigenous, religious, and racialized local and immigrant communities – reveals the various ways in which different liberal democracies have had a substantial role in reinforcing and perpetuating the conditions that render women and girls vulnerable to oppressive treatment within their communities. For example, in the Canadian context, the practice of removing Indian status as a penalty for Indian status women marrying non-Indian status men was not a long-standing tradition in Indigenous communities. Rather, it was the result of the 1869 *Indian Act*,¹⁵ which introduced several patriarchal concepts and arrangements that reflected Eurocentric ideals and norms into Indigenous communities, including the establishment of exclusively male-elected band councils.¹⁶ The removal of these women’s Indian status has had devastating impacts on many Indigenous women and their descendants. Without formal Indian status, these Indigenous people lost their treaty rights and associated benefits, including inheritance rights and permission to reside on reserve land.¹⁷

articulation through intersectional feminists’ accounts like Dolores M Taramundi’s influential essay: See Dolores Morondo Taramundi, “Minorities-within-Minorities Frameworks, Intersectionality and Human Rights: Overlapping Concerns or Ships Passing in the Night?” in Gaetano Pentassuglia, ed, *Ethno-Cultural Diversity and Human Rights: Challenges and Critiques* (Boston: Brill, 2018) 256.

¹⁵ See *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria*, S.C. 1869, c 42, s 6.

¹⁶ See Thomas Isaac and Mary Sue Maloughney, “Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government” (1992) 21 *Manitoba LJ* 453, at 458.

¹⁷ See Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford: Oxford University Press, 2006) at 132.

The provision whereby Indian women lost their status upon marrying a non-Indian man was not abolished until 1985, when Bill C-31 was passed into law to bring the *Indian Act* into accord with the *Canadian Charter of Rights and Freedoms*. Since then, many Indigenous women and their children have become eligible to have their Indian status restored and have managed to regain their band membership.¹⁸ However, others have been unable to do so. In fact, many of these non-status Indigenous people are still deprived of their treaty rights and access to their community's economic resources. In addition to the psychological harm of being denied recognition of their Indian identity, without formal Indian status these Indigenous people are also ineligible for federal benefits and services such as treaty payments, post-secondary education funding, and the Non-Insured Health Benefits program (which are granted to individuals who are registered under the *Indian Act* only).¹⁹

There are several, seemingly intertwined, reasons for the disadvantageous conditions of many of these non-status Indian women and their descendants. While this article is not intended to delve into a full-fledged discussion of these reasons (or contextual inquiries into this or other examples of intra-group vulnerability, more generally), the role of the Canadian state in creating and reinforcing disadvantageous conditions for these non-status Indigenous people is apparent. Turning a critical eye to the historical context that has generated these factual reasons allows us to see the various ways in which the Canadian state has been directly implicated in this case of intra-group vulnerability through its colonial oppressive regime and its impact on gender relations within Indigenous

¹⁸ See Canada, Indian and Northern Affairs, *Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report* (Ottawa: 1990) at 8.

¹⁹ See Issac & Maloughney, *supra* note 16 at 463.

communities. First, until 2019 the *Indian Act* still differentiated between First Nations men's descendants and some First Nations women and their descendants, with regards to their eligibility to register under the *Indian Act*.²⁰ The recent removal of the remains of this formally legislated discrimination is obviously a welcome development. However, considering the long-standing effects of colonial oppression, and the infusion of patriarchal political structures and norms into Indigenous communities, this legislative reform is unlikely to be sufficient for ending this gender-based discrimination. Given the limited economic resources left to most bands, many of these bands, which are (still) predominantly male-led, had refused to give back that which was taken away from these Indigenous women and their descendants by non-Indian colonials.²¹

Similarly, in the South-African context, the 'official code of customary law,' which was recognized by the Constitution, had been formalized by colonial courts and administrators during the nineteenth and the first half of the twentieth centuries.²² One of the most troubling aspects of this formal code is that it codified women's status as perpetual minors, rendering them unable to enter contracts in their own name, or to hold, inherit, or dispense of property. As minors, women could neither negotiate a marriage, terminate it, or claim

²⁰ This was after Bill S-3, which received royal assent in 2018, came into force in its entirety. In fact, the delay was exactly to allow for a consultation process with First Nations about the provisions aimed at eliminating all remaining sex-based discrimination before the creation of the modern Indian registry in 1951. See Jennifer Geens, "Indian status could be extended to hundreds of thousands as Bill S-3 provisions come into force", *CBC News* (15 August 2019), online: <<https://www.cbc.ca/news/indigenous/bill-s-3-indian-act-sex-discrimination-1.5249008>>

²¹ See Isaac and Maloughney, *supra* note 16 at 464.

²² The apartheid administrators strategically reinforced the cultural differences of African groups to facilitate the organization of separate tribal 'homelands', which made possible the monitoring and control of Blacks. To this end, these administrators courted the favour of traditional African leaders and underwrote their power and authority in return for guarantees of loyalty. The formalization of customary law, which secured the authority of these leaders, has been described as "forging an alliance between the colonial authorities and African male elders." See Thandabantu Nhalpo "African Customary Law in the Interim Constitution" in Sandra Liebenberg, ed. *The Constitution of South Africa from a Gender Perspective* (Belleville, South Africa: Community Law Centre, University of the Western Cape, 1995) 157 at 161.

custody over their children. Further, women were denied the power to bring actions in their own names to court without their legal guardian's (i.e., their husband's, father's, etc.) assistance.²³ Ultimately, "it was a law of the 'white' parliament, the Black Administration Act of 1927, that reinstated customary law."²⁴ According to customary law specialist T.W. Bennett, this codified version of customary law is widely believed to have "exaggerated the subordinate status of women" and even contributed to a "decline in [women's] overall status."²⁵

Another example, in the Israeli context, is the vulnerability of Bedouin-Arab women in Israel to oppressive marriage arrangements. As I have shown in a different paper which investigates this case of intra-group vulnerability, the circumstances of Bedouin-Arab women in Israel illustrates how Israel's policy of pushing the Bedouins out of their land, and its legal treatment of polygamy, have been significant in reinforcing this vulnerability.²⁶ This investigation further reveals how discriminatory accessibility barriers to public resources, including family courts and welfare assistance, perpetuate this vulnerability by negatively impacting Bedouin women's ability to resist and break away from oppressive marriage arrangements.

These examples indicate the relationship between the subordination of minority communities and patriarchal oppression within them. However, as we shall see, the scholarship on internal minorities views the injustice *toward* cultural minority groups and

²³ See T. W. Bennett, *Human Rights and Customary Law Under the South African Constitution* (Cape Town: Juta, 1999) at 80, 89.

²⁴ See Caroline White, "Gender on the Agenda: Will women gain equality in the new South Africa?" (1995) 8:7 *Policy: Issues & Actors* 5 at 23.

²⁵ See Bennett, *supra* note 23 at 84.

²⁶ See generally Zucker, *supra* note 3.

injustice *within* them as two distinct phenomena, as if they exist on two parallel planes without overlap. As a result, these scholars treat the state as a bystander vis-à-vis the vulnerability of women and other members of minority groups within cultural minorities. As a bystander, the state is only called to respond to instances of intra-group vulnerability, but it is not held to be accountable for the occurrence of this problem. This presumption, I argue, explains the limitations of the scholarly discussion on these issues.

Viewing the state as a bystander confines our imagination of the alternatives for addressing intra-group vulnerabilities to response strategies that allows only two limited options: the interventionist approach that uses the power of the state against members of minority groups to combat oppression in these groups, or the laissez-faire approach that rejects interference in these groups' affairs. Yet, considering the role of the state in this problem opens a way out of this binary by allowing us to envision creative alternatives for addressing intra-group vulnerabilities. First and foremost, recognizing that the state is one of the generators of this problem allows us to trace the wrongs of the state that helped reinforce the vulnerability of minority women to internal oppression, and consider strategies to repair or, at least, mitigate the harm.

In fact, the literature on liberal multiculturalism, to which the scholarship on internal minorities is responding, has already started to show signs of the problematic presumption that the state is a bystander vis à vis intra-group vulnerability. Hence, before delving into a critical examination of the scholarship on internal minorities, I discuss Will Kymlicka's position on this issue and identify the origins of this presumption. I examine how Kymlicka contends with the difficulty that 'internal restrictions' – which are often imposed on the personal liberties of minority groups' members – pose for his liberal argument for group

rights. As the leading exponent of the theory of multiculturalism, Kymlicka became the lightning rod for all the liberal criticisms that deal with the issue of intra-group vulnerability. Therefore, examining Kymlicka's position on this issue provides a critical perspective on the development of the theoretical scholarship on this issue.

This discussion suggests that the relationship between the inter-group vulnerability of cultural minority groups and the intra-group vulnerability of certain members of these groups remains undetected. Whereas the state plays a central role in Kymlicka's liberal multicultural theory, it takes a back seat in his discussion on this issue of intra-group vulnerability. As my discussion in the following sections demonstrates, the perception of the state as a bystander – one free to decide whether or not to intervene in cultural minorities' affairs – appears to have uncritically diffused as an unexamined proposition into the scholarship on internal minorities.

For Kymlicka, granting group rights to members of minority cultures – which might include various accommodations such as funding special educational programs, providing a certain degree of cultural autonomy, and establishing exemptions from state laws – is important first and foremost for securing their ability to make choices about how to lead their lives.²⁷ Cultures provide us with meaningful options and a context within which to evaluate these options. Thus, the ability to make meaningful choices requires securing the equal access of all individuals to their 'societal culture,' which Kymlicka defines as "a set

²⁷ See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995) at 80–84, 89–90, 94 [Kymlicka, *Multicultural Citizenship*]. A secondary reason for providing cultural accommodations that Kymlicka mentions is that "people are deeply connected to their culture" at 94. This justification resembles arguments made by Avishai Margalit and Joseph Raz, as well as Charles Taylor, about the importance of respecting cultures and national membership in supporting one's self-identity and dignity. See Avishai Margalit and Joseph Raz, "National Self-Determination" (1990) 87 *The J Philosophy* 439 at 447–449. See generally Charles Taylor, *The Ethics of Authenticity* (Cambridge: Harvard University Press, 1991). See also Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture" (2004) 7 *Social Research* 529 at 539–542.

of institutions covering both public and private life, with a common language, which has historically developed over time and a given territory.”²⁸ However, according to Kymlicka, the state should not support or accommodate groups which impose ‘internal restrictions’ on their members.²⁹ Special cultural accommodations should not be granted to groups that seek to significantly restrict the liberties of their members. He states that “[t]he aim of liberals should not be to dissolve non-liberal nations, but rather to seek to liberalize them.”³⁰ Thus, whereas some minority groups may not be found deserving of state support, they may still warrant minimal toleration.

In Kymlicka’s view, illiberal practices should not be prohibited by law, with the exception of activities that involve clear violations of human rights, such as slavery, genocide, or mass torture and expulsions.³¹ Kymlicka sets the limits of permissible cultural practices within the constraints of liberal-democratic values, drawing reassurance from the existing constraints of criminal and constitutional laws.³² However, he also stresses that there is “relatively little scope for legitimate coercive interference,” especially in the case of national minorities.³³ Outside the realm of state laws, Kymlicka favours dialogue for resolving cultural conflict and reaching agreements based on shared fundamental principles, or (when that is not possible) “relying on some other accommodations, such as

²⁸ See Will Kymlicka, “Do We Need a Liberal Theory for Minority Rights?: Reply to Carens, Young, Parekh and Forst” (1997) 4 *Constellations* 72 at 75 (In Kymlicka’s view, national and indigenous groups should be entitled to much more pervasive protections and rights, such as self-government and special group representation rights, than other minority groups like ethnic immigrants or religious groups).

²⁹ See Kymlicka, *Multicultural Citizenship*, *supra* note 27 at 152.

³⁰ See *ibid* at 94, 169. Kymlicka also refers to a few possible strategies for “liberalizing cultural communities,” such as speaking out against injustices within non-liberal communities and lending their members support to liberalize their cultures. Another strategy that he mentions, but does not elaborate on, is offering illiberal communities various incentives for liberal reforms.

³¹ See *ibid* at 169.

³² See Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (New York: Oxford University Press, 2001) at 174–176.

³³ See Kymlicka, *Multicultural Citizenship*, *supra* note 27 at 167.

modus vivendi.”³⁴ In the case of national-ethnic communities “who [have] won some degree of cultural autonomy” such as Indigenous people, Kymlicka even supports reaching agreements which allow exemptions from “federal bill rights and judicial review.”³⁵ He calls on liberals to learn to live with violations of human rights in these communities.³⁶

It appears that an overriding concern about inflicting further injustice on minority communities underlie Kymlicka’s position on the issue of ‘internal restrictions.’ While Kymlicka supports the “liberalization” of these communities as the ultimate goal, he nevertheless disapproves of coercive interference as a means to achieve it. Thus, when peaceful strategies have been exhausted, he believes that the liberal state should refrain from intervening in these communities’ affairs. Effectively, this position exhibits a compromise to tolerate illiberal practices as ‘the lesser of two evils.’³⁷ Namely, Kymlicka acknowledges the tension (from a liberal standpoint) in allowing the state to remain indifferent to infringements of individual rights in minority communities, but he nevertheless concludes that it would be ‘less evil’ than forcing liberal values onto them.

His ‘lesser than two evils’ style of thought is especially evident when it comes to national-ethnic minority communities. Kymlicka’s statement that liberals “should learn to live” with violations of human rights in these communities shows that he recognizes the ‘liberal paradox’ in tolerating these violations, but believes that it cannot be settled. The peace that Kymlicka makes with this paradox indicates a profound unease with the idea of exerting further force on these already beleaguered groups. Kymlicka seems so deeply

³⁴ See *ibid* at 168.

³⁵ See *ibid* at 167.

³⁶ See *ibid* at 168.

³⁷ This toleration is therefore different from substantive tolerance to deep-diversity, in the sense of appreciation of other ways of life.

concerned with the idea of inflicting further injustice on national-ethnic minority groups that he effectively supports a ‘hands off’ approach towards oppression within them.³⁸ In other words, according to this position, turning a blind eye to intra-group vulnerability in subordinated (national-ethnic) minority communities is the ‘unavoidable cost’ of taking the ‘lesser of two evils.’

I do not contest that it is difficult to square the significant culpability of states across the Western developed world in generating the injustice toward national-ethnic, aboriginal, and other minority communities, with assigning them a role in eliminating injustice in these communities.³⁹ Indeed, given the oppression that many minority groups have suffered through colonialism, religious persecution and other maltreatments (at the hands of empires, colonials and religious inquisitors), the moral standing of Western-liberal states to intervene against illiberal practices is seriously questionable. However, the presumption that seems to underlie Kymlicka’s deferral to a ‘hands off’ approach – namely, that the only alternative that remains open for the liberal state (when dialogical efforts have failed) is using its coercive power *against* the group (and consequently inflicting further injustice on many of its members) – is highly contestable. This presumption reflects a problematic view of the state as a bystander in relation to intra-group vulnerability.

³⁸ I use the word “oppression” rather than Kymlicka’s more ‘neutral’ terming of “rights violations”, drawing on the feminist critiques of liberal multicultural theories. Taking into account that the subjects of these violations are usually the same group of members – typically women and girls (due to the unequal burden they bear in preserving their community’s culture) – these recurring violations come down to oppressive treatment.

³⁹ In fact, while Kymlicka acknowledges the role of the state in creating the injustices only toward indigenous communities and national minorities (in terms of their limited access to what he defines as ‘societal culture’), I believe that the state also has a significant role in the injustice toward other minority groups, such as post-colonial immigrant populations or persecuted religious minorities. See Kymlicka, *Multicultural Citizenship*, *supra* note 27 at 79.

Instead, the recognition that not only the community, but also the state, are responsible for this problem, eliminates the cognitive dissonance around the moral standing of the state. This recognition entails two fundamental conclusions that render it key to overcoming this potential dissonance. First, recognizing the share of the state in this problem opens non-belligerent alternatives for addressing it. As I have indicated, as a bystander, the state is limited to two problematic responses to intra-group vulnerabilities – taking either heavy-handed liberal intervention measures or a “hands off” approach. As a bystander, if the state opts to act to address the problem, it runs the risk of inflicting further injustice on the community (because it can only take interventionist measures). However, recognizing the responsibility of the state for this problem (with the community) requires it to address its own share in it. Ultimately when the state acts on this recognition, it should innately alter the kind of measures that it would (or could legitimately) take – from interventionist to remedial strategies. Secondly, this recognition allows us to uncover the interrelations that often exist between intra-group vulnerability and the injustice toward the minority community at large in which it arises (or its ‘inter-group’ vulnerability). These interrelations indicate that addressing these problems are not just non-contradictory tasks, but rather aligned endeavours; at times even complementary. The interrelations between these problems imply that the kind of measures that we might find useful for addressing the role of the state in different instances of intra-group vulnerability, would usually also benefit the community as a whole and promote the reparation of past injustices toward it.

Thus, I contend that recognizing the role of the state in these problems (of both inter-group vulnerability and intra-group vulnerability), releases us from the burden of making questionable moral evaluations to determine ‘the lesser of two evils.’ Namely, it dismisses

the need to choose between the ‘evil’ of enduring injustice (i.e. oppression within subordinated minority communities) and the ‘evil’ of risking inflicting further injustice (on these communities). Also, given the interrelations that commonly exist between these problems, this recognition opens alternatives that could in fact support ‘two goods’. Ultimately, this recognition illuminates that addressing the injustice toward subordinated minority communities and injustice within them is not a zero-sum game.

II. Replicating the View of the State as a Bystander in the Critical Scholarship on Liberal Multiculturalism

Whereas Kymlicka incorporates a tension between interventionist and laissez-faire responses into his theory, most of the criticism of his work picks one of these options as a comprehensive approach. Some of these critics seem to recognize the role of the state in the injustice toward minority communities, and this leads them to accept some exceptions to their interventionist/non-interventionist rule (of fear of inflicting further injustice on the community). However, like Kymlicka, they all view the state as a bystander in relation to the problem of intra-group vulnerability.

One critical response accuses liberal multiculturalists of allowing transgressions of basic human rights in the name of cultural accommodations and group rights. These critics advocate for an uncompromising intervention in minority groups’ affairs, to protect the vulnerable members of these groups against the group’s more powerful members. This interventionist solution relies on a view of the interface between vulnerable individuals, their community, and the state as a victim-predator-liberator relationship. The state in this

relationship is perceived as a third intervening party that should act to protect minority women who are victimized by their own community.

Another critical response rejects the deviation of liberal multicultural theories from the emphasis on the individual freedom in liberal theory. This school of thought advances the exit right solution to the problem of intra-group vulnerability. Its underlying principle is that “no one should be forced into ways of life.”⁴⁰ Thus, according to this solution, the state’s sole duty is ensuring that ‘the gate’ that leads out of the group is ‘unlocked.’ This duty allows the state very limited intervention in minority groups’ affairs. Namely, the state is a bystander that performs the job of a gatekeeper. As such it should not interfere in minority associations’ affairs and leave their practices intact as long as members are able to leave their groups. The formal model of this solution is advanced by Chandran Kukathas. This model rejects any interference in minority groups’ affairs beyond protecting the ability of their members to leave the group without paying for it with their lives,⁴¹ thus espousing an extreme version of the non-interventionist (*laissez-faire*) approach. Other models allow greater (yet still limited) intervention in minority communities’ affairs. These models lean heavily on the importance of securing certain educational content in schools’ curriculums that will allow members of a minority group to consider other ways of life and to provide opportunities to integrate into the wider society if they choose to leave their group. However, as we shall see, these exit models fall into the same interventionist/*laissez-faire* binary.

⁴⁰ See Kukathas, “Are There Any Cultural Rights?” (1995), *supra* note 5 at 231.

⁴¹ See Kukathas, *The Liberal Archipelago*, *supra* note 5 at 134.

A. Okin's Liberal Feminism: A Heavy-Handed Interventionist Solution

In her critique of liberal multicultural theories, Susan Okin rejects liberal arguments for granting cultural autonomy and group rights to minority cultures.⁴² She stresses that these arguments could not be reasonably defended if we take into account the patriarchal nature of most minority cultures and their object of controlling women and maintaining gender roles.⁴³ Beyond warranting rejection of non-liberal communities' claims for group rights, she contends that inequalities within cultural minorities justify coercive interference into their affairs to protect individuals rendered vulnerable by their community. To this end, Okin urges liberal democracies to employ legislative, social policy, and criminal law measures.⁴⁴ The essence of Okin's heavy-handed interventionist approach is summarized in her own words as follows:

The liberal state (...) should not only not give special rights or exemptions to cultural groups that discriminate against or oppress women. It should also enforce individual rights against such groups when the opportunity arises (...) Not to do so, from the point of view of a liberal who takes women's, children's, and other potentially vulnerable persons' rights seriously, is to let toleration for diversity run amok.⁴⁵

While Okin comments on the importance of consulting cultural groups in debates about controversial practices (for the sake of tolerance), she also reasserts her support of a liberal-interventionist solution, upholding liberal rights as trumps:

[B]asic rights – which arguably include, along with the right to personal freedom, and to be able to earn one's living without endangering one's life, the right to basic legal equality in the most intimate sphere of life – should not be granted or withheld

⁴² See Okin, "Feminism and Multiculturalism," *supra* note 1 at 633, 672–678; Okin, *Is Multiculturalism Bad for Women*, *supra* note 1 at 20–23.

⁴³ See Okin, "Feminism and Multiculturalism," *supra* note 1 at 667–668.

⁴⁴ See Okin, "Is Multiculturalism Bad for Women," *supra* note 1 at 12–24.

⁴⁵ See Okin, "Mistresses of Their Own Destiny," *supra* note 8, at 229–230.

depending on the outcome of democratic procedures. They should be guaranteed for all – even for those who would abjure them for themselves.⁴⁶

Only in the case of groups that have “recently suffered, or still suffer, from oppression at the hands of colonial powers or of the larger society,” does Okin believe that women who support a cultural practice that does not conform with gender equality “should be taken seriously.”⁴⁷ However, she qualifies this by adding two conditions: a) that women are “consulted in truly non-intimidating settings;” and b) that “they produce good reasons for preferring to continue aspects of their traditional status over moving to a status of immediate equality within their group.”⁴⁸

Okin’s assertion that the state should “enforce individual rights *against* such groups”⁴⁹ suggests that she views the state as an intervenor who is assigned a role of liberating vulnerable minority members from the oppressive forces of their group.⁵⁰ Indeed, Okin’s statements indicate that she believes that the state has a categorial duty to protect liberal rights. This duty does not derive from the state’s actions (and it thus has no remedial

⁴⁶ See Susan Okin, "Multiculturalism and Feminism: No Simple Question, No Simple Answers" in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights and Diversity* (New York: Cambridge University Press, 2005) 67 at 87 ["Multiculturalism and Feminism"].

⁴⁷ See *ibid.*

⁴⁸ See *ibid.*

⁴⁹ See Okin, “Mistresses of Their Own Destiny,” *supra* note 8 at 229 [emphasis added].

⁵⁰ As Martha Nussbaum suggests, Okin seems to endorse a form of comprehensive liberalism. According to this view, the fostering of personal autonomy in all areas of life is an appropriate goal of the state. See generally Martha C. Nussbaum, “A Plea for Difficulty” in Cohen Howard & Nussbaum, eds, *Is Multiculturalism Bad For Women?* (New Jersey: Princeton University Press, 1999) 105. Whereas comprehensive liberalism insists on equality and autonomy (and other liberal values) as determining all social and political matters, political liberalism accepts reasonable disagreement in society and the existence of plurality of comprehensive doctrines about the good (but liberalism). It therefore requires all citizens to endorse equality and autonomy as *political* values – namely, as moral facts that shape the basic structure of society (in the sense of the ‘rules of the game’), but nonetheless are “free-standing” (in Rawls terminology) from any metaphysical claim. According to this view, all cultures are required to accept the political equality of women as citizen (but are not required to accept that men and women have equal metaphysical nature), as well as a political conception of autonomy which demands to treat all citizens as equal choosers of ends. See generally John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

function), but from the perceived superiority of liberal values. Neither does it depend on a plea for help. As Okin insists, the state is obliged to enforce liberal rights even on “those who would abjure them for themselves.”⁵¹

Okin’s position on the case of cultural minority groups that have suffered colonial oppression or other forms of subordination (which is the sole exception that she is willing to make to her liberal-intervention rule) reveals further evidence of the gaps in her approach. Firstly, this position which assigns the liberal state another (external) role – the role of a judge – provides another indication for Okin’s view of the state as a bystander. According to this position, before the state can be exempted from its ‘liberating duty’ (i.e. to enforce individual rights against the group), the state must determine whether women have freely provided “good reasons” to continue a certain aspect of their traditional status.⁵² Secondly, once a ‘judgment’ has been issued (as for the authenticity and the rationality of women’s stance), the state should either apply the same liberal-intervention rule (if the answer is negative) or uphold the status quo (if it is positive). In other words, Okin’s position about the dilemma around women’s agency highlighted by this case indicates that she envisages the solutions to intra-group vulnerability as a heavy-handed intervention/laissez-faire binary. For Okin, if the state is convinced by women’s claims that keeping the status quo is preferable to “moving to a status of immediate equality,” its job is done; it has no further obligations and it could legitimately wash its hands off the matter.⁵³

⁵¹ See Okin, “Multiculturalism and Feminism,” *supra* note 46 at 87.

⁵² See *ibid.*

⁵³ This position effectively leaves these women in limbo. In other words, it is unclear how women are supposed to find the resources to transform the conditions that keep them vulnerable (See text beside note 77 below about this point which Okin herself and other feminist scholars have rightfully raised in their critiques on the exit right solution). Okin leaves this question unanswered.

The very fact that Okin allows this exception to her liberal-interventionist rule suggests that, like Kymlicka, she is uneasy with the idea of treating intra-group vulnerability in historically oppressed groups like intra-group vulnerability in all other cases. However, in contrast to Kymlicka, she is not satisfied with fostering dialogue (for reaching agreements with these groups), not even if we ensure that everyone, including women, is heard. Before she allows a deferral to a hands-off approach, Okin demands that women “produce good reasons” for maintaining aspects of their traditional status.⁵⁴

Requiring minority women to back up (and articulate) their support of cultural practices with “good reasons” demonstrates an assumption that women cannot genuinely support a cultural practice that does not conform with liberal conceptions of gender equality and personal autonomy. Thus, if they do support such practice, Okin assumes that they have been forced to do so.⁵⁵ This assumption reflects a Western-essentialist stance. Okin’s demand that women provide good reasons for keeping the status quo reinforces an oversimplified picture of these women as the victims of their community. As Ayelet Shachar puts it, “[Okin portrays] women who remain loyal to minority groups’ cultures (...) as victims without agency,” ignoring the possibility “that women within non-dominant communities may [authentically] find their cultural membership a source of value and not only as a source of oppression.”⁵⁶ This oversimplified picture of minority women as victims, as Leti Volpp points out, “leads many to deny the existence of *agency within*

⁵⁴ See Okin, “Multiculturalism and Feminism,” *supra* note 46 at 87.

⁵⁵ This condition deploys liberal-rationalism style of argumentation, and it also effectively imposes liberal values through the backdoor. In fact, even if Okin believes that women can authentically make non-liberal choices, she does not respect these choices. In fact, her position on this matter reflects the pivotal difficulty (even a paradox) of comprehensive liberalism – the disrespect of the choice to lead a non-autonomous life.

⁵⁶ See Shachar, *Multicultural Jurisdiction*, *supra* note 1 at 66.

patriarchy, ignoring that these women are capable of emancipatory change on their own behalf.”⁵⁷

Ultimately, a view of the interface between cultural minority groups, their female members, and the state, as ‘victim-predator-intervenor’ relations appears to underlie Okin’s solution. According to this view, minority women are victims of men and other powerful elements in their community, and the liberal state is obliged to intervene to liberate them. The most troubling effect of this view is that it overshadows alternatives for addressing this problem which do not involve liberal intervention. Okin’s position in the case of historically oppressed groups compounds this criticism. On the one hand, if women in these groups provide arguments that do not satisfy liberals they will be ignored, and the state will exhort its force to “liberate” them. On the other hand, if their reasons for holding off the transition to a status of gender equality (as liberals see it) are found satisfying, the state can wash its hands off the situation and apply a *laissez-faire* approach. In this case the burden of promoting a cultural change (to reach the desired end of equality within these groups) is left for women to bear. In both cases no further effort is required to understand these women’s interests and needs and consider what the state could do to improve their conditions. Yet, investing such effort can highlight transitional arrangements that better align with women’s interests and needs, as well as ways that the state could assist women with promoting such arrangements.

As I have indicated, I suspect that the source of this problematic stance is the view of the state as a bystander, and the fact that this view situates the state in a (merely) responsive position. Indeed, the exception that Okin makes to her liberal interventionist rule suggests

⁵⁷ See Volpp, *supra* note 14 at 1211.

that she senses the difficulty with giving the state an open ticket to exert (further) force on groups that have been oppressed throughout history by its governments. However, she fails to contemplate alternatives that could settle this difficulty. Revealing the relations between ‘inter-group vulnerability’ of these groups and intra-group vulnerability in them, and the role of the state at its heart, I contend, is key to settling this difficulty. This is because it reveals alternatives to coercive liberal intervention – alternatives which treat women as emancipatory subjects and build on a genuine effort to address their interests and needs.

B. Kukathas’s Formal Exit Right: A Laissez-Faire Solution

Whereas Okin’s proposal demonstrates a heavy-handed liberal interventionist approach, Chandran Kukathas’s exit solution is clearly situated on the other side of this scholarship’s binary. Kukathas advances an individual-centred standpoint that affirms freedom of association, freedom of conscience, and toleration for diversity, stressing that all three values have in common the core principle which lies at the heart of his approach, “that no one should be forced into ways of life.”⁵⁸

At the same time Kukathas also rejects the idea of justifying state intervention in cultural communities’ affairs for the sake of securing personal autonomy and individual choice. Autonomy and choice, he argues, may be valueless for some individuals.⁵⁹ According to Kukathas’s non-universalist view, there is no single moral authority or set of moral standards that govern the lives of individuals.⁶⁰ Kukathas’s non-universalist view is the

⁵⁸ See Kukathas, “Are There Any Cultural Rights?” (1995), *supra* note 5 at 231. See also Kukathas, *The Liberal Archipelago*, *supra* note 5 at 55.

⁵⁹ See Kukathas “Are There Any Cultural Rights?” (1995), *supra* note 5 at 244 (Kukathas believes not only that personal autonomy is an alienated concept for many individuals, but that it also contradicts many cultural communities’ interest in being “left alone.” Here Kukathas effectively articulates the tension between the concept of personal autonomy and cultural autonomy).

⁶⁰ See Kukathas, *The Liberal Archipelago*, *supra* note 5 at 8.

basis for his extreme non-interference stance. For Kukathas, groups and their practices are legitimate insofar as “the individuals taking part in [them] are prepared to acquiesce in [them].”⁶¹ While Kukathas recognizes that under this rule, association “may be quite illiberal,” he nevertheless defends the rights of cultural minorities to impose internal restrictions on their members.⁶² Giving the freedom of association its due, according to Kukathas, requires acknowledging that individuals may retain their citizenship rights when they choose to become a part of a cultural group.⁶³

Thus, Kukathas allows illiberal practices such as forced marriage, refusal of standard medical treatment for children, the raising of unschooled and illiterate children, and even practices “which inflict cruel and unusual punishment” – as long as individuals within these communities are free to leave the group without paying for it with their lives.⁶⁴ The only safeguards that his approach provides for protecting individuals in their group are the right to exit the group and the right to appeal to different authorities and challenge one’s unjust treatment.⁶⁵ To make “the freedom of exit creditable” Kukathas sets a single condition – the “existence of a wider society that is open to individuals wishing to leave their local groups.”⁶⁶

In Kukathas’s vision of a liberal multicultural society the state has no special obligation vis-à-vis cultural minority groups or their internal minorities. Its duty is one and only: to keep the way out of associations, including minority groups, open to their members. This

⁶¹ See Kukathas “Are There Any Cultural Rights?” (1995), *supra* note 5 at 246.

⁶² See *ibid* at 247–248.

⁶³ See Kukathas “Are There Any Cultural Rights?” (1992), *supra* note 5 at 133.

⁶⁴ See Kukathas, *The Liberal Archipelago*, *supra* note 5 at 134.

⁶⁵ These safeguards do not include the protection of the state for cultural dissenters, even if their basic individual rights are systematically violated in their group. See Kukathas, “Are There Any Cultural Rights?” (1995), *supra* note 5 at 249; Kukathas, *The Liberal Archipelago*, *supra* note 5 at 103.

⁶⁶ See Kukathas “Are There Any Cultural Rights?” (1992), *supra* note 5 at 134.

duty stems from the role of the state to protect the equal liberty of all individuals against unwarranted interference. Thus, it does not depend on the social reality or the actions of its governments. In Hohfeldian terms, according to this logic the state has a duty that arises from the (negative) right of the individual to liberty, and this right determines the scope and substance of its duty.⁶⁷ In this sense, according to Kukathas' formal exit model the state's duty is solely to oversee that group members can terminate their membership by leaving the group. In other words, the state's duty does not stem from its own actions or any responsibility for the conditions of any group members.

The problem with this approach is that it presupposes that the state is a bystander that only responds to intra-group vulnerability. However, as I have indicated, this presumption is highly questionable because it fails to consider the interrelations between the prolonged subordination of different cultural minority communities throughout the history of different liberal democratic societies and the conditions that render less powerful members of these communities (especially women and girls) vulnerable to oppressive treatment in their communities. Instead, recognizing these interrelations leads to the conclusion that the state, as one of the generators of this problem, has partial responsibility for it (which it shares with the community). Therefore, the state cannot satisfy its duty by playing only a gatekeeper role. In other words, the state's responsibility entails a positive obligation to address the harms it has helped create.

⁶⁷ According to Wesley Hohfeld's rights table, whenever there is a right there is a duty. See Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions" in Walter Wheeler Cook, ed, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1923) 23 at 36.

C. The Alternative Exit Models – Falling Back to the Same False Binary Choice

While Kukathas's exit model represents an extreme non-interventionist approach, some theorists advance other exit models that approve of certain interference in minority groups' affairs. These theorists purport to offer a more balanced approach that allows the state to use its power to secure certain conditions that each of them views as necessary for the ability of minority group members to leave their group. For example, Jeff Spinner-Halev and William Galston both emphasize the importance of exposing children to educational content that will allow them to lead independent lives as adults if they choose to leave their group. Allegedly, these 'less formal' exit models offer an intermediate solution, between heavy-handed interventionism and laissez-faire approach.

Spinner-Halev and Galston agree that the state should interfere in minority communities' affairs when their practices risk what they see as fundamental pre-conditions to securing a substantive exit right – namely, the ability of their members to leave the group. Beyond physical integrity, both agree that education is a primary condition to exit.⁶⁸ Their disagreement revolves around the kind of education that is needed for this end. Contrary to Kukathas, Spinner-Halev derives the justification of the exit right from its potential to secure personal autonomy “for as many people as possible.”⁶⁹ Seeking to minimize intervention into the autonomy of minority cultures' associations while at the

⁶⁸ For Spinner-Halev, group autonomy ends at the point of “serious physical harms”. Thus, other types of harms that are “not all encompassing” do not justify a prompt interventionist action on the part of the state. See Jeff Spinner-Halev, “Feminism, Multiculturalism, Oppression and the State” (2001) 112:1 *Ethics* 84 at 106 [“Feminism, Multiculturalism, Oppression”]; Galston insists also on a psychological condition to exit, which includes the freedom from brainwashing and other forms of coercion beyond “the purely physical that may give rise to warranted state interference on behalf of affected individuals.” See William A Galston, “Two Concepts of Liberalism” (1995) 105:3 *Ethics* 516 at 534.

⁶⁹ At the same time that Spinner-Halev rejects Kukathas's libertarian stance, he criticizes liberals “that argue for ending all forms of discrimination or supporting a robust version of autonomy.” According to Spinner-Halev, liberal democracies should work to find a balance amongst these different liberal concerns. See Jeff Spinner-Halev “Autonomy, Association and Pluralism,” in Eisenberg & Spinner-Halev, *supra* note 2 at 157.

same time securing a substantive exit right, Spinner-Halev establishes a “minimal standards argument.”⁷⁰ According to this argument, groups that adhere to the conditions that he sets should be left alone.⁷¹ These conditions constitute what he views as essential to ensure that members of minority groups would be in a position to evaluate their choices and possess minimum skills that are needed to integrate into the mainstream society. They include “freedom from physical abuse, decent health care and nutrition, the ability to socialize with others,” as well as “minimal education” which should comprise “basic literacy in the basic subjects of reading, math, sciences, etc.”⁷² To these conditions Spinner-Halev adds a requirement of the acknowledgment of the existence of a “mainstream society.”⁷³

Galston’s model allows for greater intervention into minority communities’ affairs, especially in the context of the educational requirement, which he believes that the state should comprehensively enforce.⁷⁴ Galston believes that in order to make exit a meaningful option, one needs to gain knowledge about other ways of life and have the capacity to evaluate them.⁷⁵ Thus, in opposition to Spinner-Halev, he is not satisfied with the mere awareness of the existence of a mainstream society for securing one’s option to leave the group. Children in Galston’s diversity state vision should be educated in such a way that enables them to evaluate their own and other ways of life.

⁷⁰ See *Ibid* at 158.

⁷¹ See *Ibid*, at 160.

⁷² See *Ibid*.

⁷³ See *Ibid* at 161–163 where Spinner-Halev answers to criticism of his last condition. According to this criticism the mere acknowledgment of a mainstream society is not sufficient to ensure the ability of children who are raised in close environments to understand and evaluate their own and other ways of life.

⁷⁴ The version of Galston’s exit right concept includes four elements: a knowledge condition, whereby one must be aware of other alternatives to one’s way of life; a capacity condition, according to which one must possess the intellectual capacities to assess one’s tradition in light of these alternative ways of life; a fitness condition, which requires that one would be able to participate in other ways of life; as well as a psychological condition of freedom from “brainwashing.”

⁷⁵ Also, in contrast to Spinner-Halev, Galston explicitly rejects autonomy in favour of diversity. Galston stresses that diversity and autonomy often point in different directions, thus compelling us to take a side in the conflict between these two liberal principles. See Galston, *supra* note 66, at 521, 525.

Spinner-Halev and Galston's exit models provide more leeway for the state to intervene in minority groups' affairs than Kukathas's formal exit model. For Spinner-Halev and Galston, the state should intervene to enforce certain educational content in the school curriculum of minority groups. However, once this content is in place (the details of which, as said, each of them sees differently), they both agree that the state should hold back and leave these groups alone. In effect, outside of the sphere of education, Spinner-Halev and Galston's models fall back to the same *laissez-faire* approach that Kukathas' formal exit right solution advances. Ultimately, Spinner-Halev and Galston's 'less formal' exit models are still constrained to the binary choice between interventionism (when it comes to education) and a 'hands off' approach (in other cases). They simply draw the line between these two opposite choices differently, in a way that might seem to be a more balanced sketch. To put it differently, for Spinner-Halev and Galston the watershed line between interventionism and *laissez-faire* approach towards minority groups' practices runs through schools' curriculums.

Except for allowing the state more room for intervention, the state remains a gatekeeper for Spinner-Halev and Galston. Like Kukathas, they envision the role of the state as keeping the gate between minority groups and the wider society unlocked. According to Spinner-Halev and Galston's proposals, education is the means of performing this job. In other words, these exit theorists appear to hold the same view of the state that characterizes the scholarship on intra-group vulnerability (from Kymlicka to his critics) – that of a bystander who is called to respond to this problem, rather than an entity that bears (at least partial) responsibility for it. Spinner-Halev's discussion of the case of historically oppressed groups clearly indicates this view of the state.

Like Okin and Kymlicka, Spinner-Halev treats the case of historically oppressed groups as an exception, by exempting these groups from his “minimal standards” rule. Namely, he does not allow the state to intervene in these groups’ affairs, even if their schools’ curriculums do not comply with his educational demands and the other conditions that he sets as minimum standards.⁷⁶ His statement that women in these groups might be unwilling to accept “that their oppressor will be their liberator” clearly indicates that he acknowledges the role of the state in the injustice toward these groups (as oppressor),⁷⁷ but treats the state as a bystander vis-à-vis the intra-group vulnerability of women in these groups (when he refers to the state as a liberator). To put it differently, since Spinner-Halev views the state as a responder, he does not seem to envision any other options that might be open to the state to address this problem except through acting as a liberator. Spinner-Halev’s declaration that “avoiding the injustice of imposing reforms on oppressed groups is often more important than avoiding the injustice of discrimination against women”⁷⁸ further indicates that, like Kymlicka, he sees the tasks of addressing the problems of intra-group vulnerability and inter-group vulnerability as a zero-sum game – one that forces us to choose between ‘two evils’ of imposing liberal reforms on oppressed groups and the discrimination against women within them. However, this view, as I have indicated, ignores the relations between the two phenomena (of intra-group vulnerability and inter-group vulnerability) and the role of the state at their core.

In sum, while Okin and Kukathas are grappling with the question of *whether* to leave minority groups’ practices intact or to interfere, Spinner-Halev and Galston focus on the

⁷⁶ In this case the only condition that he sets is ensuring that these groups’ representatives are “democratically accountable.” See Spinner-Halev, “Autonomy, Association and Pluralism,” *supra* note 64 at 108.

⁷⁷ See *Ibid* at 113.

⁷⁸ See *Ibid* at 86.

question of *when* the state should interfere. Yet, at the end of the day they all see only two responses available to the state: using its power to enforce certain standards on minority groups or ‘leaving them alone.’ This is because, like other scholars in this area, Spinner-Halev and Galston fail to recognize the role of the state as one of the generators of intra-group vulnerability. Thus, except for enforcing a certain kind of education that they see as necessary to allow members to leave their group, they believe that the state has no further obligation to act on this front. However, if we recognize the (partial) responsibility of the state for this problem, we realize that Spinner-Halev and Galston’s heavy reliance on school curriculum misses the mark. Neither education, nor any other magic bullet, should let the state off the hook. Instead of searching for such ready-made formulas, we should invest our efforts in identifying the role that the state played in the problem. Only after identifying the wrongs of the state, can we start to search for ways to repair or at least mitigate the harms.

In other words, the question is not *whether* to leave minority groups’ practices intact or interfere, or *when* the state should act. Given the part of the state in the responsibility for this problem, the question must be *how* the state should act to address intra-group vulnerability. Indeed, I suspect that there exist neither magic bullets nor formulas that could instantly solve this problem. Despite this, in the next section I propose a conceptual framework that could assist the state in delineating best practices to perform its duty and account for its responsibility.

III. Refining the Exit Right Solution to the problem of Intra-Group Vulnerability: A Path for Overcoming the Laissez-Faire/Heavy-Handed Intervention Binary of the Theoretical Scholarship

While the exit models tend to let the state off the hook by allowing it to alienate itself from the problem, the interventionist approach that Okin advances simply throws the entire responsibility on what she views as the ‘oppressive forces’ of these communities. For Okin, the state takes the role of women’s liberator from these oppressive forces, who are typically men. Thus, at the same time that Okin’s interventionist approach treats men in these communities as predators, it treats women as victims, rather than as emancipatory subjects.

In this respect, the exit models have one important advantage over the liberal interventionist solution – respecting illiberal choices. For the exit theorists, the choice not to embark on an ‘exodus journey’ is legitimate, even if the group’s ways of life do not align with liberal values and norms. In other words, the exit right solution purports to leave the choice at the hands of each vulnerable group member to decide whether to submit to her group’s demands or to leave. However, the exit solution has significant limitations that render this ‘exit choice’ a hollow paradigm. Scholars have made several critical points that illuminate these limitations.

To begin with, as feminist scholars point out, women in minority cultures have less access to the kinds of resources and opportunities needed to successfully exit from their community, such as economic stability, cultural ‘know-how,’ language skills, and connections.⁷⁹ Moreover, the consequences of leaving the community can be dire for many

⁷⁹ See Shachar, *Multicultural Jurisdiction*, *supra* note 1 at 69; Okin, “Mistresses of Their Own Destiny,” *supra* note 8 at 209.

women. Women risk losing custody of children and property rights, both of which would obviously have a ‘chilling effect’ on their willingness to leave their communities.⁸⁰ In other words, the circumstances that women of cultural minorities face and the consequences that they may bear render their exit extremely difficult.

Equally problematic are the conclusions drawn from the mere fact of individuals’ ‘failure to exit.’ As Ayelet Shachar puts it, for Kukathas, group members who do not leave their community are presumed to have agreed to relinquish “a set of rights and protections, granted to them by virtue of their citizenship.”⁸¹ Attributing such consent to members of traditional cultures is problematic for several reasons. First, it glosses over the fact that most individuals *enter* their cultural community through the accident of birth. It also ignores that women and other less powerful group members lack the resources to make and pursue the choice to leave their community. Second, as Leslie Green suggests, even if we could infer consent to membership from the mere fact of non-exit (disregarding the problem of free entrance and exit), this in itself does not validate all cultural practices.⁸² Indeed, as Shachar points out, to assert that failure to exercise exit right equals accepting all of the group’s practices and rules is to fail to consider the existence of different positions within the hierarchies of cultural minorities, and to overlook group members’ multiple

⁸⁰ For example, in the Israeli context, a Bedouin woman who divorces her husband may find that her own family is not willing to support her and may even ostracize her. She may also lose custody over her children as the Bedouin norm is that the “best interests of the child” is to grow up in their paternal extended family’s care, and according to Islamic law (applicable to Muslims in Israel) fathers gain custody of boys over the age of seven and girls over the age of nine. See Rawia Abu Rabia, “Redefining Polygamy Among the Palestinian Bedouins in Israel: Colonialism, Patriarchy, and Resistance” 19 *Am UJ Gender Soc Pol’y & L* 459 (2011) at 471.

⁸¹ See Shachar, *Multicultural Jurisdiction*, *supra* note 1 at 70.

⁸² See Green, *supra* note 7 at 175.

affiliations (to their gender, family, etc.), which exist in addition to their ties to their group and to the state as its citizens.⁸³

According to this critique, the exit right solution forces minority community members into an impossible choice between accepting their culture as one unnegotiable package or leaving their community.⁸⁴ Both choices require the individual to make a great personal sacrifice of either yielding one's cultural identity (and sometimes also cutting family ties) or subordinating oneself to all the cultural or religious dictates of the community. Effectively, the exit solution presents the individual with a choice between her citizenship rights and her culture.⁸⁵

Another fundamental difficulty is embedded in the basic mechanism of the exit right solution. This mechanism relies on the existence of a wide-open society. However, the applicability of the exit right solution to different relational climates between ethnic, national, or religious groups in states of diverse population is far from obvious. In some countries, such general or mainstream society simply does not exist. Especially questionable is the relevance of the exit solution for contexts of minority communities that have experienced long years of discrimination and oppressive treatment at the hands of governments and the authorities of the state, or which have otherwise experienced prolonged conflict with the dominant group (ethnic, national, or religious) in their country. In such conflictual circumstances, leaving one's community would rarely be possible, since

⁸³ See Shachar, *Multicultural Jurisdiction*, *supra* note 1 at 69–70.

⁸⁴ See *Ibid* at 41.

⁸⁵ Confronting the vulnerable members of minority groups with this choice is unfair and treats them unequally, as everyone else who are not affiliated with a cultural minority group, are free to enjoy both – their culture and their citizenship rights. But what is most problematic is the assumption that underlies this position – namely, that people's identity is defined by their affiliation with a cultural group (ethnic/religious/indigenous) and the state (as its citizens/residents) only. This assumption ignores other important elements of people's identity like gender or class.

the most fundamental condition for exit – namely, the existence of a wider society to which the individual can exit – is not met.

The situation of the Arab minority in Israel offers insights into the problem of applying the exit right solution in such conflictual circumstances. Given the conflict-ridden relationship between Jews and Palestinian-Arabs in the state of Israel, it has been argued that Israel is an ‘ethno-cratic’ Jewish state.⁸⁶ According to this argument, even the very definition of Israel as a Jewish state excludes other ethnic and religious minorities. In other words, the existence of a civil neutral society is undercut by the statement that Israel is a Jewish state in Israel’s basic laws and establishing documents.⁸⁷

Finally, the market model exit right solution assumes a direct relation between exit and social transformation. According to this model, a mass exit of discontented members will force extremely oppressive communities to either dissolve or ‘mend their ways.’ As Green suggests, considering the huge transaction costs – i.e. the potentially grave consequences and lack of resources to pursue or even conceive of exit – the assumption that vulnerable members “might simply leave” if they are mistreated by their group (as if they were dissatisfied consumers) is baseless.⁸⁸ Indeed, transformative change in people’s beliefs about traditions and norms is obviously a longer and much more complex process than a change in consumers’ preferences about commodities or services. Hence, exit on such a large scale – to the extent that oppressive communities will dissolve – is unlikely to happen.

⁸⁶ See Oren Yiftachel, “Ethnocracy and Its Discontents: Minority Protest in Israel” (2000) 26 *Critical Inquiry* 725.

⁸⁷ See Michael M. Karayanni, "On the Concepts of Ours: Multiculturalism with Respect to Arab-Jewish Relations" (2003) 27:1 *Tel Aviv U L Rev* 71.

⁸⁸ See Green, *supra* note 7.

Equally unlikely is the prospect that a flow of people out of the group would affect group leaders to loosen their demands, to the point that oppressive practices would perish.

A. Understanding Exit as a Non-Dichotomous Concept

Should the criticism of the exit models lead us to reject the exit right solution from the outset? I suggest not. While Okin's interventionist liberal approach reinforces an oversimplified picture of minority women as victims without agency, the underlying principle of the exit models to leave the choice at the hands of the vulnerable individual to decide the course of her own life demonstrates an appreciation of minority women as emancipatory subjects. In other words, the idea that underlies the exit solution of leaving the ultimate choice at the hands of the vulnerable individual, rather than shifting the power to the state, provides a useful conceptual framework for respecting women's agency. However, this framework ought to be refined in a way that provides women with multiple realistic options to alter their life conditions, aside from leaving their community altogether.

Thus, understanding exit as a dichotomous concept that allows only one definite option for transforming one's conditions – i.e. the choice of leaving the group altogether (which effectively, as critics have shown, is rarely a viable option) – is what limits the potential of the exit models for addressing the problem of intra-group vulnerability. Instead, altering our conception of exit from a dichotomous 'all or nothing' concept (of leaving or 'staying and submitting') to a *gradational* concept, can support a more complex understanding of minority women's agency, one that recognizes the possibility of exercising agency within patriarchy. According to this understanding, one can realize her exit right not only by

‘climbing the wall’ that separates her community from the broader society, but also through less dramatic choices that she could pursue within the sphere of her community or family. In other words, exit as a gradational concept supports a spectrum of choices – from various decisions to withdraw from a certain practice or other aspects of the community’s ways of life, to a full-blown manifestation in leaving the group entirely.

This refined conception of the exit solution has several advantages over its traditional understanding. First, understanding exit as a gradational idea addresses the feminist criticism of the exit models. By offering moderate exit options, this understanding opens alternatives that overcome the binary of forcing minority women to ‘leave their whole world behind’ or otherwise submit to all dictates of their community. It further demonstrates appreciation of the value of cultural identity for minority women, as well as other aspects of their identity, like gender and national identity. In other words, rather than forcing minority women to choose between their culture and citizenship rights, the availability of intermediate exit options exhibits acknowledgment of the intersecting dimensions of their identity and allows women to navigate between them.

Recognizing the availability of such intermediate exit choices also complicates the ‘package picture’ of minority cultures. Rather than treating these communities as homogeneous and stagnant entities, it demonstrates attentiveness to the reality of life within them, which usually leaves some room for deviation from the community’s traditions and norms. These deviations indicated how exit could be realized in other, less extreme forms. In fact, a careful examination of the social realities in some of the most patriarchal, hierarchal, and insular communities reveals that there are different ways in which members

manage to deviate from the community's practices and challenge its norms.⁸⁹ For example, Angela Campbell's study of marriage practices in the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) community in Bountiful, British Columbia, identifies early signs of change in the way in which the community's marriage ceremonies increasingly resemble mainstream ceremonies.⁹⁰

Furthermore, understanding exit as a gradational concept rejects the problematic conclusion that theorists infer from non-exit – namely, the presumption that a 'failure' to leave the group entails submission to all cultural demands and the community's dictations. This understanding exhibits acknowledgment of the insurmountable obstacles that minority women and girls face if they wish to leave their community, as well as the fact that many might not desire to do so. In other words, the gradational conception of exit rejects the deployment of the contractual legal doctrine of consent in the cultural context. Indeed, while this doctrine might be appropriate for commercial (free market) interactions, it seems at odds with this context of power (patriarchal and hierarchical) relationships. This rejection has practical implications, especially if we consider it together with the role of the state in the problem. It eliminates the opportunity of the state to relieve itself of responsibility and take a laissez-faire approach by using this doctrine to justify itself with a claim that "its hands are tied because it must not intervene against 'women's will.'" In other words, rejecting the conclusion that remaining a member of a minority community can be equated to a woman yielding her citizenship rights, requires the state to take positive

⁸⁹ We might not notice such cases due to the closeness and the insularity of such communities – especially when such choices are made in the domestic sphere – or we may simply not acknowledge them as outsiders who might not be familiar with the nuances of the community's traditions.

⁹⁰ Campbell also finds greater diversity and pluralism in the attitudes of the community's young generation to polygamy and other marriage traditions. See Angela Campbell, "Plus Ça Change? Bountiful's Diverse and Durable Marriage Practices" in Gillian Calder & Lori G. Beaman, *Polygamy's Rights and Wrongs: Perspectives on Harm, Family, and Law* (Vancouver, UBC Press, 2013) 21 at 30–34.

measures to address its contribution to the obstacles impeding her ability to make exit choices.

Second, understanding exit as a gradational concept is more compatible with the reality of social transformation than the economist (market-based) model's reliance on the prospect of mass exodus of 'discontented' members out of the group. Rather than relying on such a dubious scenario (for guaranteeing that "extremely oppressive" groups would dissolve or that it would force their leaderships to 'mend their ways'), this refined conception offers a more realistic prospect of cultural change. According to this alternative prospect, when individual women manage to deviate from the group's norms in little measured steps it encourages others to follow their footsteps. Eventually these steps might reach a critical mass, generating a cultural change.⁹¹ Hence, the gradational understanding of exit is also more complementary to the transformative aspect of this solution. In other words, understanding transformative change in minority cultures as a gradual process, which relies on individual members' actions, offers a more reasonable working premise for addressing the problem of intra-group vulnerability.

Moreover, rather than relying on the actions of the group leadership for progressive developments, this understanding requires that we shift our attention to the vulnerable group members and focus on promoting their ability to take such moderate exit steps. This shift has further important implications. It entails treating women as agents who are capable of emancipatory change on their own behalves, instead of viewing them as pawns who depend on the initiative of their group leaders. In addition, focusing on fostering the ability

⁹¹ It might also happen that at some point exiting (or avoiding entering into) a certain cultural practice or tradition would become a legitimate choice in the eyes of the community members. In turn, that transformation in members' perceptions might create a change in the community's practices, traditions, or norms.

of a minority woman to take moderate exit steps allows her to transform her own life conditions, without placing on her the additional burden of participating in the kind of political activity that might promote progressive transformations in her community's practices generally.

Third, the gradational conception of exit, also addresses the pivotal criticism about the presumption of a wider civic or mainstream society available to welcome members of minority groups who leave their group. Instead of forcing minority women to submit to all their community's demands because 'they have nowhere they can exit to' in the political and social constellation of their country, this conception supports a spectrum of alternative, more feasible, options for transforming their life conditions. Therefore, not only does this refined exit conception account for the internal obstacles that vulnerable members (especially women) face due to their status and circumstances in their community, it also responds to the external obstacles that these members might face due to the conflict-ridden relationship of their community with the majority group in their state.

Finally, the gradational understanding of exit allows for normative minimalism. Indeed, the formal exit model that Kukathas advances rejects the deployment of liberal values, however it offers almost nothing that could facilitate the ability of vulnerable minority members to leave their group. Other, 'less formal' exit models, allegedly offer 'more' for the vulnerable individual. For instance, Spinner-Halev and Galston's proposals offer certain protections against physical harm and ignorance (although, as indicated below, the helpfulness of securing certain educational content for the vulnerable member is seriously questionable). However, Spinner-Halev and Galston's 'more substantial' models uphold certain liberal values, such as personal autonomy, diversity and pluralism. Instead, focusing

on the vulnerable member and available means to support their ability to make different exit choices, eliminates the need to engage in such normative discussions about legitimate intervention in these groups' affairs and whether that would be justified.

Nevertheless, while the gradational exit conception offers normative minimalism, it also offers something significant: it calls for taking positive measures to secure access to public resources for vulnerable members that are fundamental to better their conditions as they see fit. Ultimately, the virtue of this conception is that it attends to the shades of grey in cultural practices and legal tools. This, along with the recognition of the state's role, allows us to overcome the 'all or nothing' dynamic that informs the scholarship on intra-group vulnerability.

B. Using the Gradational Exit Right as a Conceptual Framework for Addressing Intra-Group Vulnerability Concerns: A Contextual Approach

As we have seen, some exit theorists (such as Spinner-Halev and Galston) seek to secure certain pre-conditions, such as education, that they view as necessary to enable minority group members to leave their group. These theorists have elevated the importance of providing certain educational content in overcoming the obstacles to leaving minority communities. Their proposals, however, seem to ignore the fact that some members of minority groups (especially women) might simply have *no access* (or very limited access) to educational institutions.⁹² Moreover, overcoming the serious hurdles that women

⁹² For example, in Israel, more than 60 percent of girls living in Bedouin-Arab villages in the Negev area drop out of high school each year. The considerable distance and the dilapidated road infrastructure between their villages and localities that have high schools are major disincentives for Bedouin parents to send their children, especially their daughters, to school. See Suleiman Abu-Bader & Daniel Gottlieb, "Poverty, Education and Employment Among the Arab-Bedouin Society: A Comparative View" (2009) Society for the Study of Economic Inequality Working Paper No 137.

typically meet in trying to exit seems to require a host of other vital resources beyond education, such as access to family courts, welfare assistance, and protections against domestic violence (DV). In other words, the ability to make and pursue exit choices – not only by leaving the community, but also by withdrawing from practices or traditions – necessitates some access to basic resources. For instance, how is a minority woman able to leave an unfavourable marriage arrangement if she does not have the financial means to hire a lawyer or pay court fees?

One common way in which the state continues to generate conditions that render minority women vulnerable to oppressive treatment in their communities is through the creation and fortification of barriers to accessing public resources and services that are crucial to their ability to resist these oppressions. Thus, unless the role of the state in the intra-group vulnerability of minority women is accounted for, the conceptual refinement of the exit right solution is not enough. In other words, to offer minority women a viable exit right, the partial responsibility of the state for the problem must be recognized. Hence, the duty of the state to address its own part in the intra-group vulnerability of minority women must be understood in developing a practical approach for tackling this problem.

The state, therefore, has a powerful mechanism through which to fulfil its duty. Namely, securing minority women's access to public resources and services that could support their ability to leave, resist or avoid entering into unfavourable arrangements or other aspects of their community's ways of life. Most importantly, removing accessibility barriers to such public resources allows the state to account for its responsibility, while respecting women's agency since it leaves them with the ultimate choice of whether to use these resources.

As the examples discussed in Part I indicate, the state's culpability takes on different forms in different contexts. Therefore, addressing the role of the state in different instances of this problem requires close attention to the relevant context. Indeed, the multiple forms of exit supported by the gradational exit approach open a wide range of strategies that could be applied to different contexts in which intra-group vulnerability manifests in minority women's lives.⁹³ While these strategies should focus on promoting the ability of women and girls to make (personal and individualized) exit choices, they could nonetheless vary significantly from one context to another and change over time. Strategies that are suitable for a given context are dependent on the relevant interests and needs of the specific group of females, at a given time, and on the obstacles that they face.

For instance, removing discriminatory barriers to minority women's access to justice in family law is an important strategy for supporting their ability to leave or resist an oppressive marriage arrangement. But this strategy might necessitate using different (legal and extra-legal) measures in different contexts. In the South African context, this strategy required a comprehensive reform of customary marriage. This reform led to the enactment of the Customary Marriage Act of 1998, and was the culmination of deliberative and

⁹³ For instance, the proposals that are known as dialogical or deliberative approaches offer an important democratic procedure for providing women with opportunities for voicing their positions and negotiating contested aspects of their tradition. I do not include these proposals as representing one of the solutions that scholars have proposed for the problem in the theoretical scholarship, precisely because of their procedural nature. These proposals offer political strategies rather than a substantive approach for addressing these issues. While political strategies may be valuable tools in addressing intra-group vulnerability, this article intends to focus on the substantive rather than procedural mechanisms through which to reach these ends. Prominent works of scholars who propose different models of dialogue and deliberation include, among others: See Iris Marion Young, *Inclusion and Democracy* (New York: Oxford University Press, 2002); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (New Jersey: Princeton University Press, 2002); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, 2nd ed (Basingstoke, UK: Palgrave MacMillan, 2006). It also includes the work of Monique Deveaux. See: Deveaux, *supra* note 17, and Deveaux, "A deliberative approach to cultural conflicts" in Eisenberg & Spinner-Halev, *supra* note 2 at 40.

consultative hearings sponsored by the South African Law Commission⁹⁴ The Act, which granted customary African marriage equal status with civil (usually Christian) marriage, also affirmed women's proprietary capacities and their equal custody rights, and asserted the family courts' jurisdiction over divorce, maintenance and custody matters (taking this power away from local chiefs).⁹⁵ Instead of abolishing the custom of polygamy, the deliberations yielded new legislation that aims to protect the financial interests of wives in a multiple marriage situation.⁹⁶ According to this legislation, a man intending to marry another wife must "apply to court to approve a proposed contract which will regulate the future matrimonial property system of his marriage" in the event of divorce or his death.⁹⁷

In Israel, after a five-year campaign of women's organizations and other NGOs, the civil family courts were finally opened to non-Jews in 2001. However, while Arabs and Jews in Israel are now 'equal before the law' in terms of their right to access family courts, laws that were enacted to diminish socio-economic barriers to justice, such as the Legal Aid Law (1972), are still implemented in a discriminatory way that impedes the ability of many Arab women to meaningfully access the courts and claim matrimonial reliefs. Given the fact that Bedouin-Arabs in the Negev area are among the most impoverished populations in Israel, this discriminatory implementation fortifies obstacles to the ability of Bedouin women to leave an oppressive marriage arrangement. Instead of acting to address its own

⁹⁴ See Deveaux, *supra* note 17 at 204.

⁹⁵ In fact, while women's equality and legal reform advocates voiced tremendous opposition to women's status as minors (in marriage) under customary law, proposals for a more radical reform of a single civil marriage code (that would protect the rights of all women, irrespective of their race, culture, or religion), could not generate enough support to go forward. See *Ibid* at 207.

⁹⁶ Most participants in these deliberations opposed abolishing polygamy – both because they view the practice as an important variation of customary marriage, and because they felt that it would be ineffectual, leaving women in polygamous marriages essentially unprotected. See *Ibid* at 208.

⁹⁷ See I. P. Maithufi & J. C. Bekker, "The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa" (2002) 35:2 Comp & Int'l LJ S Afr 182 at 190.

role in the subordination of Bedouin women, the Israeli government has recently decided to resuscitate the criminal ban on polygamous marriage. From its original laissez-faire approach that ignored the prevalence of polygamy among the Bedouin-Arabs for more than sixty years, Israel has shifted to an enforcement policy that aims to eradicate the practice by punishing polygamist men. Not only does this decision reflect an approach through which the state avoids taking accountability, but also ignores the fact that imprisoning polygamist men might further harm polygamous wives and their children because it would leave these families without material support.

The South African model displays a useful legal tool for protecting the financial interests of polygamous wives. And yet, while this example suggests a valuable alternative to criminalizing polygamy, we must not attempt to import this legal model to other contexts as an “all inclusive” template strategy. For example, in the Israeli context, such legislation might be ineffectual if polygamous wives cannot afford to initiate a legal proceeding to claim their rights according to their matrimonial contract. We should also pay attention to the different ways in which cultural customs or traditions are practiced in different contexts and the respective challenges invoked by these contexts. Acknowledging that many polygamous Bedouin wives are practically abandoned wives is indispensable for addressing polygamy in the Israeli context. Divorce is stigmatized in Bedouin society and may cause disputes between the couples’ extended families. Consequently, Bedouin men often use polygamy as a way out of their first marriage. After marrying an additional wife, a Bedouin man may move in with his new wife and cease to support his “old” wife and her children. Thus, in the Israeli context, any legislation that aims to protect the financial interests of all wives in the polygamous family, must take these facts into account. In other

words, such legislation cannot merely impose a contract that regulates the matrimonial property system only upon divorce or the man's death; it must protect the financial interests of the senior wife from the moment that her husband entered a subsequent marriage.

Ultimately, the refined understanding of exit as a gradational model offers an alternative conceptual framework for addressing intra-group vulnerability concerns. My intentions are not to propose a fixed formula or magic bullet that will end the problem. Instead, this approach aims to provide guiding principles for bettering the conditions of individual women to make different exit choices, which in turn should be carefully tailored to the relevant context. Thus, we must not attempt to import template strategies that we find suitable for addressing one context of intra-group vulnerability to another. Careful examination of the socio-political context is required – both in revealing the various ways in which the state is implicated in different manifestations of this problem, and in developing appropriate strategies that the state could take to account in addressing their culpability.

Conclusion

This essay sought to move beyond reductionist accounts of minority women's subordination in two significant ways. First, it pointed to the role of the state in such subordination. Second, it advanced an alternative approach that can guide the state in addressing issues of intra-group vulnerability in a way that addresses its own responsibility for creating and reinforcing conditions conducive to internal oppression, and that involves an appreciation of the existence of agency within patriarchy.

As critical race feminist scholars have shown, liberal feminists like Okin tend to focus on gender subordination in minority communities, without noticing how it relates to other

forces of subordination, such as colonialism and racism.⁹⁸ Rather than inquiring into these other forces, these liberal feminist accounts demonstrate a Western-essentialist view of minority women as victims who need to be saved by the state from ‘the claws’ of men in their communities. While these liberal feminist accounts portray a simplistic picture of minority women’s social realities, other liberal scholars’ accounts of the problem of intra-group vulnerability rely exclusively on theoretical analyses of this problem. These scholars espouse traditional liberal views that treat the individual as an abstract-rational agent, removed from their affiliations. The role of the state, according to these views, is limited to protecting the liberty of the individual against unwarranted interference. In other words, the state’s mandate is restricted to protecting the equal freedom of its citizens (in its ‘negative liberty’ sense) as a ‘gatekeeper.’ These views seem to be transferred to the cultural context, except that in this context, the state oversees the ‘exit gate’ which separates the group from wider society.

At the end of the day, the result of scholars’ analyses of this problem is an ‘all-or-nothing’ binary. First, as we have seen, the solutions that these scholars advance allow the state to take one of two troubling approaches – a laissez-faire policy or a heavy-handed liberal intervention. Second, these analyses reflect a binary understanding of choice. According to this understanding, one is either a “free-rational” agent or a victim. This binary understanding of choice ignores the possibility of agency within patriarchy, and reveals a failure to acknowledge that minority women can make choices that do not align

⁹⁸ See generally Volpp, *supra* note 14; Razack, *supra* note 14.

with liberal views about gender equality and personal autonomy that are nonetheless authentic choices.⁹⁹

To overcome this ‘all-or-nothing’ binary, this article advanced an alternative analysis of the problem of minority women’s intra-group vulnerability. Following the criticism of liberal feminists’ excessive focus on minority communities’ sex-subordinating practices and its obscuring effects, my analysis reveals other structural forces (beyond the minority communities themselves) that shape these practices by pointing to the role of the state. This analysis further illuminates how a refined understanding of the exit right solution as a non-dichotomous (gradational) concept, integrated with a recognition of the state’s role, can open up new paths for addressing this problem.

Rather than forcing minority women into an impossible choice between their citizenship rights and their culture, the gradational exit approach seeks to support these women’s ability to negotiate their freedoms and rights within their culture, thereby recognizing the possibility of agency within patriarchy. As one of the generators of the conditions that render minority women vulnerable to internal oppression, the state should take an active role in fostering the gradational exit right. To this end, removing barriers to the access of minority women to public resources and services that could support their ability to leave or resist unfavourable aspects of their community’s practices is often a useful strategy.

⁹⁹ The positions of black African women in the debate on customary marriage in South-Africa are good examples of such non-liberal choices. In addition to opposing a proposal for a single civil marriage code, many of these women also rejected the idea of simply abolishing the customs of polygamy and bridewealth payment (*lobolo*). *Lobolo* is a payment that the prospective groom passes to the father of the bride (or another male guardian in the event of his death). Without it, marriages are deemed invalid. If a woman seeks to leave her marriage, her family is expected to return the *lobolo* to the groom or his family – a requirement widely blamed for keeping women (who fear impoverishing themselves and their families) trapped in abusive marriages. Here, too (like in the case of polygamy), rather than eliminating the practice, the deliberations yielded a reform which removed the requirement of *lobolo* to prove a marriage's validity. See Deveaux, *supra* note 17 at 204-208.

Ultimately, recognizing the partial responsibility of the state for this problem denies it the privilege to act as a bystander. The state cannot legitimately either throw the entire responsibility on the community by taking a heavy-handed interventionist approach against the community, or resist forming any response at all. Instead, this recognition instructs us to trace the wrongs of the state that helped reinforce the intra-group vulnerability of minority women and to consider strategies to repair or at least mitigate the harms.