

PANEL III: FEMINISM, MULTICULTURALISM, AND THE LAW

WOMEN: AN UNCERTAIN FIT FOR THE MULTICULTURAL MOVEMENT?

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Initially, consider the meaning of the word "culture." That word derives from two Latin words—*cultura*, meaning cultivation, and *cultus*, meaning worship. People often speak of cultivation of the soil or animals, and even of microscopic organisms. Sometimes, however, people refer to cultivation of the mind, taste, and manners. The word is employed in the latter sense to speak of a cultured or civilized person. By making adjectives of the two nouns, the implication arises that the nouns are used properly only in the singular form—culture rather than cultures, and civilization rather than civilizations. This, interestingly enough, was the practice until the middle of the Nineteenth Century.

The plural form derives from *cultus*, meaning worship, from which comes the word "cult," meaning "[a] particular form or system of religious worship; *esp.* in reference to its external rites and ceremonies."¹ Hence, different forms of worship, different cults, and eventually different customs, manners, mores, or lifestyles have each denominated a culture, leading to multiculturalism.

To illustrate the implications of these differences, examine an early study of multiculturalism—Shakespeare's *Merchant of Venice*. In a famous speech, Shylock, to make his case that cosmopolitan Venice is a place where Jews and Christians live together in peace, argues that there is no difference between the two.

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1. OXFORD ENGLISH DICTIONARY 119 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

"Hath not a Jew eyes?" he asks in this famous speech. "Hath not a Jew hands, organs, dimensions, senses, affections, passions; fed with the same food, hurt with the same weapons, subject to the same diseases, heal'd by the same means, warm'd and cool'd by the same winter and summer, as a Christian is?"² Every reference in this passage is to the body and its passions. And Shylock is right. People are the same with respect to the body and its passions. Our differences derive from our cultures, originally from our different forms of worship. As it turns out, these differences are decisive.

Indeed, religion divides a population. When put to the test, even cosmopolitan Venice proves to be a Christian city. Shakespeare seems to be suggesting that when culture is taken seriously, multiculturalism is impossible. Expressing it differently (and in a secular context), Abraham Lincoln concurred when he stated, "A house divided against itself cannot stand."³ Recognizing the divisive nature of competing and conflicting religion, the United States Constitution removes it from the political field by separating church and state.⁴ Consequently, unlike many other countries, American politics has been blessed by the absence of religious parties.

When seriously regarded, ethnicity also divides a country. This especially is likely when people harbor memories of old wars or past oppression that were driven by ethnic differences. The foundation of the American political arrangement acknowledges these differences, and perhaps as a result, the United States Constitution speaks only of individuals and never of groups.

The Constitution expects citizens, serving as jurors, to render justice regardless of the faith or ethnic background of the parties involved.⁵ Generally, this impartiality has been achieved. This "setting aside" of religious and ethnic differences was not possible in Northern Ireland, where, in 1973, Britain abolished trial by jury for defendants accused of violent crimes. Why? Northern Ireland was, to paraphrase W. S. Gilbert, the very

2. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 1.

3. Abraham Lincoln, *House Divided*, Speech at the Republican State Convention at Springfield, Illinois (June 16, 1858) (paraphrasing *Mark* 3:25), in *SPEECHES AND WRITINGS, 1832-1858*, at 426, 428 (1989).

4. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

5. See *Ham v. United States*, 409 U.S. 524 (1973) (holding that a judge must ask jurors about their possible racial bias when there is cause for doubt).

model of a modern multiculturalism.⁶ Catholic jurors refused to convict Catholic defendants, and Protestant jurors refused to convict Protestant defendants.

With this background, we turn to the subject of multiculturalism today. Proponents of multiculturalism ask others to recognize and accept people's cultural identity. Professor Amy Gutmann of Princeton University specifically mentions African-Americans, Asian-Americans, Native Americans, and even women.⁷ Does this mean that people are obliged to take these so-called cultural identities into account when we design electoral districts?⁸ The 1982 amendments to the Voting Rights Act of 1965 do promote racial districts, with a view to racial voting.⁹ If Lani Guinier and other activists were to succeed, such racial voting would be accomplished more forthrightly.¹⁰

However, women differ from other groups seeking recognition of their cultural identities. As feminist Susan Wolf pointedly explained in her volume of essays on multiculturalism, women always have been recognized as a group, and that is precisely their complaint.¹¹ Women, as a group, were denied the right to practice law,¹² and in their capacity as wives, they were denied various legal rights that men were entitled to, including the rights to sue, enter into contracts, make wills, and vote. Even supposed legal protections often were practically useless. For example, under the old common law rule, wives and husbands were equally incompetent as witnesses either for or against each other. But as Chief Justice Earl Warren observed in *Wyatt v. United States*,¹³ this rule rested partly on the desire to foster peace in a marital relationship,¹⁴ and it was the husband who prescribed and enforced the terms of that peace, sometimes by exercising his legal right to "chastise" his wife.

6. See W.S. GILBERT & ARTHUR SULLIVAN, H.M.S. PINAFORE.

7. See AMY GUTMANN, DEMOCRATIC EDUCATION (1987).

8. See Mark S. Nagel, *Constitutional Limits on Racial Redistricting: Miller v. Johnson*, 19 HARV. J.L. & PUB. POL'Y 188 (1995).

9. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973p (1988)).

10. See LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

11. Wolf stated that women have been recognized as "nothing but women" for too long. See SUSAN WOLF, FEMINISM AND BIOETHICS (1995).

12. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

13. 362 U.S. 525 (1960).

14. *Id.* at 531 (Warren, C.J., dissenting).

Women rightly objected to these gender-based classifications, whether those classifications took the form of limitations or supposed privileges. Women demanded to be recognized not as a special group with special treatment, but rather simply as individuals with equal treatment. This feminist argument lends support to the proposition that women do not constitute a separate community in the way that an ethnic group does.

This analysis does not deny that women differ from men. They do—the most obvious example being that women can become pregnant. But women also differ among themselves. For example, they may disagree about how the law should respond to pregnancy, particularly as it relates to the workplace. The 1980 amendment to Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act,¹⁵ designed to protect working women, treats pregnancy as a temporary disability.¹⁶ Under this law, employers may treat pregnancy neither more nor less favorably than other potentially disabling conditions. Women would be entitled to some disability leave while men would not.

Feminists are divided sharply on whether this arrangement is a step forward for women.¹⁷ Some view it as beneficial because it appropriately recognizes a fundamental difference between men and women. Others believe that such treatment merely is another example of the law treating women as nothing but women, rather than as persons, and further that it implies that only women can nurture children.

As this discussion illustrates, women are not a cohesive group that is easily defined in multicultural terms for multicultural purposes. If one takes culture seriously, as the extreme multiculturalists do, one is what one's ancestors were—a French-Canadian rather than a Canadian, a Serb or a Croat rather than a Yugoslav, a Christian rather than a Venetian or an Englishman, an African or Native American rather than an American, or a

15. Pub. L. No. 95-555, 92 Stat. 2076 (1980) (codified at 42 U.S.C. § 2000e (1988)).

16. It reads, in part, as follows: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e (1988).

17. Compare Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RIGHTS L. REV. 175, 192-200 (1982) (choosing equality over special treatment in the context of pregnancy-discrimination law) with Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (arguing against the assimilationist approach).

Southerner whose claims for special recognition led him to sever his connection with America.

In a multicultural regime, one is defined by one's history. Attention is focused on where one has been, rather than on where one might go, and on what one was, rather than on what one might be. Clearly, this does not describe the women's movement. Women do not regard themselves as a distinct cultural group with roots to be nourished or a past to be treasured. They see themselves mainly as persons entitled to what they have not had, namely, the equal protection of our laws. How this is to be done, whether by changing the laws to ensure that they protect equally or by changing men to make them interchangeable with women, remains highly contentious. However, women and the women's movement are no easy fit for the multicultural model.

