

Critical Distance in a Cross Cultural Context

by

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B.A., Queen's University, 2005

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

MASTERS OF ARTS

In the Department of Political Science

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University of Victoria

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ABSTRACT

Within the dominant culture, culture tends to be given more weight to explain the behaviour of members of cultural minorities than members of the dominant culture. Drawing on the work of Sherene Razack, Leti Volpp and Anne Phillips, I examine two possibilities as to why this may occur by: racism and multicultural overreach. I then determine that there needs to be an approach which public authorities can employ to unpack the relationship between culture and autonomy in an individual's decision making process. Drawing on the work of Will Kymlicka, Natalie Stoljar and Susan Meyers, and utilizing resources from liberal multiculturalism and relational autonomy, I develop a method to assess the relationship between culture and autonomy which I term critical distance. I analyze four cases involving the decision making process of culture minorities and use critical distance to assess how culture and autonomy inform an individual's decision making process.

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Introduction

Within a liberal democratic society there are individuals who try successfully to live up to the autonomous ideal, individuals who are unsuccessful at living up to the ideal and individuals who do not even attempt to live up to the ideal. An autonomous person and a non-autonomous person are both conditioned by the forces of society. What distinguishes those who are autonomous is that an “autonomous person is not a passive receptacle of these forces but reflectively engages with them to participate in shaping a life for herself” (Barclay 2000: 55). While some cultures actively promote the development of individual autonomy and others do not, ultimately “all cultures limit their members’ autonomy. The question is ‘how?’” (Chambers 2004: 231). Every culture produces individuals who are inclined to pursue more actively an autonomous life and every culture produces individuals who prefer to lead an unquestioned life.

This thesis examines how to understand the explanatory power of culture when it is applied in an analysis of an individual’s decision-making process. The term explanatory power refers to the significance invested in a variable to account for why individuals make the decisions that they do. In this sense, culture is often an explanatory variable because it helps to explain human behaviour. However, it is often applied unevenly and inconsistently depending on whether the behaviour in question is that of a member of the dominant culture or a member of a cultural minority. I argue that culture tends to have more explanatory power when the behaviour of members of cultural minorities is in question. All cultures both constrain and promote autonomy to different degrees. It is necessary to understand how both autonomy and culture can function in an individual’s decision-making process, regardless of the content of a culture or the content

of a decision. This requires a method to identify the legitimacy and extent of understanding culture as an explanatory variable in an individual's decision making process.

I identify a gap in the literature on culture and autonomy, namely that no method exists to evaluate when culture acts as the central explanatory variable in an individual's decision making process, when it does not and how to weigh the explanatory power of culture in any given context. I argue that this gap is most readily apparent in the context of cultural minorities because culture is more likely to be given a disproportionate amount of explanatory power in explaining the behaviour of members of cultural minorities than in relation to the dominant culture. I am not suggesting that culture cannot be used to explain the behaviour of members of the dominant culture; on the contrary, culture is crucial to understanding the behaviour of the dominant culture. The values and institutions of the dominant cultures in western nations are informed by multiple cultural factors, including the tradition of the Protestant work ethic, Catholic charity, secularism, consumerism and celebrity, to name just a few. In this thesis, my analysis does not specifically extend to the dominant culture and instead focuses on minority cultures where I argue the problem is more pronounced. The aim of this thesis is to provide an analysis of culture that evenly applies to the decision-making process of members of the dominant culture and members of cultural minorities.

I argue that culture is applied as an explanatory variable in a way that is more problematic in minority cultures than in the dominant culture. In the dominant culture, culture is utilized as an explanatory variable in conjunction with other variables such as gender, class, sexuality, region and so forth. In comparison, members of minority

cultures often find that the dominant culture explains the bulk of the decision making process of members of minority cultures using the explanatory variable of culture. A gap exists in the literature regarding how to assess when the use of culture as the primary explanatory variable is legitimate.

In this thesis, I am not asking what counts as a cultural explanation. I am not going to attempt to define culture or quantify culture in such a way as to determine what culture is and what culture is not. Instead I am asking how to analyze an individual's ability to obtain critical distance without alienating him from his culture. Critical distance, as I am using the term, is very similar to, but not synonymous with autonomy. Critical distance is the ability to understand and evaluate both the circumstances leading to a particular situation and the possible outcomes of various decisions. Autonomy is the ability to act freely, without coercion, to further one's conception of the good life. Critical distance is the forethought required by autonomy that leads to action.

Critical distance can be applied in a number of contexts. In asking if a specific individual is exercising critical distance, it is implied that a judgment will be made regarding the presence or absence of critical distance. However, equally important, though implicit, is whether the person making the judgment has critical distance. If A is judging B's critical distance, then it would seem to be implied that A has critical distance. In this thesis, I am not going to specifically examine my critical distance as the author, or the critical distance of various public authorities who might one day be called upon to judge the presence of critical distance in someone else. However, it is important to acknowledge the multiple dimensions of critical distance that are involved in determining the presence or absence of critical distance in any specific situation.

A method to analyze an individual's ability to obtain critical distance, without alienating him from his culture, and to determine when culture is appropriately employed as an explanatory variable is important for three reasons. First, it provides individuals and communities with a set of tools they can use to create intercultural equality, to dismantle stereotypes and to develop critical thinking skills. Second, it provides scholars who study culture – whether they are sociologists, political scientists or philosophers – with a tool that can be used to explore questions surrounding issues of identity and community. Third, it is important for public authorities, including lawyers, doctors, politicians and policy makers. These groups of people are responsible, in part, for creating the public and private spaces in which individual decisions acquire meaning. These public authorities have the power to label certain behaviours as motivated by, or not motivated by, culture. In order to make these types of assessments, public authorities need a method to determine how culture acts on an individual's decision-making process. In addressing these three audiences, individuals and communities, scholars, and public authorities, my goal is not to explain how culture influences an individual's decision-making process, but to analyze how to assess the influence of culture on an individual's decision-making process.

The uneven application of culture as an explanatory variable in an individual's decision-making process is a central criticism of normative approaches to politics, which emphasize the need to respect cultural diversity. Leti Volpp argues that culture is used to explain the behaviour of individuals within minority cultural groups but is not used to explain the behaviour of individuals within the dominant group and this difference undermines the agency of members of cultural minorities. She examines several

narratives within American society and suggests that the narratives which the dominant culture find most troubling are those where an individual is perceived as having “culture.”

Because we tend to perceive white Americans as “people without culture,” when white people engage in certain practices we do not associate their behaviour with a racialized conception of culture, but rather construct other, non-cultural explanations. The result is an exaggerated perception of ethnic differences that equates it with moral differences from “us” (2000: 89).

If the dominant culture is equating ethnic difference with moral difference, it is assuming a conflict which exaggerates the differences between “us” and “them.” Volpp identifies one possible explanation for this phenomenon: racism. Volpp argues that the dominant culture practices a thinly veiled racism, which suggests that certain members of minority cultures have a limited capacity for autonomy and rational thought (96). This leads to circumstances where “society presumes that immigrants of colour are passive victims dominated by their cultural traditions, in contrast to the rational actors of western liberalism” (113). The dominant culture characterises racialized cultural minorities as oppressing their members by denying their individual autonomy while simultaneously promoting the virtues of western society as a site of liberation.

The uneven application of culture as an explanatory variable and the problem of assessing the legitimacy of culture as an explanatory variable is also a concern of Anne Phillips. Phillips is specifically concerned with the effects of overly deterministic conceptions of culture. Phillips identifies three problems that are the result of overly deterministic conceptions of culture within political theory. First, while multiculturalism examines potential and actual conflicts between minority groups and the dominant culture, the conflicts within each minority group, around issues of gender, age, region and

economic class are largely ignored. Second, culture comes to be seen as the primary origin of people's actions and behaviours. Third, culture becomes something associated primarily with non-Western or minority cultural groups (Phillips 2006: 17-18). Members of the dominant culture will point to the effects of class or gender on their actions, but more rarely identify culture as an explanatory variable. Conversely, members of the dominant culture are quick to point to the effects of culture as an explanatory variable influencing the behaviour of cultural minorities while the effects of gender or class are more rarely identified. I term this set of problems multicultural overreach.

Phillips does not argue that there are no cultural difference or that cultural differences are not important, but rather when culture becomes “a catch-all explanation for everything that goes awry in non-Western societies or minority cultural groups, while remaining an invisible force elsewhere, something has gone wrong with the use of the term” (21). Phillips claims that a theory of autonomy and culture needs to ensure that cultural differences are included in the analysis, without an *a priori* assumption that cultural membership determines behaviours or values. My goal in this thesis is to begin to develop an approach that does just that.

The inconsistent application of culture as an explanatory variable is evident in a comparative example presented by Volpp (2000). In one case, a 16-year-old Mormon girl was going to be forced (by her father) to marry her 32-year-old uncle. In the second case, 15 and 16-year-old Iraqi-American girls were going to be forced (by their father) to marry 28 and 34-year-old Iraqi American men. In the Mormon case, the dominant culture quickly condemned the father's behaviour and the behaviour of the prospective husband. However, the behaviour of the Mormon family was portrayed in the news

media as an isolated instance of deviant behaviour by specific individuals who had perverted the religious teachings of their church in an attempt to justify marrying young girls. In contrast, the media explained the circumstances of the Iraqi-American family as an example of “a clash of the culture of newcomers with American mores and law” (Volpp 2000: 104). Though in both situations the actions of the older men were seen as unacceptable, the cases were treated differently in terms of where the media located responsibility and placed blame.

These narratives suggest that behavior that we might find troubling is more often causally attributed to a group-defined culture when the actor is perceived to “have” culture. Because we tend to perceive white Americans as “people without culture” when white people engage in certain practices we do not associate their behaviour with a racialized conception of culture, but rather construct together, non-cultural explanations. The result is an exaggerated perception of ethnic difference that equates it with moral difference from “us” (89).

In the Mormon example, the news media framed the practice in terms of the actions of individuals. In the Iraqi-American example, the news media framed the practice in terms of the actions of a culture. While the news reports and dominant culture were able to accept that there could be more than one interpretation of the Mormon religion, and that some interpretations were more legitimate than others, this same level of nuanced understanding was not extended to Iraqi cultural practices.

A second example of the inconsistent application of the explanatory power of culture is evident in the debates in the dominant culture regarding women’s dress, specifically around the question of veiling. Western society has tended to see the veil as “the ultimate symbol, if not tool” of women’s inequality within Islamic societies and “women are seen as brainwashed or coerced, and the veil is seen as a key emblem of this oppression” (Hirschmann 1998: 349). And yet, “many Muslim women not only

participate voluntarily in veiling, but defend it as well, indeed claiming it as a mark of agency, cultural membership and resistance” (345). Agency, cultural membership and resistance are also reasons why many western women choose to wear miniskirts and push-up bras, and yet public authorities within western societies are concerned with debating and regulating the wearing of the veil at the level of public policy but not the mini-skirt. There is an assumption that a woman’s decision to veil can be explained by her membership in a Muslim religion and Islamic culture, while a woman’s decision to wear a mini-skirt can be explained by an individual woman’s concern for fashion or comfort. “The veil is *both* a marker of autonomy, individuality, and identity, *and* a marker of inequality and sexist oppression” (352). But so too is the miniskirt. The question is not which article of clothing is more oppressive. The question is why does the dominant culture make the assumption that a woman who wears a veil is doing so because of culture and not because of choice? And how does this undermine her agency? The question that should be asked is what are the markers that signify whether or not a woman is making an autonomous choice?

When individuals are part of the dominant culture, they are judged on their actions as individuals who are influenced by a myriad of factors including gender, age, culture, class, region and sexuality; however, often when individuals are members of cultural minorities, the individuals’ culture is judged, and the individuals are characterised as passive agents of their culture. In order for a liberal society to bring cultural minority groups and the dominant culture together in a meaningful dialogue, it has to move past the false dichotomy that sees respecting group autonomy and individual autonomy as mutually exclusive goals (Saharso 2003).

In chapter 1, I analyze two explanations of how and when culture is applied as an explanatory variable. The first explanation is racism. The second explanation is multicultural overreach. I examine the benefits and limitations of racism and multicultural overreach, and examine how both explain or describe the application of culture as an explanatory variable. Racism and multicultural overreach are not rival explanations or descriptions. They are both concerned with questions of race, with how assumptions are made about racialized cultural minorities and with how cultural stereotypes deny certain individuals agency. However, racism is concerned with how cultural explanations further a deeply entrenched racial power imbalance, while multicultural overreach is concerned with how cultural explanations ignore alternate explanatory variables and can lead to overly deterministic conceptions of culture.

Racism and multicultural overreach are both concerned with what counts as a cultural explanation. Racism is concerned that race will count as a cultural explanation and blind the dominant culture and public authorities to racial differences and further entrench racism within society's institutions. Multicultural overreach is concerned that culture will become a catch-all explanation for difference and privilege cultural identities above other identities within society's institutions.

I argue that while racism and multicultural overreach provide interesting insights into the problem of how culture is employed as an explanatory variable, neither offers a method or an approach to assess the legitimacy of using culture as an explanatory variable in specific situations. One way to solve the problems identified by racism and multicultural overreach is to eliminate the use of culture as an explanatory variable. However, this solution denies the reality of culture in shaping the contexts and the

choices made by people and will alienate people of all cultures. Therefore, there needs to be a method that can determine how and when culture functions as an explanatory variable, which avoids the problems pointed to by racism and multicultural overreach.

Instead I ask how ought we to analyze an individual's ability to obtain critical distance without alienating him from his culture. Critical distance refers to a method or approach that can help determine the legitimacy of using culture as an explanatory variable. The critical distance method is a means to analyze what gives a person critical distance without alienating him from his culture. Critical distance focuses on an individual's decision making process in terms of six markers, whose presence indicates the degree to which an individual has exercised critical distance. The markers of critical distance are not absolutes; they are contextually dependent and can display themselves more or less strongly. I suggest that critical distance is able to fill a gap in the literature on culture and autonomy and provide a method to assess the legitimacy of using culture as an explanatory variable, regardless of the culture or the individual in question. Critical distance can address the problem of the inconsistent application of culture as an explanatory variable in an individual's decision-making process by providing a constant, testable method to determine the legitimacy and extent of culture's inclusion. Critical distance can be employed by individuals, scholars and public authorities to help determine how culture is functioning in an individual's decision-making process. In order to identify the presence of critical distance, I examine two theories of autonomy and culture that emphasize the importance of culture for obtaining autonomy. The first is liberal multiculturalism and the second is relational autonomy. I chose these two theories because both identify autonomy as important for living a meaningful and valuable life

and emphasize that culture is central to establishing and creating the context in which autonomy is exercised.

I will elaborate on these theories in chapter 1, although I will broadly characterize them here. Liberal multiculturalism, as developed by Will Kymlicka, is characterized by an individual's desire to lead a good life in accordance with his values and the belief that culture provides the context for evaluating what constitutes a good life. The relational autonomy approach, as developed by some feminist scholars, is characterized by an individual's desire to understand all of her identities and relationships in order to exercise autonomy, and the belief that culture is a key component that informs identities and relationships. Together, these two approaches to culture and autonomy form the basis of the methodology I utilise to indicate whether or not an individual is exercising critical distance in her decision making process.

The three markers of critical distance I identify in liberal multiculturalism are rationality, revisability and resources. The three markers of critical distance I identify in relational autonomy are intersectionality, relationality and independence. Once I have identified these markers, I use them to analyze specific cases to determine to what extent an individual is exercising critical distance. When these six markers are consistently applied they help legitimize the inclusion of culture as an explanatory variable in an individual's decision-making process while ensuring that culture is not exercising undue explanatory power. In chapters 2 and 3, I examine cases where the actions of members of minority groups have been explained by the dominant culture as originating from minority cultural norms. I ask whether or not an analysis privileging the explanatory

power of culture is legitimate by analyzing each case using the six markers of critical distance.

In choosing to utilise criteria from both liberal multiculturalism and relational autonomy, I do not intend to suggest that these two theories are in competition with one another. I do not assess whether one theory provides a better analysis of the role of the explanatory power of culture and the role of critical distance. Instead, I use the resources provided by these two theories to develop a fuller understanding of how to determine an individual's ability to obtain critical distance from his cultural norms. While both liberal multiculturalism and relational autonomy provide a thoughtful account of the relationship between critical distance and culture, they each contain resources the other lacks. In my analysis, these two theories complement, rather than compete with, each another. I have chosen resources from both theories to strengthen the critical distance method of examining the role of culture in an individual's decision making process.

In chapter 2, I examine the arguments for and against the cultural defence. The cultural defence is the legal argument that individuals who were socialized with cultural norms that differ from those of the dominant culture should not be held fully accountable when they break the law, if their actions would have been consistent with the values and norms of the culture in which they were socialized. The cultural defence is not a legally recognized defence, but prosecutors, defence attorneys and judges occasionally consider cultural factors on a case-by-case basis. The cultural defence is very susceptible to the inconsistent application of culture as an explanatory variable because at present, there is no accepted test to determine whether an individual possessed critical distance from his actions or if his actions were primarily motivated by cultural norms. In order to analyze

how the cultural defence may be employed to recognize both the potential explanatory power of culture and an individual's capacity for critical distance, I reassess two criminal cases employing the six markers of critical distance: rationality, revisability, access to resources, intersectionality, relationality and independence. I suggest that the more of these markers the defendant possessed, the more critical distance the defendant possessed, the less applicable the explanatory power of culture is to that specific situation and the less legitimate a cultural defence would be to the defendant in question.

Conversely, the fewer markers of critical distance the defendant possessed, the more value the explanatory power of culture would have for understanding his behaviour, and the more applicable a cultural defence would be to the defendant in question.

In chapter 3, I examine the problem of the legitimacy of the application of culture as an explanatory variable in two cases that are specific to women. Women who are members of cultural minority groups are double minorities and face a specific set of challenges not faced by men in their cultural group or by women in the dominant culture. I examine the role of critical distance and the role of the explanatory power of culture in the decision-making process of cultural minority women in deciding to undergo hymen repair surgery and female genital cutting. As in chapter 2, I suggest that the greater number of markers of critical distance present in a woman's decision-making process, the more critical distance she possesses, and the less applicable the explanatory power of culture would be to her specific situation. Conversely, the fewer markers of critical distance she possesses, the more explanatory power culture would have for understanding her behaviour. The markers of critical distance allow the role culture plays in an individual's decision making process to be analyzed and assessed on a case by case basis.

I conclude by examining possible avenues for future research and potential developments of critical distance as well as the potential applications of critical distance in an analysis of an individual's decision making process.

Chapter 1: How to understand Critical Distance and Culture

The Problem

Written in 1879, Henrik Ibsen's play, *A Doll's House*, is one of the most significant works of the late 19th century exploring the relationship between gender and autonomy. In *A Doll's House*, the main character, Nora, has always identified herself as a daughter, wife and mother. She has no cause to question the value of this identity until she is confronted with a crisis that forces her to reevaluate her roles of wife and mother (Worrall 1985: xlii). She realizes that these roles have not prepared her to understand the legal and social consequences of her actions, as her values are not reflected in societal norms and the law. In the end, she decides that her need as an individual to understand the world takes priority over the commitment she has made to her husband and children and she chooses to abandon her family. "The conflict is between society's demand that Nora embrace the woman's role that it has determined for her – 'Before all else you are a wife and mother' – and her refusal in the name of her own autonomy: 'I believe that before all else, I'm a human being'" (Templeton, 1997: 325). Normative relationships form the basis of society and many individuals live their lives without wavering in their commitment to these relationships; however, as Ibsen's play shows, these commitments are legitimate only if they can be reaffirmed when they are challenged and if the opportunity exists to change them.

In the introduction, I identified the problem of assessing the legitimacy of the explanatory power of culture, when minority cultural norms are utilised by the dominant culture to explain the behaviour of individuals who are members of cultural minorities but not used to explain the behaviour of individuals who are members of the dominant

culture. I identified two inadequate analyses present in the literature on culture and autonomy: racism and multicultural overreach. According to racism, culture is given broad explanatory power in a manner consistent with stereotyping, for reasons that are best understood as an implicit or explicit racism towards some, though not all, cultural minority groups. The second is multicultural overreach. The development of multicultural policies has encouraged the dominant culture to locate members of cultural minorities within a cultural context. This has sometimes occurred at the expense of recognizing and acknowledging other explanations for the behaviour of cultural minorities. I then proposed a method to analyse the role of culture in an individual's decision making process: critical distance. One of the factors that determine how much explanatory power culture is understood to have is the extent to which observers believe that individuals have critical distance from their culture. Critical distance and the explanatory power of culture exist in an inverse relationship to one another. The more critical distance an individual is thought to possess, the less explanatory power is ascribed to culture; the less critical distance an individual is thought to possess the more explanatory power is ascribed to culture. Racism and the overreach of multiculturalism help illuminate the inconsistent application of the culture as an explanatory variable, and critical distance helps to analyze the role of culture as an explanatory variable. In this thesis, I argue that the critical distance method can be used to analyze, assess and potentially change how the explanatory power of culture is understood.

Racism

Human beings tend to generalize and to make assumptions about groups. It is natural to categorize as a first step towards understanding; however, a problem arises when the process of understanding ends with this first step. People can sometimes become confused regarding the difference between racism and accurate generalizations. For example, it is not racist to conclude that if a woman wears a hijab she is Muslim. However, this is very different from the conclusion that Muslim women wear a hijab because she is forced to wear one.

A racism analysis suggests that the explanatory power of culture is uneven depending on the presence or absence of racism. Culture is given a lot of explanatory power in relation to racial minorities and very little explanatory power in relation to other minorities or the dominant culture. The problem is not only that racial-cultural minorities are stereotyped, but that the dominant culture employs racial stereotypes as part of a broader narrative about the value of human life. “Cultural differences perform the same function as a more biological notion of race (for example, the idea that Black people have smaller brains) once did: they mark inferiority. A message of racial inferiority is now more likely to be coded in the language of culture rather than biology” (Razack 1998: 19). The main thrust of the racism explanation is that race is not the same as culture, and that what determines when culture matters is not the presence of culture *per se* but rather the presence of a racialized minority. Racism is about power relationships and who has the power to name culture and race, and right and wrong, and who is performing the naming and who is being named. Ending racism requires that racial minorities stop

being racialized by the dominant culture. According to the racism explanation, this can only happen by equalizing the distribution of power.

The process of “making culture into the new ‘race’” occurs when cultural differences are used to explain all group differences. This is evident when “[c]ultures that are thought to lag behind are often differentiated from the hegemonic culture by race” (Volpp 2000:96). When members of the dominant culture regard other members of the dominant culture as individuals who are capable of autonomous decision-making, while perceiving racialized cultural minorities as products of culture and therefore unable to engage in autonomous decision-making, the dominant culture is likely differentiating members of minority cultures for reasons of race. Whereas racism is now widely condemned as the product of ignorance, culture is viewed as possessing real explanatory power.

Individuals from the dominant culture might be led astray or make mistakes, but are usually deemed as in some way responsible for their actions. No one suggests that “their culture made them do it;” indeed their culture has become such a taken-for-granted background that it has been rendered virtually invisible. Individuals from minority groups, by contrast, are more commonly conceptualized as defined by and definitive of their culture, so that even the most aberrant can become “typical” products of their cultural norms. (Phillips, 2003: 516)

These types of assumptions are both common and false and are indicative of the phenomenon of culture obscuring racism.

The following comparison offers an example of the uneven application of the explanatory power of culture. In the first scenario, a violent and abusive man from a minority culture stabs his daughter to death because of her sexual indiscretions (real or perceived). In the second scenario, a violent and abusive man from the dominant culture shoots his wife to death because of her sexual indiscretions (real or perceived). The two

crimes differ with regard how the victim was related to the killer and the weapon used. However, often the dominant culture perceives another difference that is not actually present. It is common to assume that culture played a role in the former crime but that culture played no role in the latter. This assumption is wrong for two reasons. First, both of the murderers were men with individual volition. In the examples, both men had a history of violence, procured a weapon, and killed someone whom they claimed to love. To say that the first crime was motivated by culture wrongly removes agency from the killer and denies justice to his victim. However, one also cannot argue that culture played no role in either killing. The first man might have been affected by cultural norms surrounding family honour and chastity; however, the second man would have been equally affected by cultural norms surrounding male honour and fidelity. The man in both scenarios understood the sexual behaviour of his family member as reflecting negatively on him and both live in a society where violence against women is both illegal and tacitly condoned.¹ These two cases contain far more similarities than differences, yet one difference that is present, culture, can quickly obscure what might otherwise be identified as racism.

Racism is about a power imbalance and ascribing certain qualities to people based on race. The racism explanation suggests that there needs to be a way to evaluate the actions and behaviours of all individuals using a constant set of criteria to help eliminate the power imbalance at the heart of racism. Two possible places to locate these criteria are in the description of the problem of multicultural overreach and the critical distance

¹ Uma Narayan points out how American gun culture contributes to the death of women in much the same way as Hindu culture contributes to dowry murders (Narayan 1997, cf Phillips 2007).

method. However, some scholars who study race view multiculturalism as unsuccessful in equalizing the distribution of power across race. Multiculturalism is viewed as a

device for constructing and ascribing political subjectivities and agencies for those who are seen as legitimate and full citizens and others who are peripheral to this in many senses. There is in this process an element of racialized ethnicization, which whitens North Americans of European origins and blackens or darkens their “others” by the same stroke” (Bannerji 2000: 60).

Himani Bannerji’s position is that multiculturalism is unable to challenge or change the power imbalance which underlies racism. This is partially due to the fact that multiculturalism was in part developed as a response to an influx of racial minorities and not European minorities, despite the multiple religious, linguistic and cultural differences. When European countries, and countries settled by European immigrants, began receiving large numbers of immigrants who were racial minorities, multiculturalism was developed as a strategy of “containment and management” (43). The fact that the emphasis on culture coincided with the rise of racial minorities suggests that when culture is used as an explanatory variable, culture is standing in for race. I argue that critical distance can fill the gap in the literature suggested by the racism analysis as to how to evaluate the behaviour of all people, regardless of culture or race, while acknowledging the influence of culture on an individual’s decision making process.

Multicultural Overreach

A second and similar reason why the dominant culture ascribes culture to some minorities but not to others is multicultural overreach. The development of multiculturalism and the adoption of multicultural principles by public authorities have encouraged the dominant culture to locate cultural minorities within a cultural context.

An unintended consequence has been that so much significance has been invested in the importance of guaranteeing members of cultural minorities a secure context in which to make their decisions that the significance of other explanatory variables has been minimized. In identifying the problem of multicultural overreach, I am not suggesting that culture is not an important variable explaining individual behaviour. However, multicultural overreach identifies the danger of ignoring other explanatory factors that influence behaviour, such as class and gender.

Phillips is wary of how multiculturalism can privilege culture above other explanatory variables when assessing individual values and behaviours. Instead, Phillips would like a theory of culture and autonomy to promote individual autonomy without becoming subsumed by culture. Phillips states her project is not to critique Kymlicka's analysis of the relationship between autonomy and culture or to "settle whether Kymlicka's squaring of the circle is as successful as he hopes," (Phillips 2007: 106) but she does suggest several reasons why she is critical of multiculturalism. She is critical of some political theorists' understanding of culture as a "quasi-legal entity" and she observes that "[t]his solidifies the group into something very substantial" (19). The substantial nature of the group helps to insulate it from criticism, including from some feminist scholars who argue that "multicultural policies shore up the power base of the older men within the community and encourage the public authorities to tolerate practices that undermine women's equality" (12).

Phillips would like a theory of culture and autonomy to fulfill three criteria. First, it has to embrace the values of cultural plurality and cultural diversity, but not at the expense of women, children or other traditionally marginalized groups. It must

acknowledge the influence of multiple identities without (further) marginalizing any one aspect of an individual's identity. Second, it needs to acknowledge and celebrate individuals' similarities as well as their differences and not reinforce divisions along identity lines. Finally, it would have to avoid "falsely homogenizing reification," exaggerating the internal unity of culture and presenting identities as solid and not fluid (12-14). Phillips believes individuals should be understood as a compilation of identities, which together create a unique personality, and not exclusively through any one lens.

When individuals are members of cultural minorities, viewing them through the lens of group membership can create a set of expectations about behaviour. These expectations may be established with the best of intentions for accommodating individuals from minority cultures, but cultural membership is only one aspect of an individual's identity. To that end, Phillips defines the problem and her goal:

"When multiculturalism is represented as the accommodation of or negotiation with cultural communities or groups, this encourages us to view the world through the prism of separate and distinct cultures. We see ways of life struggling to survive; we see clashes of culture. If we are feminist critics, we may see the oppressed female victims of patriarchal ways of life. The individuals, in all their complexity, disappear from view. My object here is a multiculturalism without this conception of culture, a multiculturalism that dispenses with reified notions of culture or homogenized conception of the cultural group yet retains enough robustness to address cultural inequalities." (179)

If one way of developing a less encompassing conception of culture is acknowledging the effects of other factors, such as gender and sexuality on an individual, then a corollary of this is to understand culture in the same way as these other identifiers. "Culture needs to be treated in the more nuanced way that has become available for class and gender: that is, as something that influences, shapes, and constrains behaviour, but does not determine it" (Phillips 2007: 10).

In her analysis, Phillips does not provide an explicit explanation as to why she believes that culture has so much explanatory power. She does, however, have some suggestions for how the explanatory power of culture has developed. She identifies part of the initial impetus for multiculturalism as the “need to challenge dismissive and disparaging stereotypes of people from minority cultural groups, to contest the hierarchy of ‘us’ and ‘them’” (31).

But insofar as it starts from the unquestioned “fact” of cultural difference, multiculturalism tends to call up its own stereotypes, categorizing people in ways that simplify differences, emphasize typical features and suggest defining characteristics of each cultural group. This intentionally promotes a view of individuals from minority and non-Western cultural groups as guided by different norms and values, and inadvertently fuels a perception of them as driven by illiberal and undemocratic ones.” (31)

This suggests that Phillips might agree with racism as a possible explanation as to why culture has taken on such explanatory power for minority cultures, when it is widely thought to be an over-simplification to ascribe such broad explanatory powers to class or gender. Ultimately, multicultural overreach is unable to provide a method to assess the role of culture as an explanatory variable role in an individual’s decision-making process, where culture is understood as one variable among many.

I have argued that in its attempts to be inclusive, multiculturalism can implicitly support a power imbalance which furthers a racist status quo, or attempt to accommodate minority cultures in such a way as to forget that members of those cultures are individuals as well as group members. Neither racism nor multicultural overreach is able to assess how an individual’s culture affects their decision-making process. Therefore, a method needs to be developed that can understand the relationship between culture and

behaviour at the level of the individual and can be applied to specific individuals regardless of culture.

Critical Distance

As I have demonstrated in the previous two sections, I am not arguing that culture should have no explanatory power, but that the inconsistent application of culture as an explanatory variable is problematic; specifically, culture is sometimes afforded more explanatory power in relation to cultural minority groups than in relation to the dominant culture. I have examined two possible explanations for this. First, the explanatory power of culture is a modern form of racism and second, the result of locating individuals from cultural minorities within a cultural context exaggerates the significance of culture. I propose a new method for determining the legitimacy of culture as an explanatory variable: critical distance. I argue that by examining the extent to which individuals have critical distance from their cultural norms and practices, and analyzing individuals' decision-making processes against a specific set of criteria, it is possible to create a template that allow for a more accurate analysis of culture as an explanatory variable.

Critical distance is central to evaluating an individual's actions. If an individual lacks critical distance, then it may be necessary to seek an explanation for his actions outside of individual autonomy. A popular alternate explanation is to ascribe specific behaviours to an essentialized aspect of an individual's identity. Historically, certain groups were believed to be incapable of being fully autonomous for reasons related to their gender, religion and class. The explanatory power of gender, class or religion was employed to understand and evaluate individual behaviour and used as evidence that

certain individuals were incapable of possessing autonomy. Conversely, if an individual is thought to possess critical distance then her behaviour can be evaluated on its own merit and no external explanatory variables will be required to understand or explain her actions. It is now widely accepted that while gender, class and certain religious beliefs can influence an individual's decision making process, any of these in isolation cannot fully explain an individual's decision making process. I am suggesting a method that could be employed to guarantee culture this same level of nuanced understanding.

Two Approaches to Critical Distance

In order to examine the success of critical distance in analyzing the legitimacy of culture as an explanatory variable it is necessary to understand critical distance. What gives people critical distance? How does one recognize critical distance? How does critical distance work? Critical distance is a promising tool because critical distance and explanatory power exist in an inverse relationship. The more critical distance an individual is thought to possess the less their behaviour is explained using the explanatory power of culture; the less critical distance an individual is thought to possess the more their behaviour is explained using the explanatory power of culture. Therefore, critical distance offers a promising starting point from which to begin to frame the relationship between individual autonomy and the explanatory power of culture.

In order to examine how critical distance affects the explanatory power of culture, I am going to examine two theories of culture and autonomy, both of which promote and support the development of critical distance. I chose these two theories because both identify autonomy as important for living a meaningful and valuable life while

simultaneously emphasizing that culture is central to establishing and creating the context in which autonomy is exercised. First, I examine liberal multiculturalism as presented by Kymlicka (1995). Liberal multiculturalism is characterized by an individual's desire to lead a good life in accordance with his values and his desire to apply critical distance to his values to ensure that he is always leading his best possible life. According to this theory, an individual's culture provides the context in which he make judgments and decisions and in which he evaluates and re-evaluates his beliefs and values. Culture is the context in which gender, class, age and sexuality acquire meaning. I identify three resources within liberal multiculturalism that can be used to assess critical distance: rationality, revisability and resources. Second, I examine the relational autonomy approach to critical distance, drawing from the work of Catriona MacKenzie, Natalie Stoljar and Susan Meyers (2000, 2000). This approach is characterized by an individual's desire to include all of her relationships and facets of her identity in her decision making process. According to this approach, culture is the basis for the relationships and contexts which inform an individual's decision-making process. I identify three resources within this approach that can be used to assess critical distance: intersectionality, relationality and independence.

Liberal Multiculturalism

Liberal multiculturalism is premised on many of the values of Enlightenment philosophy, which forms the basis for modern liberalism, currently the dominant tradition

in western philosophy.² Liberal multiculturalism developed as a response to the rejection of the ideal of the homogenous nation state and is the view that

“states should not only uphold the familiar set of common civil, political, and social rights of citizenship that are protected in all constitutional liberal democracies, but also adopt various group-specific rights or policies that are intended to recognize and accommodate the distinctive identities and aspirations of ethnocultural groups” (Kymlicka: 2007: 61).³

One of the core values of liberalism is individual autonomy, which is the belief that one’s life must be lived as an expression of one’s core values and not with values and beliefs that are externally located.

In order to be autonomous, an individual must possess both competency and authenticity. “Competency includes various capacities for rational thought, self-control, and freedom from debilitating pathologies, systematic self-deception and so on. Authenticity conditions include the capacity to reflect upon and endorse (or identify with) one’s desires, values, and so on” (Stanford Encyclopaedia of Philosophy). The competency condition requires that an individual’s beliefs and practices are grounded in rationality. Rationality plays an important role in all liberal theories of autonomy. John Rawls argues that individual freedom requires the moral power to “form, to revise, and rationally to pursue a conception of the good” (Rawls, 1993: 72) and Joseph Raz identifies three conditions of autonomy, the first of which is that autonomy requires

² According to the Stanford Encyclopaedia of Philosophy “Liberalism arises historically out of the social contract tradition of political philosophy and hence rests on the idea of popular sovereignty.... The commitment to popular sovereignty implies that justice must be an extension of people’s rules of themselves, the free and rational pursuit of people’s own conception of morality and the good, assuming a pluralism among such conceptions.”

³ Kymlicka believes that this definition is too broad as to provide any real analytic value, but it serves as good template to understand some of the underlying tenants of liberal multiculturalism to understand its position in this discussion of critical distance and the explanatory value of culture.

forming intentions and executing plans requiring minimum rationality and possessing the ability to execute goals and to plan action (1989: 373).⁴

Kymlicka agrees with other liberal theorists that one of the most effective ways to evaluate one's beliefs is rationally. Rationality is important for analyzing the problem of culture as an explanatory variable, because this problem presumes a lack of rationality and suggests that the actions of members of certain minority groups are motivated by "irrational" cultural reasoning rather than rational reflection. In many liberal approaches to autonomy, including liberal multiculturalism, critical distance is secured through rationality. Rationality is an effective resource to secure critical distance because it encourages an individual to examine decisions and commitments on their own merits and for a person to reach their own conclusions.⁵

In liberal multiculturalism, a rational formation and evaluation of beliefs will lead to the revisability of beliefs, which fulfils the authenticity requirement of autonomy. "Liberalism is committed to (perhaps even defined by) the view that individuals should have the freedom and capacity to question and possibly revise the traditional practices of the community, should they come to see them as no longer worthy of their allegiance" (Reich 2002: 74). Kymlicka argues that it is rational and reasonable for an individual to analyze his beliefs in light of new information or a change of circumstances and to determine if that belief is still consistent with his true self. Revisability does not require that an individual revise his beliefs, it requires that an individual consider his beliefs

⁴ The second condition he identifies is an adequate range of options (long term, short term, options of little consequence and options of great consequence). The third condition is independence, which is choice free of coercion and manipulation.

⁵ In a liberal multiculturalism approach, critical distance is undermined when an individual is not able to examine decisions and commitments on their own merit and instead another person exerts external influence, through either paternalism or coercion, and attempts to influence an individual's decision making process.

revisable and that he is prepared to revise his beliefs should those revised beliefs better reflect his authentic self.⁶

Since we can be wrong about the worth or value of what we are currently doing, and since no one wants to lead a life based on false beliefs about its worth, it is of fundamental importance that we be able rationally to assess our conceptions of the good in the light of new information or experiences, and to revise them if they are not worthy of our continued allegiance (Kymlicka 1995: 81).

Revisability is central to the practice of critical distance. However, critical distance does not require the constant revision of beliefs, nor the revision of beliefs at a pre-appointed time; rather, it is the conviction that the revision of beliefs can be desirable and may be necessary, that all attachments and beliefs are potentially subject to evaluation, and to engage in this revision willingly: “freedom of choice is not a one shot affair, [and] earlier choices sometimes need to be revisited” (92). In order for individuals to have critical distance they must accept that all of their beliefs are potentially open to revision as they gain new insights and experiences throughout their life. This requires that an individual recognize that her “judgements about the good are fallible” and that it may be in her own interest to assess and revise her beliefs and judgments to ensure that she is leading a good life and not one based on false beliefs. When an individual evaluates her practices, beliefs and commitments, she can either reaffirm the decisions and commitments she has made or choose to make different decisions and commitments (92). Within liberal multiculturalism, practicing critical distance means recognizing that “[o]ur current ends are not always worthy of our continued allegiance, and exposure to other ways of life helps us make informed judgments about what is truly valuable” (92). Revisability is not conditional, and certain aspects of an individual’s life cannot be immune from potential

⁶ In so doing, he rejects the communitarian argument that an individual’s ends are fixed beyond rational revision (Kymlicka 1995: 158).

revision because that revision may be uncomfortable. “It is not easy or enjoyable to revise one’s deepest ends, but it is possible, and sometimes a regrettable necessity. New experiences or circumstances may reveal that our earlier beliefs about the good are mistaken. No one is immune from such potential revision” (91).

In order for an individual to have the tools necessary to revise his beliefs he requires certain conditions from society. Subjecting one’s deepest convictions to scrutiny is never easy and would be nearly impossible if such revision had the potential to cause the individual to become socially isolated. The theory of liberal multiculturalism “insists that people can stand back and assess moral values and traditional ways of life, and should be given not only the legal right to do so, but also the social conditions which enhance this capacity” (92). In order to successfully practice rationality and revisability an individual requires access and exposure to certain societal resources. Resources allow an individual to develop an awareness of societal norms and values. Resources are necessary for people to develop both intracultural and intercultural relationships without fear of sanction by a group or the state.

Resources can be specific, such as access to education and developing literacy, numeracy and problem solving skills, all of which are beneficial to an individual navigating modern society and his ability to make informed, rational and revisable decisions. A liberal education also exposes individuals to a variety of different conceptions of the good life. However, resources do not need to be this formal. Access to resources includes freedom of speech and association, the right to due process, access to educational and social services, and being exposed to a number of different conceptions of the good life simply by living within a multicultural society.

Kymlicka insists that individuals must “have the conditions necessary to acquire an awareness of different views of the good life, and an ability to examine these views intelligently” (1989: 81). One of these conditions, [Rob Reich] suggest[s], is not only *intracultural* learning and comparison, but *intercultural* learning and comparison (Reich 2002: 79).

Within a multicultural society an individual may live within a small ethnic enclave, or she may live, work or travel to other areas and other communities within her city or region. This mobility would affect her exposure to different conceptions of the good life and her ability to access the resources present in these different conceptions.

Liberal multiculturalism is designed to ensure equality and cultural respect within a liberal democratic society, regardless of ethnicity, skin colour or country of origin. It aims to protect group rights and individual rights simultaneously, as long as the group rights do not jeopardize an individual’s human rights. “Immigrant multiculturalism policies are intended to expand rather than restrict individual choice: they reduce the costs or stigmas individuals previously faced in expressing their ethnic identity, but do not provide any legal mandate or legal justification for abridging or violating individual rights” (Kymlicka 2007: 161). It is very difficult to locate the balance between protecting group rights and protecting individual rights, and group rights do not trump or supersede individual rights. Having individual autonomy does not negate the importance of culture, just as having culture does not negate individual autonomy.

Relational Autonomy

The second approach I identify is relational autonomy. Relational autonomy can be understood as a range of related perspectives premised on a shared conviction “that persons are socially embedded and that agents’ identities are formed within the context of

social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender and ethnicity” (Mackenzie and Stoljar: 2000, 4). The goal of relational autonomy is to develop “a more fine-grained and richer account of the autonomous agent” (21). This conception emphasizes an individual’s plurality of affiliations and self-reflectivity, in addition to rationality, when practicing autonomy or exercising critical distance. In order to develop such a conception, relational autonomy emphasizes:

[an] analysis of the characteristics and capacities of the self cannot be adequately undertaken without attention to the rich and complex social and historical contexts in which agents are embedded; they point to the need to think of autonomy as a characteristic of agents who are emotional, embodied, desiring, creative, and feeling, as well as rational, creatures (21).

Relational autonomy contains a number of resources which help dispel the misconception that members of certain groups are better able to obtain or to exercise individual autonomy. Within relational autonomy, it does not make sense to view certain groups as better able to exercise autonomy because an individual does not possess a single group identity; therefore, generalizations about an individual based primarily on their cultural affiliations are meaningless.

There is a significant literature within feminism that highlights the situation of women of colour and how such women may feel trapped between their ethnic identity and their gender. Relational autonomy addresses this reality with the concept of intersectional identities. An individual’s identity is formed at the intersection of their race, religion, culture, sex, gender, sexuality, class, age and an untellable number of other identity variables. Thinking about intersections can help to understand some of the conflicts and tensions operating in an individual’s decision making process.

[Feminist and relational autonomy theorist] Meyers explores questions concerning the identities that result from the intersections of various structures of power, such as race, ethnicity, class, sexual orientation, and gender. Rather than arguing that members of oppressed groups are less autonomous than members of dominant groups, she illustrates the central role that a critical awareness of intersectional identity can play in the processes of self-definition and self-knowledge, which are crucial in achieving autonomy (Schwartzman 2002: 184-185).

Meyers reminds her readers of the fact that “enormous numbers of people are assigned to social groups that are systematically subordinated,” but that the external repression or oppression of individuals does not lead to the suppression of autonomy, and marginalization does not eliminate autonomy, it may simply make it less obvious to the causal observer (Meyers 2000: 152). Relational autonomy actively encourages the development of a plurality of affiliations and self-reflectivity in all people. It does not view minority status, including cultural minority status, as a potential barrier to critical distance. The skills that a person develops when she develops an awareness of her multiple identities are some of the same skills that will help her obtain critical distance. All individuals, including members of the dominant culture, have intersectional identities. However, since the dominant culture promotes certain identities over others – for example that of the straight, heterosexual, middle-aged, white male – some individuals may find that their multiple identities are not in conflict with one another and those individuals may not suffer under the burden of intersectionality in the same way that individuals who have more marginalized identities might suffer. Intersectionality is not about integrating all the aspects of an individual’s identity because it may not be possible for an individual to inhabit all of her identities equally. Intersectionality is about the weaving together of identities and understanding how these identities inform an individual’s decision making process. Developing an awareness of the intersection of

identities can help illuminate the conflicts and tensions operating in an individual's decision making process.

A second marker of critical distance found in a relational approach to autonomy is relationality. The importance of relationality for autonomy has developed in the fields of bioethics and professional autonomy. Relationality is the concept that people should be understood in the context of their social networks. Most of the literature on relationality focuses on understanding an individual's role in the context of a single social network. In my analysis, I extend this concept to examine an individual who is at the apex of multiple social relationships. Chris MacDonald understands the literature on professional relational autonomy as “illustrating that the relational understanding of autonomy is a *general*, rather than a *specific*, theory and is capable of application to a wide range of kinds of subjects” (MacDonald 2002: 282).

In order to understand an individual's decision-making process it is necessary to understand all of the contexts that could influence her decision. These relationships can be based in the context of culture, region, religion, family, professional affiliations, age, region, and many other connections based in interpersonal and community relationships. MacDonald argues that it is “not that autonomy *should* depend on social relationships but that it just does so depend. The kinds and degrees of autonomy that agents experiences just do depend on a range of social factors” (287).

Jack Crittenden identifies three resources present in relational autonomy, the third of which is independence.⁷ I adopt independence as my third marker of critical distance from relational autonomy. Independence allows for an individual's beliefs to be comprised of his insights and principles and not be constituted by the insights and

⁷ The first two are rationality and self-reflexivity.

principles of his group. If a person holds the same belief as his family or community, it is because he has scrutinized the belief and accepted it as his own. Autonomy does not require creating beliefs, it simply requires scrutinizing and affirming beliefs. The exercising autonomy requires that “one must be able to step back reflectively from her social context to evaluate critically the norms and standards and ends of that context” (Crittenden 2004: 43). This is true regardless of whether an individual possesses many or few identities and whether her identities have traditionally been marginalized or validated.

Conclusion

Racism and multicultural overreach are two lenses that highlight the possible misuses of culture in an explanation of an individual’s decision making process. However, neither provides an analysis of how an individual can be understood in a way that recognizes both the importance of cultural membership and individual autonomy. Critical distance is a promising method of analysis because it is a central part of how two major theories of autonomy explain culture. Liberal multiculturalism and relational autonomy, and the liberal and feminist approaches that they incorporate, present a contextual argument for autonomy. These two theories both identify autonomy as important for living a meaningful and valuable life while emphasizing that culture is central to establishing and creating the contexts in which autonomy is exercised. Liberal multiculturalism and relational autonomy both acknowledge that practicing autonomy and being embedded within a cultural context are not mutually exclusive. The resources identified –rationality, revisability, resources, intersectionality, relationality and

independence – can help to determine the nature of an individual's critical distance.

Critical distance provides an analyzable resource that can be used to assess the explanatory power of culture and help determine how culture is influencing behaviour.

Critical distance is a valuable resource for simultaneously negotiating individual and cultural identity. It allows individuals to acknowledge their cultural values and cultural context, while simultaneously allowing their actions to be understood independently of culture.

Chapter 2: Critical Distance and the Law

The Problem

In the introduction I identified the difficulty of understanding the role culture plays in an individual's decision making process. In this chapter, I examine the effects of applying a cultural lens to Western legal systems, drawing on examples from Canada, Britain, and the United States. I examine the applicability of a cultural defence by assessing whether or not a defendant possesses critical distance. In other words, what are the necessary circumstances for including culture as an explanatory variable in criminal court cases?

It is debated within the legal community whether or not members of minority cultures who are charged with a crime should be able to employ a "cultural defence". Cultural defence refers to evidence that criminal defendants' offer of their cultural background and cultural norms to explain and potentially excuse their criminal behaviour.⁸ Cultural defence is defined by Paul Magnarella as a concept which "maintains that persons socialized in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture's norms, should not be held fully accountable for conduct that violates official law, if that conduct conforms to the prescriptions of their own culture" (Magnarella 1991: 67). Cultural defences are potentially applicable when the defendant's actions would not be considered a crime, or as serious a crime, in his culture of origin:

⁸ There is some debate in the legal community regarding the desirability and the legitimacy of a cultural defence in Western courts, and at present, no Western legal system has a codified mechanism in place for considering a cultural defence.

The defendant adverts to cultural influences and argues that her native culture would have excused her conduct, that cultural factors or patterns of behaviour are relevant to a determination of her state of mind at the time of the criminal act, or that cultural factors warrant reduced charges or punishment (Chui 1994: 1096).

In order to believe a defendant's cultural context should play a role in criminal proceedings, one must subscribe to the premise of "enculturalism – the notion that culture shapes cognition and conduct" (Rentlen 2004: 6).

The application of a cultural defence is problematic, not necessarily because a cultural defence should never be considered, but because of the absence of a coherent and consistent approach to applying the cultural defence. This leads to the introduction and inclusion of cultural factors in a piecemeal fashion with no guiding principles as to how and when they should be considered. I hope to provide some criteria to guide prosecutors and judges in evaluating the applicability of cultural evidence for different defendants.

Cultural factors can influence a criminal case at a variety of different stages. They can be considered at the time the charge is laid if the prosecutor, considering cultural factors, decides to reduce the charge. Cultural factors can be presented during the trial to a judge and/or jury who are made aware of the cultural norms to which the defendant was adhering through expert testimony. Cultural norms can be considered by the judge to mitigate sentencing and can be considered by the judge as a motivating factor in the crime but not used to mitigate sentencing. While judicial and prosecutorial discretion are accepted and necessary parts of the legal system, it is an unfair burden on all parties in a criminal case if cultural factors are included or excluded without any standard to determine the legitimacy of their inclusion. This inconsistency is especially problematic because the inclusion or exclusion of cultural factors can perpetuate

preconceived notions of the legitimacy of the explanatory power of culture in a way that negatively affects the equality of all members of society. In my analysis I focus on the use of the cultural defence to have a charge reduced or to mitigate sentencing. I do not examine the cultural defence as an affirmative defence in criminal court to negate legal guilt.

Cultural Defence

Allison Renteln identifies two important rationales in favour of the cultural defence. The first is that the cultural defence ensures the flourishing of multiple cultures. Renteln argues that if it is assumed that culture is constitutive of identity, then in order to ensure that members of minority cultures are granted “the dignity and rights which are their due, some kind of formal cultural defence is essential” (Renteln 2004: 187). She argues that any theory that is consistent with the position that culture is constitutive of identity, and that the flourishing of multiple cultures is valuable, must support a formal cultural defence. The second rationale is that cultural defences bridge the gap that currently exists between moral and legal guilt. This is important because it provides the legal basis to change a defendant’s charge or sentence because of the defendant’s culture and still balance the interests of the defendant and the interests of society.⁹

⁹ Renteln identifies three principle theories of punishment: deterrence, rehabilitation and retribution. Deterrence alone does not explain punishment, because deterrence would work equally well if punishment was exercised arbitrarily, regardless of guilt. Rehabilitation alone does not explain punishment, because people are still punished if they do not admit guilt and are unlikely to be rehabilitated. Therefore, the primary motivation for punishment is retribution and essential to this concept is proportionality. A defendant whose actions were culturally motivated is less blameworthy, and deserves less punishment, thus the importance of bridging legal and moral guilt (Renteln 2004: 188-189). The importance of retribution is also reflected in Canadian legal decisions, such as *R v. C.A.M.*, in which the court held that “[r]etribution is an accepted, and indeed important, principle of sentencing in our criminal law.... Retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions... Retribution requires that a

There are also arguments against allowing a cultural defence in criminal trials. Diana Chui argues that the full support of a cultural defence often accompanies a belief in the exclusion of minorities from full participation in public life. Chui is worried that assumptions about minority cultures will be used to justify the exclusion of members of minority cultures from public life by suggesting that certain cultural differences are not compatible with Western democratic society (Chui 1994: 1101). She believes this would mark Asians (and by extension members of other cultural minorities) “as irreconcilably different from the American mainstream, isolating immigrants for that difference, and subjectively judging them on that ground” (1099).

There are multiple arguments both for and against a cultural defence and differing opinions over whether a cultural defence promotes equality or inequality. One of concerns associated with employing a cultural defence is that it may cause the dominant culture to assume that culture is the primary motivator behind the behaviour of certain cultural minorities. If a cultural defence can be utilised in a criminal trial, the dominant culture may infer that it is legitimate to assume that members of certain cultural minority groups have less critical distance, less autonomy and are less individually accountable for their behaviour because their actions are significantly influenced by their culture.

I begin my analysis by examining the cultural defence through the lenses of racism and multicultural overreach. The main problem with these two analyses is that both fail to provide a means of distinguishing fair and legitimate uses of cultural defences from unfair and illegitimate ones. I analyse two cases, *R v. Lucien* and *People v. Moua*, using the six markers of critical distance identified in liberal multiculturalism and

judicial sentence properly reflect the moral blameworthiness of the particular offender” *R. v. M.* (C.A.), [1996] 1 S.C.R. 500.

relational autonomy – rationality, revisability, resources, intersectionality, relationality, and independence – to examine the legitimacy of employing a cultural defence in these two cases.

Racism

One way of assessing the legitimacy of a cultural defence in criminal court cases focuses on the presence of racism. Pascale Fournier argues that racism is the basis of the cultural defence. She argues if the dominant culture attempts to eliminate racism it will not be successful because its institutions are infused with racism. This is especially problematic in the legal system, which is based on the premise of equality and steeped in the mythology of justice as blind. The courts are challenged to strike a balance that reflects the cultural sensitivity valued by western cultures without relying on, or perpetuating, stereotypes; however, the courts attempts may be futile. “Racism is so deeply embedded in culture that even when, and perhaps especially when, the court is attempting to be culturally sensitive, stereotypes of good and bad, white and black, us and them, superior and inferior, linger as the background of the decision” (Fournier 2002: 94). If it were possible to recognize difference without racism, it would have to be done in such a way that minority cultural practices were understood as different, but not as different and therefore inferior. However, if as Fournier suggests, the power imbalance makes true equality within the legal system impossible, then the presence of racism cannot address the problem of determining the legitimacy of a cultural defence.

Chui argues that one way in which racism functions in the cultural defence is that the dominant culture only believes the cultural defence is relevant when the actions of

members of minority cultures mirror existing stereotypes of minority cultures within the dominant culture. This phenomenon is identified as the “model minority myth” (Chui 1994: 1079). An example of this myth can be found in the case of *R v. Bibi*. Bashir Begum Bibi, a 47-year-old woman from Kenya, living with her brother-in-law in England, assisted her brother-in-law in unpacking a shipment of cannabis that he received at the home they shared. Initially sentenced to three years in prison, this sentence was reduced to six months when the Court of Appeal ruled that “it is apparent that [Bibi] is well socialized into the Muslim traditions and as such has a role subservient to any male figures around her... In the light of that history, it would not be safe to credit her with the same independence of mind and action as most women today enjoy” (Phillips 2003: 522, cf. *R v Bibi* [1980] 1 WLR 1193). Bibi fit into the dominant culture’s stereotype of a submissive, Muslim woman and therefore her culture was used as a variable to mitigate her sentencing.

The model minority myth also functions in reverse, namely, when a member of a cultural minority does not fit the dominant culture’s stereotype of how she should behave, the public authorities in the legal system are less likely to mitigate her sentence for cultural reasons. In *R v. Kiranjit Ahluwalia*, Ms. Ahluwalia was convicted of killing her physically abusive husband. In this case, the judge advised the jury that

[t]he only characteristics of the defendant about which you know specifically that might be relevant are that she is an Asian woman, married, incidentally to an Asian man, the deceased living in this country. You may think she is an educated woman, she has a university degree. If you find these characteristics relevant to your considerations, of course you will bear that in mind (Phillips 2003: 523, cf. *R v Kiranjit Ahluwalia*, unreported case, Lewes Crown Court, 6 and 7 December 1989 (transcript: Hibbit and Sanders)).

Phillips concludes that by giving these instructions, the judge indicated that although the fact that the defendant was Asian might be a reason why she would not have been able to leave her abusive marriage, the fact that she had a university education suggested that she was not a typical Asian woman trapped in an abusive marriage and therefore would have less justification for resorting to desperate measures (523). It is possible to conclude that Ahluwalia's deviation from the model minority myth in some way negated her status as a minority.

Applying culture as an explanatory variable to mitigate sentencing, or in any other stage of the legal process, should not occur only when the defendant in question mirrors the dominant culture's stereotype of a cultural minority. This is an implicit display of racism based on cultural stereotypes. There needs to be a method that can determine the role that culture played in the decision making process of both Bibi and Ahluwalia, regardless of whether or not they conform to cultural stereotypes.

Multicultural Overreach

Phillips identifies four major issues that are raised by the cultural defence: first, it threatens to undermine legal universalism; second, it can lend itself to opportunistic defences; third, culture often operates to sustain male power; and finally, it can lend itself to stereotypical representations of the non-western "other" (Phillips, 2003: 516). The third and fourth concern are the ones that speak most directly to the problem of determining the legitimacy of culture as an explanatory variable. Phillips is concerned that culture only gains currency in the legal decision making process when the culture in question belongs to a member of a cultural minority group. "Individuals from minority

groups are regularly presented as defined by and definitive of their culture, to the point where even the most aberrant can serve as typical products of their culture's norms... The individual [is] read from the culture, and the culture from the individual in turn" (Phillips 2007: 85).

Phillips wants to see a shift from the bounded view of culture as something that provides a specific prescription of actions, to culture as a framework for meaning, in the way that gender, class, and religion provide a framework for meaning. Phillips believes that understanding culture as a framework of meaning will help alleviate the problem of multicultural overreach. In the context of the dominant culture, culture is viewed as a framework in which meaning is developed, not as a prescription for beliefs and values. Culture should be recognized as performing the same role in minority cultures.

Assessments of multiculturalism have been hampered by a misrepresentation of culture as more encompassing, and cultures as more distinct, than is really the case. Many of the cases discussed here highlight an abuse of cultural stereotypes that a more careful multiculturalism should help us avoid (77).

The cultural defence cannot further justice if it relies on stereotypes that promote a homogenized view of cultural minorities as demonstrated in the comparison of *R v. Bibi* and *R v. Ahluwalia*. Multiculturalism overreach emphasizes that if cultural evidence were introduced in court, the system would have to ensure that it could be rebutted through cross-examination and rebuttal testimony. Volpp argues that it is the responsibility of members of both the court and the community to challenge a cultural defence when it is being employed as an opportunistic defence. Multicultural overreach suggests that evidence can be challenged as irrelevant when it is based on stereotypes and should be strenuously protested by members of the community who can provide an accurate description of daily life within a specific cultural minority. The cultural defence

will only be helpful if it is understood as part of the context of the individual and the crime, complementing and not eclipsing other factors.

Critical Distance and Two Cases

In the first chapter, I argued that the explanatory power of culture existed in an inverse relationship to critical distance and that the more critical distance an individual possessed the less her actions could be explained utilising the explanatory power of culture. Critical distance can be used to evaluate individual behaviour and bridge the gap between moral and legal guilt. If a person has the resources identified in liberal multiculturalism and relational autonomy, it undermines the argument that a cultural defence could mitigate his culpability. If the explanatory power of culture exists in an inverse relationship to critical distance, then someone who could be shown to have critical distance would be unable to justify utilising culture as a defence. Conversely, someone who possessed few markers of critical distance would have a stronger claim to utilise the cultural defence to demonstrate a lack of moral guilt. I am not going to conclude that some people exercise complete critical distance and other people exercise absolutely no critical distance, nor that the actions of individuals who exercise little critical distance can be explained exclusively in terms of the explanatory power of culture. Rather, I am attempting to determine the relationship between critical distance and culture. I argue that by identifying the markers of critical distance one can arrive at more accurate conclusions regarding the relationship between an individual's actions and the explanatory power of culture, and by extension, the applicability of the cultural defence.

In order to demonstrate how critical distance can be used as a tool to assess the applicability of a cultural defence, I examine two similar cases, *R. v. Lucien* and *People v. Moua*. In both cases, culture was utilised by the court during sentencing to explain the actions of the defendants and to mitigate their sentences. First, I provide a brief synopsis of each case. I then examine the behaviour of the defendants against the set of three criteria that reflect the resources offered in liberal multiculturalism: Is rationality present? Is revisability present? Are resources present? I then examine the behaviour of the defendant against the set of three criteria that reflect the resources offered in relational autonomy: Is intersectionality present? Is relationality present? Is independence present? The more of these six markers the defendant possessed, the more critical distance the defendant can be said to have had prior to, and during the commission of his crime, and the less applicable the cultural defence would be for mitigating his culpability. The fewer of these six markers the defendant possessed at the time of his actions, the less critical distance the defendant can be said to have had and the more applicable the cultural defence would be for explaining his behaviour and mitigating his culpability. These six markers are applicable to almost any case where culture was introduced as an explanatory variable, including *R v Bibi* and *R v Ahluwalia*. The brief descriptions of these cases suggest that culture was seen as a factor mitigating Bibi's guilt because Bibi lacked access to resources, such as English language skills and a formal education. In contrast, because Ahluwalia had access to education and English language skills, her behaviour was explained by critical distance and not culture. In my analysis, I analyze six different variables. In doing so, I hope to be able to reach conclusions about the legitimacy of

including culture as an explanatory variable that are more accurate than conclusions based only on the presence or absence of a single variable.

R. v. Lucien

Montreal is a city in Quebec, Canada, that is home to large French and English communities as well as a number of much smaller ethnic minority communities. Between 1968 and 1974 Quebec's non-white population increased five-fold, with 76% of these new residents settling in Montreal (Williams 1989: 80). The largest non-white cultural group were Haitians, who made up half of Montreal's black population.¹⁰ None of the major Canadian cities have escaped occasional outbreaks of racial violence but "nowhere have the tensions of assimilation been greater than [Montreal], which has been preoccupied in recent years with another minority problem: the status of French Canadians in a preponderantly English-speaking Canada" (Farnsworth 1991). As the only French province in an English speaking country, Quebec has always struggled with immigration, with some Quebec leaders and citizens fearing that immigration would jeopardize the continuation of the Quebecois way of life. "The fight for French Canadian rights has absorbed official attention and resources as thousands of young Haitians, Jamaicans, St. Lucians and others, with ways of life that may clash with those of older residents, crowd into worker districts, competing for scarce jobs and housing" (Farnsworth 1991). Williams points to the severity of Montreal's racism when she

¹⁰ The first wave of Haitian immigrants to Montreal numbered approximately 3,500 and entered Montreal between 1968 and 1972. As a whole, this group was highly educated and quickly associated themselves with the white French establishment, and not with English-speaking Black minority groups in Montreal. The second wave of Haitian immigrants spoke Creole and was primarily comprised of no or low-skilled workers. The numbers of Haitian residents rose from 10,000 in 1970 to 35,000 by 1979 (Williams 1989: 68).

observed that “[i]t was not that long ago in Montreal, when Blacks in their search for housing were often confronted with signs that read, ‘no niggers, dogs or Jews allowed’” (1989: 111).

This is the context for the first case I examine, *R. v. Lucien*. In this case, two Haitian-Canadian men, Patrick Lucien and Evens Shannon, 23 and 22 respectively, were accused and convicted of raping M.O., an 18 year old black Canadian woman in July 1996. Lucien and Shannon moved to Montreal in 1991 after living in the United States for 11 years. In Montreal, the defendants shared a one-bedroom apartment. On the night of July 11, 1996 they went to a Montreal bar where they met M.O., who was visiting from Quebec City. M.O had two beers while the defendants did not drink. M.O. danced with Lucien for most of the night, and at closing time she accepted his invitation to return to his apartment before he drove her home. On arriving at the defendants’ apartment she ate a yogurt and then asked Lucien to drive her home. The defendants refused and each sexually assaulted her while the other held her down and held a pillow over her head to muffle her shouting (Fournier 2002: 88).

The defendants were found guilty. The maximum sentence for sexual assault in Canada is 10 years, although this can be increased to 14 years when there is more than one party involved in the assault, as these crimes are considered particularly heinous. The defendants were sentenced to 18 months to be served in the community, which meant that they could serve their sentences at home, so long as they respected a curfew and performed 100 hours of community service. The court was presented with evidence that the defendants felt no remorse. A lack of remorse is usually considered an

aggravating factor, but in this case Judge Dubreuil felt that a sentence served in the community was acceptable. She explained:

In this particular case, the absence of remorse of the two accused seems to me to arise more from a particular cultural context with regard to relations with women than to a real problem of a sexual nature.... Considering their age, their social integration, the fact that they have no previous criminal record, and the special circumstances of the case, I believe that by making an order for a conditional sentence served in the community, the safety of the community would not be endangered.... Evans Shannon, confident in his charm, did not take into account the hesitations and reticence of the young girl after she accepted to go to his place. The two accomplices then took her consent for granted. They behaved like two young roosters craving for sexual pleasure without any regard for the young woman. Despite their resentment for her, despite the pride of young males who cannot admit having committed a serious insult to the victim by not respecting her choice to leave at a certain moment, they nevertheless thought about the incident and gained a little more maturity since it became judicial (Fournier 2002: 91-93).

The general interpretation of these comments was that, although no official cultural defence had been offered, the judge reached her conclusion, not on the evidence presented in court, but on the basis of her assumptions and stereotypes regarding black men. “The accused are black men from Haiti, the ‘particular cultural context.’ [And the judge provided] a cultural explanation for what only appears to be sexual misbehaviour” (91).¹¹ It is against this background of two founding cultures, multiple ethnic minorities, a significant Haitian minority and thinly veiled racism that I analyse the defendant’s ability to practice critical distance and the legitimacy of explaining their behaviour in terms of the norms of their culture.

¹¹ Judge Dubreuil is unfortunately not alone in her stereotypes of members of Montreal’s Haitian community. In 2003 racism against the Haitian community was again seen in a Quebec courtroom when a Quebec lawyer explained the behaviour of his client who was charged with pimping by arguing “[h]e’s black, he’s Haitian. Prostitution in that environment is normal. It’s part of their culture, like it’s part of Jamaican culture to smoke cannabis.” The lawyer later corrected himself: “What I said is that in Haiti there is a lot of prostitution” (Lafortune 2004).

People v. Moua

In 1990, 94,439 people of Hmong origin were living in the United States. The largest concentration of Hmong, 65,000, were living in California and within California, the largest concentration of Hmong, 19,444 people, were living in Fresno. The late 1980s and early 1990s were a time of rapid change in the Hmong-American community, as the majority of Hmong refugees and immigrants arrived in the United States between 1985 and 1994 (Pfeifer and Lee 2000).¹² As a group, the Hmong are not familiar with, and are often frightened by, American law. Community leaders actively discourage direct contact with American authorities in order to prevent misunderstandings and bad publicity for the Hmong community (Magnarella 1991: 69). Instead of relying on American authorities, the Hmong have retained their traditional patrilineal clan social organizations, where male elders adjudicate disputes (Norgren and Nanda 2006).

One of the traditional Hmong marriage rituals is *zij poj niam*.¹³ *Zij poj niam* is translated into English as marriage by capture, although the term is actually similar to elopement (Norgren and Nanda 2006: 176). The ritual begins with a flirtation, which the woman consents to by giving the man a token item. In Hmong villages in Asia, the courtship ritual is more elaborate than in North America, and can include the prospective husband playing the flute for his future bride outside of the wall of her home or sneaking inside her home so the couple can sing softly to each other at night. However, much of the ritual has been modified or eliminated in the United States to adapt to the realities of apartment buildings and locked doors. When it is time for the marriage, the man takes

¹² In 1990, the Hmong population was on average, less educated than the American population, with only 11% reported holding a high school diploma and only 3% reported holding a bachelor's degree, while 67% reported receiving public assistance (Pfeifer and Lee 2000).

¹³ This is one of two traditional Hmong marriage rituals. In the second ritual, the families of the bride and groom negotiate the marriage in advance on behalf of their children.

the woman from her home to his home to consummate the marriage and the woman is not allowed to return to her home for three days (Donnelly 1994). The woman is expected to protest the capture and consummation of the marriage in order to prove her virtue, and the man to perform the ritual despite her protestations in order to prove his virility.

In 1984, after living in the United States for six years, Kong Moua, a Hmong refugee, abducted an Americanized 19-year-old Hmong woman named Xeng Xiong. Moua brought Xiong to his family home and consummated their marriage. Xiong protested throughout the ritual. Moua claimed that he believed Xiong had already consented, as following Hmong custom, he and Xiong had engaged in a ritualized flirtation and the exchange of tokens of affection (176). Xiong filed a criminal complaint and Moua was charged with kidnapping and rape. Moua did not argue that he did not understand that rape was a crime; rather, he argued that he did not understand her resistance as non-consent. “The Hmong marriage practice centers on and celebrates the male sex-right: kidnapping for marriage and consummation by force is marital sex, not rape” (Chui 1994: 1115). After taking Hmong marital practices into consideration, the judge concluded that Moua was sincere in his belief of Xiong’s consent, and therefore did not have the intent needed for rape. The judge also believed that Xiong had genuinely not consented. After conferring with Hmong elders the judge allowed Moua to plead guilty to the lesser charge of false imprisonment and he was sentenced to ninety days in jail (Norgren and Nunda 2006: 176).

Critical Distance and the Cultural Defence

i) R. v. Lucien: Liberal Multiculturalism

I have identified three markers of critical distance within liberal multiculturalism: rationality, revisability and resources. The rationality criterion requires that an individual rationally appraise their desires by “testing them for internal consistency, their relation to reliable beliefs, and the like” (Stanford Encyclopaedia of Philosophy). Although Lucien and Shannon acted in a logical manner, their actions did not demonstrate rationality. Lucien and Shannon knew that committing rape was wrong, yet they raped M.O. They therefore did not demonstrate internal consistency of their beliefs, as their actions went against that which they knew to be right. Beliefs are dependent on context, but nothing within the defendants’ cultural or social context pointed to a belief in the acceptability of rape. Although their behaviour was irrational, their cultural context did not contribute to this irrationality. The Haitian community in Montreal responded with outrage at the suggestion that a Haitian male identity made rape an acceptable course of action, and called such assumptions racist and sexist. Eric Faustion, head of the Christian community of Haitians in Montreal strongly refuted the cultural rationale that appeared to underlie the defendants’ sentencing. “I interpret what [the judge] says as it being normal for Haitian men to proceed with group rapes and then to have no remorse because it’s normal to do this. I find this outrageous.” The Haitian community asked for a public apology (Fournier, 2002: 100).

In order to prove that Lucien and Shannon acted rationally, the court would have had to have been presented with evidence that the defendants developed their beliefs in a context which viewed rape as an acceptable behaviour. The court was not presented with

this type of evidence, despite the judge's ruling suggesting otherwise. The judge's ruling suggested that she believed that the defendants had acted rationally and that the deeply held beliefs of Haitian men include a belief in the acceptability of rape, and therefore the defendants had demonstrated internal consistency in their beliefs when they raped M.O. This can be inferred from subtext of the judge's comments as characterized by Fournier. "Black men are inherently and unalterably sexually aggressive. They are embodied penises. They are biological dangers. They are animals, young roosters craving for pleasure" (93). It would appear that the judge's ruling reflected her deeply held beliefs about the insatiable sexual appetite of Haitian men, rather than reality. Although her ruling was rational, insofar as it was based on the internal consistency of her beliefs, her beliefs were mistaken and clouded her ability to impartially weigh the evidence.

Although the defendants did not act rationally, this was not a result of their culture and therefore, neither culture nor critical distance has explanatory value for this criterion.

The second marker of critical distance, revisability, was present. Revisability is the practice of assessing and potentially revising one's beliefs and judgments to ensure that one is leading a good life and not a life based on false beliefs. Over the course of the evening the defendants had several opportunities to revise their choices. They could have chosen not to drive M.O. back to their apartment; however, at this point in the evening they may have believed that sex would be consensual. When M.O. indicated that she wanted to leave the defendants could have driven her home, but chose not to. At any point during the commission of the crime the defendants could have recognized her distress or the extent of their violence but they did not. In order to prove that their behaviour was not revisable, the defendants would have had to present evidence that

changing their behaviour would have violated their pursuit of the good as understood in their cultural context. However, the opposite was true. Their culture, however defined, would have fully supported their revision of beliefs, as not raping women is considered a reasonable and rational course of action in both the Haitian and Canadian communities. Finally, in the aftermath of their actions, they could have expressed remorse. The revisability criterion does not specifically include remorse; however, I believe the criterion can reasonably be expanded to do so, as there is value in wishing that one's actions could have been otherwise. In this case, the defendants gave no indication of post-rape remorse or a desire to revise the course of events, although they would have faced no societal consequences had they done so. The fact that the defendants had the opportunity to express remorse for their behaviour but chose not to, demonstrates that the explanatory power of culture cannot account for this aspect of their behaviour, and that the defendants possessed the revisability marker of critical distance.

The third marker of critical distance is access to resources. Although there is no specific evidence indicating whether or not the defendants took advantage of the resources available to them, it is possible to examine their personal histories and draw some conclusions regarding their access to resources. The defendants had lived in North America for 17 years, or the majority of their lives. They had access to liberal rights enjoyed by all residents such as freedom of speech, freedom of assembly, and due process. They also had rights to more specific liberal resources, such as education. The defendants had access to a liberal education from a very young age, in which it could be expected that they would have been exposed to autonomy promoting skills, as well as liberal values towards gender equality and crime; they would have had access to this

resource in Canada, the United States and Haiti. The defendants would have been exposed to a number of groups including English speaking Americans and English speaking Canadians, Quebecois, African Americans, white Anglo-Saxon Americans, women and men, children and the elderly, the rich and the poor, as well as exposure to different cultures and cultural values. The defendants also had access to social services, such as education, employment, welfare, medical care, and other resources that would have prevented the development of a lifestyle so lacking in material resources as to grossly narrow or distort their perception of right and wrong. Their context provided them with the material support necessary to form a comprehensive belief system. There is every reason to believe that the defendants had access to resources and possessed this marker of critical distance.

There is no evidence to suggest that the presence of a Haitian cultural context influenced the actions of the defendants or that their actions could be explained through such a context, despite what was indicated in the judge's ruling. In order to further explore the extent of the defendants' critical distance and how cultural context may or may not have informed the defendants' actions, I will examine whether or not the defendants possessed the markers of critical distance present in relational autonomy.

ii) R. v. Lucien: Relational Autonomy

The first resource I identified within relational autonomy is intersectionality. Intersectionality is the weaving together of identities and understanding the intersection of identities in such a way as to help illuminate the greatest number of the conflicts and tensions operating in an individual's decision making process. Like all people, Lucien

and Shannon possessed intersectional identities. They were male, they were 20somethings, they were Canadian, they were American, they were Haitian, they were French, they were heterosexual and they were black. The fact that they were male arguably makes them more likely to commit rape than if they were not male, however, maleness alone is not a mitigating or explanatory factor for rape. The fact that they were Canadian or American did not make them more likely to commit rape and the fact that they were Haitian did not make them more likely to commit rape. Every aspect of the defendants' identity, whether in isolation or combination, suggests that rape was not consistent with their identities, and that they committed rape does not point to the presence or absence of intersectionality. Therefore, although the intersectional identity of the defendants must be considered in full in order to determine critical distance, no aspect of their identity would have compromised their ability to know that committing rape was wrong. If being male or Haitian was widely considered to provide a person with the cultural context to believe that rape was valuable, then an argument could be made that the defendants did not possess intersectionality because they did not balance the raping aspects of their identity with the non-raping aspects of their identity. However, since every aspect of their identity did not support rape, it is irrelevant whether or not they understood the intersections of their identity because they chose to act in a way that they knew to be wrong.

The second resource identified by relational autonomy is relationality. Beliefs, and the ability to obtain critical distance from those beliefs, are formed in the context of relationships with others. It was suggested that the defendants had formed their belief that rape was an acceptable practice in the context of either Montreal youth culture or

Haitian culture; however, neither of these cultures value or promote rape. There is no evidence that rape is commonly practiced among Montreal youth or among Haitians. There is also no reason to believe that the defendants genuinely believed that rape was common in either of these groups. One relationship that may have contributed to the rape is the relationship of the defendants to one another. After bringing M.O. back to their apartment one defendant might have felt pressure from the other defendant to prove his strength and virility through rape. The desire to “save face” and appear strong and macho to his friend may have been a motivating factor to continue with the rape and created pressure not to stop when it became clear that M.O. would not consent to sex. The fact that the defendants formed their conception of the good in opposition to their various value systems and their relationships with their culture and community indicates that the defendants possessed critical distance, and were not influenced by their cultural context.

The final marker of relational autonomy is the presence of the independence of beliefs and the ability to evaluate beliefs in the context of cultural expectations while being prepared to reach an independent conclusion. The defendants understood that their culture viewed rape as unacceptable, and decided that they did not agree with their culture’s condemnation of rape, and instead formed the belief that it was acceptable for them to commit rape, independently of any cultural values. As the defendants’ actions directly contradicted all of their values systems, the defendants clearly exercised independence from their cultural beliefs. The decision to commit rape may have been dependent on the willingness of their friend to participate in the rape. However, the fact that their decision to commit rape was dependent on the belief and consent of their co-defendant exacerbates, rather than mitigates, their guilt.

iii) Conclusion

I have identified six markers of critical distance, most of which the defendants appear to possess. While the defendants did not possess rationality, they exercised means-end rationality, and there was no evidence presented that their lack of rationality was due to cultural factors. The presence of the other markers of critical distance along with a complete lack of evidence that their actions were culturally motivated should negate the applicability of a cultural defence. The explanatory power of culture and the presence of critical distance exist in an inverse relationship to one another; thus, the overwhelming evidence supporting the presence of critical distance undermines the legitimacy of a cultural defence. Therefore, the question remains why did the judge suggest that culture was a mitigating variable in this case? According to Fournier, the answer is racism. “Racism is so deeply embedded in culture that even when, and perhaps especially when, the court is attempting to be culturally sensitive, stereotypes of good and bad, white and black, us and them, superior and inferior, linger as the background of the decision” (Fournier, 2002: 94). If the test of critical distance had been applied rather than the test of cultural stereotypes, it would have been clear that these defendants possessed critical distance and that the use of cultural factors to explain their behaviour was racist, illegitimate, and not in the interest of justice and “[t]aking Haitian culture into account, as it was by this white judge, ultimately means confirming the ‘Other’ as barbaric savage, and uncivilized” (Fournier 94). The cultural defence is designed to provide a bridge between moral and legal guilt for members of ethnic minority cultures. However, nothing in the analysis of Lucien and Shannon’s critical distance, using the tools of

liberal multiculturalism and relational autonomy, suggest that their moral guilt was any less than their legal guilt. The complete lack of retribution imposed on the defendants by the court did not serve the interest of the victim, the society at large, or the defendants' community. It is reasonable to conclude that cultural considerations should not have been included at the time of sentencing.

iv) People v. Moua: Liberal Multiculturalism

Critical distance is equally helpful for cases where culture does have value as an explanatory variable. I argue that this is the case in *People v. Moua*. The first marker necessary for critical distance is rationality. Rationality requires that one's desires are internally consistent and consistent with reliable beliefs, and by this definition Moua possessed rationality. He valued marriage and acted on his desire to be married by performing a marriage ritual with Xiong. It was consistent with Hmong culture and fulfilled his conception of the good. Moua's actions were premeditated. He constructed a plan based on his correct interpretation of his culture's marriage ritual, and followed through with his plan, over the objections (which he expected) of Xiong. He proceeded with motive and intent and his actions were consistent with his beliefs regarding the marriage ritual. This suggests that the rationality marker of critical distance was present, insofar as he rationally pursued his goal of marriage. However, Moua's values did not include rape, and rape was not consistent with Moua's previously held beliefs; therefore, he could not have rationally intended to rape Xiong.

The second marker necessary for critical distance is revisability. In this case revisability is somewhat difficult to quantify. Though the defendant had multiple

opportunities during his enactment of the marriage ritual to revise his conception of the good, nothing about the series of events indicated to him that revision was necessary. Though Xiong vigorously protested her kidnapping and rape, Moua expected this, as lack of consent is an integral part of the ritual. This contributed to his rational assessment that she was, in fact, consenting. In order for the court to view Moua's beliefs as revisable, evidence would have had to have been presented indicating that Moua was aware Xiong was not consenting to the ritual itself, and not simply fulfilling her role in the ritual. Furthermore, after the fact, Moua said that if he had understood her protestations as lack of consent, he would not have continued with the ritual and he expressed remorse for his actions. Moua's actions were not meaningfully revisable. If he could have revised his actions after the fact, it is likely that he would have made different choices. Therefore, it is probable that Moua lacked this marker of critical distance, and that his behaviour was informed by his culture.

The final marker of critical distance in liberal multiculturalism is access to resources. I do not have the evidence necessary to evaluate Moua's access to resources, but I will present multiple factors that would have likely influenced his access to resources. Moua had been living in the United States for six years, and in that time would have had access to several years of a liberal education. However, due to the fact that he was a teenager when he entered the United States, his opportunity to take advantage of the education system would have been limited by his age and by his English language skills. In addition to education, he would have had access to the full range of social services offered in the United States, including employment and social services; however, his access to these resources may also have been limited by his lack of English-

language skills. Moua lived in an integrated and multicultural part of the United States. He abducted his victim from Fresno College, indicating that he had access to, and was familiar with, local methods of transportation and possessed the language skills to navigate the city. In knowing that his victim worked at the college, he might have reflected that she had been exposed to a number of different cultural beliefs, and as he had visited Xiong at her work, it is possible that he had met people from a variety a cultural backgrounds.

It is also quite possible that during his years in America Moua had not been exposed to a variety of other cultures and cultural practices. As a group, the Hmong are not familiar with, and are often frightened by, American law. Community leaders actively discourage direct contact with American authorities in order to prevent misunderstandings and negative publicity for the Hmong community (Magnarella 1991: 69). This suggests that Moua's access to cultural resources outside of the Hmong community may have been more limited than would be true of an individual from another immigrant group which was more open to adopting American cultural practices and norms. While Moua would have had access to resources that he could have used to develop critical distance, due to the high value placed on insularity within the Hmong community it is perhaps unlikely that he would taken advantage of those resources.

v) People v. Moua: Relational Autonomy

The first marker of critical distance identified by relational autonomy is intersectionality. Moua was Hmong, American, a refugee, male, heterosexual and 20-something. Although his Hmong identity may have been more significant in his

understanding of himself than his American identity, there is nothing to suggest that he was completely alienated from his American identity, or forced to reject his American identity, or not aware of potential conflicts between his Hmong identity and his American identity. An additional complexity to Moua's capacity to understand intersectionality, is that in choosing a bride who was a Hmong woman, Moua may not have understood how Xiong's identities were woven together in a manner that was not consistent with how Moua expected her intersectionality to manifest itself. The tensions and conflicts in Moua's intersectional identity were different than the tensions and conflicts in Xiong's intersectional identity, and as such Moua's ability to project himself into Xiong's mind was compromised. Moua looked to Xiong for specific cues, but the different manifestations of their intersectional identities caused him to misinterpret her cues. Moua was unable to appreciate the relationship between Xiong's American identity and Hmong identity within her intersectional identity, because it did not mirror the positions of these two identities in his intersectional identity. It is unclear to what extent Moua's intersectionality limited his critical distance, but his lack of understanding of the intersectionality of Xiong's identity certainly influenced his decision-making process.

The second marker of critical distance is relationality. Moua's beliefs were formed in relation to other members of his culture. In Hmong culture, both in Laos and in refugee communities, *zij poj niam* is practiced. However, this practice is not complemented by the wider American cultural context in which Moua lived. Although Moua and Xiong were both Hmong they had different networks of relationships. Xiong was described as Americanized and worked in an English speaking college. Moua did not recognize that this might have caused her to develop a different framework of

meaning. Moua went to visit Xiong with his friends from the Hmong community. These people saw Moua and Xiong engage in the ritual exchange of gifts. His friends may have encouraged him to go through with the marriage ritual, thus confirming Moua's conclusion that Xiong would consent. However, it is also possible that Moua may have let pressure to follow through with the second part of the ritual prevent him from listing to Xiong's protestations as he would not have wanted to appear weak to those in his community by not completing the ritual. It is likely that Moua's networks of relationships supported his marriage to Xiong, and confirmed his belief in Xiong's consent, even though she protested throughout the ritual.

The third marker is independence. The defendant's belief in the value of the marriage ritual was reached after reflection on his knowledge of his culture. However, he was not aware of the culturally independent beliefs of his victim, knowledge of which may have influenced his decision making process. This is also indicated by his expression of remorse following the event, suggesting that if he had been aware of alternative practices he may have chosen to forgo the traditional Hmong marriage ritual in favour of an American marriage ritual. It is likely that Moua possessed the critical distance marker of independence. Evidence that Moua was not acting independently could have included statements that he was under pressure by his parents or community elders to marry Xiong. However, no such evidence was presented and it is reasonable to conclude that Moua was acting independently.

vi) Conclusion

After examining the two cases in light of the six markers of critical distance it is possible to reach a conclusion regarding the applicability of the cultural defence for mitigating charges and sentencing. The Haitian defendants possessed most of the markers of critical distance and there was no evidence to suggest that their beliefs reflected their cultural norms. Moua possessed few markers of critical distance and there was a substantial amount of evidence presented that his beliefs were the result of his cultural norms. This suggests that applying culture as an explanatory variable to mitigate sentencing in *R. v. Lucien* was not justified. The fact that the defendants possessed critical distance means that it was not legitimate to employ culture to explain their behaviour. In contrast, *People v. Moua* was a legitimate application of the cultural defence to reduce the charge and mitigate sentencing because the defendant only possessed partial critical distance. The evidence suggested that giving Moua a reduced sentence was the best way to balance his legal and moral guilt. A lengthy retributive prison sentence would not have balanced Moua's moral guilt with society's need for protection, and in this case, applying culture as an explanatory variable furthered the interests of justice. Allowing the court to hear evidence of culture provided the court with the necessary information to ensure that the interests of justice could be served. In legal terms, Moua made a mistake of fact in his belief that Xiong had consented to the marriage ritual. Therefore, while a rape occurred, legally there was no rapist, as Moua's mistake of fact meant that he lacked the intent necessary to be convicted of rape. In allowing the facts of culture into evidence, it was more likely that the court would identify Moua's mistake of fact. In this case, it was legitimate to use of the explanatory

power of culture to understand much of the motivation underlying Moua's decision-making process and to conclude that it was attributable to culture. Critical distance provides a concrete standard that can examine the behaviour of cultural minorities and the role of the explanatory power of culture in order to help bridge the gap between moral and legal guilt. Public authorities, specifically lawyers and judges, can employ critical distance to develop guidelines as to when culture can be appropriately applied as a variable to reduce a charge or mitigate sentencing. This will guarantee that culture is not read onto defendants when it is not legitimately present, as in *R v. Lucien*, but that culture can be taken into account when it does offer a legitimate explanation of individual behaviour, such as in *People v. Moua*.

Chapter 3: Critical Distance and Gender

The Problem

The question of the legitimacy of culture as an explanatory variable is especially relevant for women. Women have historically been marginalized because of their gender, and their life chances negatively affected because of certain assumptions made on the basis of gender. Women who are members of ethnic minorities struggle against two very influential explanatory variables, culture and gender. Some feminists have expressed concern that recognizing and protecting certain ethnic minority practices could have a negative effect on the rights of women within some ethnic minority groups (Okin, 1999). The feminist critique can lead to stereotypical representations of the non-western “other,” promoting the belief that non-western cultures are “more sexist, more patriarchal, more tolerant of violence against women, and make this the basis for rejecting cultural claims” (Phillips 2007: 516). There are certain minority cultural practices that may unfairly impinge upon the autonomy of women according to the standards of liberal democracies. In making assumptions regarding the best interests of ethnic minority women, rather than examining whether or not a practice may be consistent with autonomy or critical distance, the dominant culture makes assumptions about minority cultural norms. The dominant culture and public authorities need to develop a method that can be used to assess the decision making process of cultural minority women, whose practices, norms and values differ from those of the dominant culture. In developing a method of analysis, I am not suggesting that women should always been seen as victims and men as oppressors, or that somehow the role of women

in society suggests that their decision-making process can be characterized by their gender. I am not offering a specifically gendered analysis of critical distance; rather, I am demonstrating how this analysis can be applied to gender-specific decision making processes.

In order to demonstrate how critical distance can be used as a method to assess the legitimacy of the application of culture as an explanatory variable in circumstances especially relevant to women, I examine the practices of female genital cutting and hymen repair surgery. These two cases were chosen because they apply primarily to women who are members of cultural minorities, and because in both cases, culture is thought to be an important variable informing a woman's decision making process. The goal of my analysis is not to determine if either of these procedures is morally acceptable or to judge who should or should not be allowed to undergo these procedures. The goal is to better understand the decision-making process of cultural minority women in deciding to undergo these procedures by examining the decision making process in terms of the six markers of critical distance.

It is not possible to determine if the decision to undergo female genital cutting or hymen repair surgery can be understood through the explanatory power of culture or critical distance in the abstract. Any conclusions would necessarily vary on a case-by-case basis. Although I provide specific examples of women who have chosen to have these procedures, I primarily address the decision to have these procedures in the abstract. I decided to focus on women's decision making processes in the abstract primarily because of the difficulty associated with selecting a single case as representative of multiple people from multiple cultures who participate in the same

practice. I examine what factors might influence the decision to have female genital cutting and hymen repair surgery. I ask what these factors would look like if an individual were exercising critical distance and what these factors would look like if an individual's decision was primarily influenced by culture.

Female Genital Cutting

One of the most abhorrent ethnic minority practices in the minds of members of the dominant culture is female genital cutting. I have chosen to use the language of female genital cutting following Meyers (2000). This terminology is “designed to avoid denying the pain and impairment often associated with female genital cutting but also to avoid presuming that women involved in this practice have no autonomy” (Meyers 2000: 470). There is no western nation that allows female genital cutting to be performed on women under the age of 18 and many anti-FGM advocates believe that the practice violates the Universal Declaration of Human Rights along with other multi-national agreements (Kwateng-Kluyitse 2005: 62-63). Female genital cutting is an umbrella term that can refer to a number of different procedures. The least invasive procedure is *sunna*, the removal of the prepuce which covers the clitoris; more invasive is excision, the removal of the clitoris; the most severe is infibulation, which is the removal of the clitoris, labia minora and labia majora, after which the remaining skin is stitched together leaving only a very small opening for urine and menstrual fluid to pass (Korieh 2005: 112).

Almost no data exists regarding the practice of female genital cutting in Europe, either on the number of girls at risk or on the total number of women and girls who have

undergone the practice (Leye 2005: 73). All the evidence available is anecdotal, and estimates are based on census data and extrapolation from country of origin prevalence data.¹⁴ The British Medical Association estimates between 3,000-4,000 girls have the procedure every year in the UK (Maguigan 1999: 407) and that 86,000 first generation asylum seekers/immigrants have undergone FGM (Leye 2005: 73). U.S. government sources believe that in the United States, as many as 168,000 girls and women are at risk for this procedure (Maguigan 2002: 241). This data speaks to the number of girls and women who have undergone or are at risk for the procedure. However, it is likely that the majority of individuals who are at risk for this procedure are girls, and the majority of individuals who have already undergone this procedure were girls at the time the procedure was performed. This data does not speak specifically to the question of the number of women over the age of 18 from Europe and North America who undergo this procedure. There is very little data on the number of women who undergo female genital cutting for “cultural” reasons in North America and Europe. However, there is some data on female genital surgery in the literature on cosmetic genitoplasty. Cosmetic genitoplasty is the surgical alteration of a woman’s genitalia. One of the most common forms of cosmetic genitoplasty is the reduction of the labia, and the number of labial reductions performed annually in the UK has more than doubled between 1998-9 and 2004-5, from under 400 to 800. Labia reduction is the surgical removal of labial tissue so that a woman’s genitalia can more closely resemble the pornography inspired ideal. In

¹⁴ The estimates of women and girls who have undergone, or are at risk for, female genital cutting are as follows: France 4,500 are at risk and 13,000-30,000 have undergone the procedure; Germany: 5,500 are at risk, and 21,000 undergone the procedure; Italy: 4,000-5,000 are at risk and 28,000 have undergone the procedure; Italy: 4,000-5,000 are at risk and 28,000 have it undergone the procedure; Switzerland: 6,700 are at risk (Leye 2005: 73).

the UK “the apparent lack of interest in developing guidelines and collecting evidence about cosmetic genitoplasty has led some doctors to align the practice with ‘female genital mutilation.’ The sentiment is not without justification when girls in their preteens are being operated on (Liao and Creighton 2008: 1091). Labial reductions have been the subject of newsmagazine show and articles in newspapers around the world, the British Journal of Medicine and Women’s magazines, such as Cosmopolitan.

According to the World Health Organization, women undergo female genital cutting for four reasons: socio-cultural, hygienic and aesthetic, spiritual and religious, and psycho-sexual (Momoh 2005: 10). Social reasons include initiation rites, the socialization of female fertility and teaching girls how to be wives and mothers. Aesthetic reasons include removing the clitoris, which is often considered ugly, to produce a physical symbolic marker of maturity, and to maintain a woman’s physical and mental health. Religious reasons include having the procedure to follow the prescriptions of Islamic, Christian, Judaic or Indigenous African religions. Psychosexual reasons include ensuring virginity as a prerequisite for marriage, increasing male pleasure during intercourse, keeping the male penis and unborn child safe from the clitoris, and saving a woman from temptation and from being over sexed (Momoh 2005: 10).

Any discussion of female genital cutting on women over eighteen years of age begs the question of whether or not the exercise is purely academic, as female genital cutting is primarily performed on female children at the request of their parent or guardian. This thesis is not designed to examine the complicated issues surrounding children and autonomy and consent, although I do not hesitate to claim that, in my opinion, female genital cutting should not be performed on young girls. However, the

question of whether or not female genital cutting can be performed on women is a question worth asking.

There is not a large number of first-person accounts of women socialized in western nations undergoing female genital cutting for cultural reasons. One such account is provided by Fuambai Ahmadu, a woman raised in America, who is a member of the Kono society of Sierra Leone. Ahmadu provides a first-person account of returning to Sierra Leone while a senior at a Washington D.C. University to undergo female genital cutting to mark her transition into womanhood (Ahmadu 2000). Another account is related by political theorist Bikhu Parekh, who recounts a time when he was approached at a conference by a 30-year-old female Nigerian academic who confided to him that she had undergone female genital cutting. She told Parekh that it was common for female genital cutting to be performed on women from her community after the birth of their first child, and that she herself had undergone the procedure at the age of 26. Women in her community chose to have the surgery to symbolize a break with the past, as a rite of passage, and to remind them that their primary role in life was that of a mother (Parekh 2006: 278).

Parekh identifies a number of reasons why western society should allow such women to undergo female genital cutting and a number of reasons why western society should restrict access to female genital cutting. Reasons to allow this procedure include that it is comparable to other forms of plastic surgery common in western societies, that to not allow it would be sexist because men have the right to alter their genitals, through circumcision or enlargement procedures, and that to not allow it would be sexist because it allows male notions of female sexuality to thwart a woman's ability to define her

sexuality on her own terms (279). Parekh also identifies a number of reasons why the surgery should not be allowed. The decision to have female genital cutting could be a response to peer pressure, to allow it suggests that people should be able to do whatever they like with their body, and it presents a slippery slope since condoning this practice for women could lead to this practice being performed on young women and girls (279).

Parekh suggests four possible approaches that public authorities could employ to regulate female genital cutting. The first is to allow female genital cutting without restriction. The second is to allow it only under certain conditions, including that it be undertaken voluntarily and because of deeply held beliefs. The third is to ban it outright. The fourth is to ban it, but to make exceptions for women who want the procedure for completely voluntary reasons to reflect their deeply held beliefs. He suggests that fourth approach is the best approach for public authorities to adopt, because it indicates society's disapproval of the procedure, but allows women who genuinely desire female genital cutting to access it safely (279).

Hymen Repair Surgery

Hymen repair surgery, or hymenoplasty, is a surgical procedure to reconstruct the hymen. Doctors who specialize in this surgery treat women from a number of ethnic backgrounds including women from the Middle East, Latin American and Asia. Some doctors in western countries report that it is primarily Muslim women who undergo this procedure. In France, Muslim community leaders are aware of this perception, and have insisted that virginity is not a necessary precondition for marriage in Islam (Crumley 2008). There are no reliable statistics on the frequency of hymen repair surgery, as the

procedure is mostly performed in private clinics and not covered by health insurance (Sciolino and Mekhennet 2008). However, indirect and anecdotal evidence suggests that this practice is becoming increasingly common in western nations. There are doctors in most major western cities, including New York, Paris, Toronto and London who perform hymen repair surgery. A Paris doctor who specializes in “intimate surgery” performs two to four hymen restorations a week, which works out to 100-200 women per year in single medical practice (Sciolino and Mekhennet 2008). This procedure has been the subject of reports in the Wall Street Journal, the New York Times, the television show 20/20, Time Magazine – an article which prompted a discussion of the procedure on the popular social networking site Facebook – and is the subject of an Italian film comedy which tells the story of a Moroccan born woman living in Italy who returns to Casablanca for the procedure.

A great deal of controversy surrounds this procedure in France and virginity restoration and virginity norms are currently being debated in a number of France’s institutions, including medicine, the courts and the government. France’s Collège National des Gynécologues et Obstétriciens Français views hymen repair surgery as a serious enough problem that it has unequivocally recommended that its members abstain from performing examinations to assess the integrity of the hymen, from issuing certificates of virginity or from performing any procedure on the hymen. Jean-Jacques Amy, editor of the European Journal of Contraception & Reproductive Health argues

[T]he verification of [a woman’s] chastity is questionable on ethical grounds. As much as the doctor wishes to protect the patient from retaliation by her relatives or the family of her future husband, he/she is reluctant to injure the woman’s intimacy and resents the deceitful character of both the certificate and hymenal repair. Either scenario amounts to upholding degrading customs (2008: 112)

The issue of virginity recently took centre stage in France when a court in Lille, in northern France, annulled a marriage between a French convert to Islam and a French woman of Northern African descent after the husband discovered that his bride was not a virgin on their wedding night (Meichtry and Colchester 2008: A11). The marriage was annulled, not on religious grounds, but because of breach of contract. France's justice minister, Rachida Dati initially upheld the ruling, but backed down following calls in Parliament for her resignation. Questions of hymen repair surgery and virginity restoration are being asked by individuals, public authorities and the media.

In order to understand how a woman may or may not obtain critical distance from hymen repair surgery, I will briefly summarize the nature of the procedure. The hymen is a skin like membrane that covers the opening to the vagina and is usually broken the first time a woman has sexual intercourse. During the hymenoplasty, a surgeon will reattach the two pieces of torn hymen tissue, making the woman physically appear to be a virgin. It is an outpatient procedure and takes one to two hours. The patient can return to work the next day, although it can take up to six weeks to heal fully (Hymen Repair). The hymen repair cosmetic surgery clinic in the UK explains why a woman might request this surgery:

While the biological function of the hymen is still uncertain, its social function is popularly regarded as a mythical symbol in many cultures. Therefore, qualified plastic surgeons perform hymenoplasty at the request of women who need the surgery for ethnic, cultural, or religious reasons. (Hymen Repair)

One of the primary reasons women have this procedure is to recreate their physical virginity prior to marriage. The other reason for having a hymenoplasty is it allows a woman who was not a virgin at the time of her marriage, to give her husband the "gift" of

her virginity; in others words, to create for her partner the illusion of taking her virginity. When women from certain minority cultures are married, her family, husband and husband's family expect that her hymen will break and that she will bleed on her wedding night. If a woman does not bleed, it will be assumed that she was not a virgin. This can have serious consequences for the marriage, as was demonstrated in the annulment of the marriage in Lille. A woman may not be a virgin for a number of reasons. She may have been the victim of rape, she may have had previous sexual partners, she may have engaged in a sexual relationship with her fiancé and the two of them are perpetuating the illusion of virginity for their families, or she may have broken her hymen while riding a bicycle and only appears not to be a virgin.

A woman may seek out hymen repair surgery for a number of reasons. She could be trying to adhere to a set of cultural norms that she does not believe in, or at the very least has chosen not practice. She might feel limited by her culture, not necessarily in the decisions she makes, but in her ability to claim ownership for her decisions. She might be choosing to undergo an invasive and unnecessary medical procedure because of a commitment to a culture that will not create space to accommodate her choices and desires. She might be empowering herself, by controlling how her sexuality is viewed by others and by society. She might be subverting the norms of her culture in an insidious and deeply personal manner, or she might be attempting to negotiate multiple identities and multiple cultures (Saharso, 2003). The option of surgery may allow a woman to adopt the more permissible sexual practices of her adopted country while still adhering to less permissive cultural and familial beliefs regarding chastity and femininity. It allows a woman to inhabit two incompatible positions at the same time. While the Collège

National des Gynécologues et Obstétriciens Français is trying to end this practice, in Canada, Dr. Stubbs supports this procedure to protect women who are attempting to navigate between two cultures (Wente 2004). This debate suggests that it would be helpful to have a method to determine a woman's motivations behind her desire to have this procedure in order to help guide the policies of individual health care providers and public authorities, as well as to provide health care providers with tools to guide their patients through the decision-making process. I argue that critical distance could provide such a method.

Racism

One way of analyzing how the dominant culture understands the decision making process of women from cultural minorities is racism. Although the dominant culture and public authorities may attempt to balance respect for cultural diversity and gender equality when creating public policy, sometimes policies are developed in the name of gender equality that explicitly discriminate against women from ethnic minority groups. When this occurs, these policy decisions can be viewed as an excuse to further an agenda that promotes an essentialized and racialized stereotype of the Other.

Nations around the world have passed laws forbidding female genital cutting on young women and girls. France has some of the most stringent enforcement of female genital cutting laws in the world. Between 1983 and 1998 there were twenty-six female genital cutting cases prosecuted in France. Of these twenty-six cases, twenty-five resulted in conviction. The defendants were almost exclusively the parents, specifically the mothers, and in only three trials was a practitioner charged (Maguigan 1999: 401).

These prosecutions criminalize racialized mothers from minority cultures and create suspicion of the parenting ability of anyone who is not a member of the dominant culture. Such laws help create an atmosphere which eliminates public sympathy of the genuinely felt responsibility of some mothers, however misguided, to have genital surgery performed upon their daughters.

One of the limitations of the racism approach is that it does not offer any mechanism for separating a racist interpretation of a problem or policy from a neutral interpretation of a problem or policy. Sherene Razack argues that the reason that the state pursues female genital cutting prosecutions is racism.

One has only to think of the energy so many scholars and legal activists have poured into the legal proscription of FGM *in North America* (in comparison with the energy directed to antiracist strategies) to recognize a preoccupation with scripts of cultural inferiority and an affirmation of white female superiority (Razack 1998: 6).

Although legislation against female genital cutting may be racially motivated and perpetuate racial division, the fact remains that the female genital cutting of minor children should be illegal, and that in almost every case, the child and the parent are racial and cultural minorities. The racism explanation is unable to offer a solution to guarantee the protection of the child while not racializing the parent.

Multicultural Overreach

A second way of understanding the dominant culture's inconsistent application of culture as an explanatory variable in an individual's decision-making process, especially as it relates to women who are members of cultural minorities, is through multicultural overreach. Wikan is concerned with how certain multicultural practices can disadvantage

minority women and contribute to the “Othering” of minorities. She is very critical of policies that view culture as inviolable or that privilege minority cultures over the dominant culture. She believes that the dominant culture is so concerned with preserving minority cultures that it neglects to critically examine the concept of “culture,” both its own culture and minority cultures. She argues that one of the limitations of multicultural overreach is that it fails to identify how cultural minorities are partially responsible for helping to perpetuate the difference between groups who have culture and groups who do not have culture. Some minority cultural groups view the dominant group as having “society” whereas they understand themselves as having “culture”. This is a view that is reinforced by the dominant group. When immigrants eliminate the use of “society” when referring to themselves, they make their own practices “inviolable” because they stem from culture (2002: 154).

Wikan illustrates the limitations of multicultural overreach for determining when culture legitimately functions as an explanatory variable with the example of Aisha. Aisha grew up in Norway, and her parents were of Middle Eastern decent. When Aisha was 14-years-old, she ran away from home because of abuse and disagreements with her parents over fundamental values and Aisha’s desire to live a life that was consistent with her own beliefs. Aisha was remanded to child welfare services, and lived with an ethnically Norwegian foster family where she thrived, before being returned to her family’s home in the interest of family re-unification and maintaining cultural integrity. Aisha, and those who knew her, expressed concerns to the child welfare authorities that she would be taken out of the country for an arranged marriage. Shortly thereafter, her parents took her out of the country for an arranged marriage. The child welfare services

said that had she been ethnically Norwegian they would have been less likely to return her to an abusive home (2002: 69). Wikan spoke to child welfare authorities who claimed that types of abuse that they would never tolerate in an ethnically Norwegian home are tolerated in the homes of immigrants because of a fear of being labelled a racist, and the fear of “taking on” culture, though by the late 1990s this had slowly begun to change (69). The policies in place did not respect Aisha’s desire to meaningfully experience the world through her chosen cultural context and values system.

Critical Distance

In chapter 1, I argued that the explanatory power of culture existed in an inverse relationship to critical distance and that the more critical distance an individual possessed the less their actions could be explained in virtue of the explanatory power of culture. In this chapter, I examine the decision making process of ethnic minority women in Western states by examining the cases of hymen repair surgery and female genital cutting. I examine the behaviour of women using the method of critical distance and the resources offered in both liberal multiculturalism and relational autonomy. In the context of the liberal multiculturalism, I examine a woman’s decision-making process by asking: Is rationality present? Is revisability present? Are resources present? In the context of the relational autonomy I examine a women’s decision-making process by asking: Is intersectionality present? Is relationality present? Is independence present? The more of these six markers a woman possesses, the more critical distance she can be said to have at the time of her actions. The fewer of these six markers she possessed at the time of her

actions, the less critical distance she can be said to have and the more legitimate a cultural explanation for her behaviour would be.

i) Female Genital Cutting: Liberal Multiculturalism

The question of critical distance with regard to the practice of female genital cutting can assume two forms. The first is the critical distance of the parents, specifically the mother, in procuring this surgery for her daughter. The second is the autonomy of an individual woman acquiring this surgery for herself. While both are interesting, and although the first problem is the larger of the two, the nature of the method of critical distance is such that I will focus specifically the question of the decision making process of women over the age of 18 who decide to undergo female genital cutting.

I have identified three markers of critical distance within liberal multiculturalism: rationality, revisability and resources. The rationality criterion requires evidence that a woman has rationally appraised her desires by “testing them for internal consistency, their relation to reliable beliefs and the like” (Stanford Encyclopaedia of Philosophy). Within the literature on female genital cutting, there are multiple examples of women undergoing female genital cutting for reasons that may or may not be rational. One such reason is peer pressure. On the one hand, peer pressure is not rational because it is an external factor that does not require that an individual establish the internal consistency of her beliefs. However, the desire to conform to the norms of one’s society to guarantee social status and secure personal relationships may be rational. The tension between conforming to the wishes of one’s peer group or the wishes of one’s family, and whether one is more rational than the other, can be examined in the example of Mary Nyamboki.

Nyamboki, a fifteen-year-old woman, ran away from home because her parents did not want her to have female genital cutting. “All of my friends were getting circumcised. I felt that if I was left out I would become the laughing stock. So I ran away from home and went to stay with grand mum who gave me the green light to become a woman (Kratz 2007: 169, cf Wachira 1995). Although Nyamboki is only 15-years-old, the function of peer pressure could be equally applicable to a woman in her twenties. Fear of exclusion does not promote thoughtful reflection on the legitimacy of deeply held beliefs and peer pressure is a form of coercion, and critical distance cannot inform a decision which is influenced by coercion. However, social pressure is a reality of life and is necessary for a functioning society. Therefore, peer pressure can be the basis for both a rational and a non-rational decision and may or may not inform critical distance.

A second reason to undergo the procedure is tradition. This reason can also indicate the presence or absence of rationality depending on the context. Some women use tradition to explain why they had the surgery, and why they would like it for their daughters, even if they wish that the tradition could be otherwise. This can be seen in an exchange between Alice Walker and a woman named Mary.

AW: Who do you think is responsible for this tradition, whose idea was this tradition?

M: Our great-great-grandmothers

AW: And why do you think they decided to do this? What is the reason for it, since there's so much pain and suffering?

M: Our great-great-grandmothers used to do it, and we don't know the reason why, or why we are still doing it and will continue to do it.

AW: If you had the power as a woman to change this tradition, would you change it?

M: I can't imagine that we would have the power to stop it. I don't have the power to stop it, but if I did, I would make it stop. (Walker 1993: 320-323)

Although Mary values female genital cutting, she does not value it for rational reasons. The surgery is not consistent with her internal beliefs, which can be inferred by her claim that she would change the tradition if she could. Mary's choice to value female genital cutting can be understood as originating in the explanatory power of culture and Mary is not exercising the rationality criterion of critical distance. However, an important caveat would be that it is quite possible Mary believes that Walker would not understand the cultural rationale behind this tradition, and Mary does not feel as though she needs to justify her practices and her behaviour to someone who is external to her culture. Tradition may be short-hand for important rituals in which a girl is taught how to be a woman and which may take place over many months, symbolically ending with female genital cutting. What some may dismiss as simple "tradition," may be the acquisition of specific knowledge which is crucial for the survival of both the individual and the community, and therefore "tradition" may be a marker of rationality (Ahmadu 2000).

The presence or absence of rationality is dependent on the individual in question. It is possible that a woman could rationally choose to have female genital cutting. A woman could have spent time reflecting on her beliefs regarding socio-cultural, hygienic and aesthetic, spiritual and religious and psycho-sexual reasons to have female genital cutting. If a woman felt that she would be unable to lead a good life consistent with her beliefs of the value of some or all of the four criteria listed above, and decided for those reasons to have female genital cutting, then that woman could potentially meet the rationality criterion of critical distance.

The second marker of a liberal multiculturalism approach to critical distance is revisability. In order for an individual to have revisability she must be able to assess, and

potentially revise her beliefs so that she may lead a valuable life, and not a life based on false beliefs or values she no longer endorses. If a woman believes that the values of her culture or religion are inviolable, then she would not be able to meaningfully revise her conception of the good life and therefore would not be able to exercise the revisability marker of critical distance.

It is possible that a woman could believe that female genital cutting was not a desirable procedure, and later change her mind for socio-cultural, hygienic and aesthetic, spiritual and religious or psycho-sexual reasons. It is possible that a woman could want female genital cutting for herself, while having friends or family members who will not be cut, and therefore a woman will know that she has the opportunity to revise her beliefs with consequence and still chose to have the procedure. Although a woman may have the opportunity to revise her conception of the good before the surgery, the surgery itself may not be revisable. Once the surgery has been completed and parts of the genitalia removed, the body cannot be returned to its pre-surgical state. However, a woman can later chose to have an additional surgery in order to change her body to more closely resemble its pre-surgical state; although this would have little to no effect on the woman's post-surgical emotion and psychological changes. Although a woman could support the belief that female genital cutting is necessary for her to practice her conception of the good life, she has little recourse if she later changes her conception of the good life and it is no longer compatible with female genital cutting.¹⁵ However, the

¹⁵ If a woman has female genital cutting, her body can never be returned to its pre-surgical state, although the most invasive form of female genital cutting, infibulation, can be partially reversed. There are multiple cases of women living in western states having undergone defibulation. When a woman is defibulated, a surgeon applies local or general anesthetic and opens the infibulated genitalia by cutting along the scar. In a significant number of cases, the clitoris is still intact, although the labia minora is usually not. This is thought to be because removing the clitoris is the most difficult part of the procedure, and heightens the risk

same is true for any cosmetic surgery procedure, and although a rhinoplasty is not reversible, this does not count as a legitimate reason to deny the presence of the revisability marker of critical distance.

The third marker of critical distance in liberal multiculturalism is access to resources. Resources include freedom of speech and assembly, education, access to social and medical services, as well as exposure to multiple cultures and completing conceptions of the good life. Evidence suggests that there is an inverse relationship between the number of resources a woman is exposed to and the likelihood that she will undergo female genital cutting. In Nigeria, one report demonstrated that an increase in “western style education” led to a decrease in female genital cutting:

Busy with book learning and preoccupied by extracurricular activities, girls have no time at puberty for lengthy seclusion periods and ceremonies. As education, employment, and marriage increasingly take place away from girls’ communities of origin, the power of cultural tradition wanes, and the incidence of female genital cutting plummets (Meyers 2000: 482).

In this case, access to resources postponed when, or even if, the girls would undergo female genital cutting. This delay would allow the teenage girls to decide for themselves if they wanted to undergo female genital cutting after they were eighteen years of age, and could use all of the resources they had access to as teenagers to inform their decision making process. Both Ahmadu and the Nigerian academic had access to a number of resources, most notably education. As a university student and an academic it is likely that both were exposed to multiple conceptions of the good life, and had been exposed to

of death. Therefore, many circumcisers will leave the clitoris intact, or remove only a part of it. This allows many women to experience increased sexual pleasure following difibulation. Regardless of the presence of the sexual organs, deflibulaiton allows for free flow of urine and menstrual blood, and opens up the vagina, making sex less painful and vaginal birth safer for both mother and child.

multiple cultures through travel and academic debates, and therefore possessed the resources marker of critical distance.

An additional example of how access to resources could create a set of circumstances in which a woman would not have female genital cutting is access to multiple interpretations of her religion and access to multiple religious leaders. One of the four primary reasons to undergo female genital cutting is the belief that it is required by religion, including Christianity and Islam. Although the validity of religious beliefs and practices is notoriously difficult to quantify, no official interpretation of either Islam or Christianity requires female genital cutting. Access to interpretations of one's religious beliefs that do not support female genital cutting may change the decision making process of someone who had planned to be cut for religious reasons.¹⁶

An important resource for many women is access to a pool of suitable candidates for marriage. Women from communities that value female genital cutting who live in western nations are likely to be able to secure marriage to a husband who is a member of the dominant culture if she has not undergone female genital cutting. However, a woman's conception of the good life may require her marrying a man who shares her cultural background. There is no way of knowing in advance whether any specific man who shared her cultural background would want her to have undergone female genital cutting. Some men from communities where female genital cutting has been performed for generations, once they are exposed to a greater number of resources, including

¹⁶ Aminata Diop, a young woman who fled from Mali to France to escape female genital cutting describes the religious imperative experienced by many young Islamic women: "No, it's not in the Koran, but I got to know that only when I arrived here in Europe, because Africans believe it is a religious necessity, that if you are not excised you are not clean. What I told my fiancé I didn't want to be excised, he said he would not marry a woman who is unclean and who could not be a good Muslim. Africans believe that there is no point to going to the mosque or praying if you are not excised, because you can never be a proper Muslim" (Walker 1993: 256).

western norms of female sexuality, do not value female genital cutting. If a woman had the resources necessary to live a meaningful life as a wife and mother within her own cultural community and still desired the surgery, this would indicate she was acting with critical distance. However, if she had not been exposed to at least some of these resources it would be unlikely that she possessed this marker of critical distance.

ii) Female Genital Cutting Relational Autonomy

The first criterion identified by relational autonomy to help determine whether or not an individual possesses critical distance is intersectionality. A woman who is considering undergoing female genital cutting in a western country is most likely religious, a westerner, an immigrant, a future wife and mother, a daughter, a student, a worker, and multiple other identities. These various identities reflect some of the different reasons why a woman might want to have this surgery. She may want it for social reasons, as part of a rite of passage or to establish a connection with previous generations of woman. She may want it for hygienic and aesthetic reasons to achieve cleanliness and beauty. She may want it for psycho-sexual reasons to be considered marriageable to someone from within her community or she may have it as a symbol of her religious commitment.

A woman over the age of 18, living in a western country, may want to undergo female genital cutting as part of her transition into womanhood. Her very ability to think of herself as a woman, and to be considered a woman within her community, may be dependent on this surgery. In order to develop the intersectional identity of a woman, as opposed to a girl, with the responsibilities of marriage, children and home that

accompany being a woman, she may choose to have female genital cutting. The procedure may assist her in strengthening those aspects of her intersectional identity. Strengthening her identity as a woman or as a mother would most likely not compromise her identity as a student or a member of the labour force or a member of her local soccer team. Female genital cutting may allow a woman to strengthen an important part of her intersectional identity without jeopardizing the stability or flourishing of other, unrelated aspects.

The second marker of critical distance identified by relational autonomy is relationality. Relationality is the recognition that an individual's beliefs are formed in the context of their interpersonal relationships. Some of a woman's most important relationships informing her decision whether or not to undergo female genital cutting include her relationships with her parents, her extended family and her future romantic partners. She may decide to undergo female genital cutting if she believes the procedure will make those around her happy. She may decide to have the procedure if her parents and family threaten to disown her and if her prospective husband makes their marriage conditional on her having the procedure. A woman may want to undergo female genital cutting, not only because of her ties to her community, but to separate herself from the dominant culture. If a woman wishes to maintain cultural insularity, she may believe that having female genital cutting will make her sexually unattractive to men outside her community and separate her from women who are members of the dominant culture. If a woman has female genital cutting because she is actively seeking to separate herself from the dominant culture, the relationality marker of critical distance may be present. Critical distance may also be present if a woman has the procedure to formally adopt a new role

within her community. For example, the Nigerian academic appears to have taken relationality into her decision making process, as her decision to have female genital cutting was made based on her relationship with her child, with her husband, and with other mothers in her community.

However, the wishes of others alone are not sufficient to fulfill the relationality criterion. The relationality criterion is concerned with the relationships between individuals, not with making people with whom one has relationships happy. Relationality is making decisions in the context of social, community and personal relationships, not making decisions because of those relationships. If a woman's relationships are the only reason she is having the surgery, then she is not practicing the relationality marker of critical distance, and it is possible that her decision can be understood through the explanatory power of culture.

The third criterion necessary to obtain critical distance on a relational autonomy approach is independence. It is illegal in all Western nations for female genital cutting to be performed on young women in their late teens, while in Britain it is illegal for genital surgery to be performed on women of any age for cultural reasons. This denies women the opportunity to develop, let alone exercise independence or critical distance. In Britain, it is "criminal to perform, or aid, abet or procure the procedure," for women over the age of 18. The exception to this law is if it is "necessary for the physical or mental health of the patient, and that in the application of that subsection, no weight is to be given to the belief that FGM is required by custom" (Maguigan 1999: 407). This

legitimizes disparate treatment of immigrant patients, whose mental health claims may be based in part on cultural imperatives. The terms chosen by the legislators do seem to rest on an assumption that there are potential patients without culture,

that there are residents of the UK who have mental health claims but no relevant culture (407, fn 94).

The British government believes that the desire to have clit-ring in order to be sexy, or to have one's labia reduced because it is ugly, or to have one's vagina tightened to perpetuate the illusion of youth, are legitimate mental health reasons to perform genital surgery, but "custom" is not. This policy is paternalistic and denies certain ethnic minority women the right to exercise independence. The "symbolic significance of a criminal prohibition" will do very little to overcome "the imperatives of religion, culture, and tradition, and the predictable resistance to an effort to protect the rights of women by putting women on trial" (Maguigan 1999, 395-6). The development of legislation specifically criminalizing female genital cutting works on the assumption that legislation will act as a deterrent and reduce the incidences of female genital cutting, although there is no evidence to support this.

Evidence that a woman has independently reached the decision to have female genital cutting, and was not doing so because of cultural reasons, could be gathered the same way evidence for the legitimacy of any plastic surgery is obtained. Before a woman can have cosmetic surgery, her doctor asks her a series of questions to make sure she understands the risks and has a realistic view of the probable outcome. In gender reassignment surgeries, where a patient's genitals are removed, the patient undergoes an extensive psychological evaluation. While there may be some flaws in the medical system, the evidence of independence that is required for cosmetic or gender reassignment surgery should be sufficient to demonstrate a level of independence necessary to be considered a candidate for elective surgeries, including female genital cutting. Critical distance is a method that could be used by doctors and other health care

professionals and health care policy makers to determine the sincerity of a woman's desire to undergo female genital cutting, and to determine her motivations behind having the procedure. It would then be relatively straightforward to demonstrate the presence of the independence marker of critical distance.

iii) Conclusion

In the case of female genital cutting, both rational and non-rational reasons inform the choice to have the procedure and would need to be assessed on a case by case basis. In addition, revisability may be present, although this may be difficult to prove or disprove and would also need to be done on a case by case basis. The evidence suggests that access to resources could undermine some of the reasons a woman would choose to have the procedure. This suggests that the more resources a woman has access to, the more critical distance she would have, and therefore a woman who had access to resources could make a compelling claim that she was exercising critical distance in her decision to undergo female genital cutting. However, as long as that state does deny women access to this procedure for reasons of culture, a woman's lack of independence may eclipse both the explanatory power of culture or critical distance.

A preponderance of the evidence suggests that it is possible to imagine a situation where a woman would exercise critical distance and decide to have female genital cutting, suggesting that it would be paternalistic for the state to deny women the option of having this surgery. In the beginning of this chapter, I reviewed Parekh's analysis of the four positions a state's public authorities could take with regard to female genital cutting. Although I find Parekh's position compelling, after reviewing the decision to undergo

female genital cutting in the context of the six markers of critical distance, I hesitate to agree with him. I believe the state should allow women over the age of 18 to undergo the sunna or excision forms of female genital cutting if they can demonstrate that it is not only consistent, but central to, their understanding of the good life. However, I agree with Parekh's original analysis in the case of infibulation, which I believe should be generally prohibited.

iv) Hymen Repair Surgery: Liberal Multiculturalism

I have identified three markers of critical distance within liberal multiculturalism: rationality, revisability and resources. The presence of these markers indicates that a woman is exercising critical distance in her decision making process, and therefore her decision can be understood without relying on the explanatory power of culture. When a woman is acting rationally, she is acting in a way that reflects her deeply held beliefs about the good. There are many circumstances in which a woman can rationally choose to undergo hymen repair surgery. For example, when a woman who is a virgin is raped, her virginity is violently taken away from her without her consent. If she had hymen repair surgery, she would be reconstructing her body to mirror her deeply held beliefs, and maintain a reputation within the community that reflected her beliefs, and therefore would be exercising critical distance.¹⁷

A second rational reason for a woman to undergo hymen repair surgery would be if her family valued virginity and she did not, but she did value family honour and

¹⁷ One such woman wrote surgeon Dr. Stubbs in Toronto that "I never thought I would be using these words, but I was raped. I come from a very strict Catholic family. I was raised here since I was 11 months old and my parents are originally from Iraq. Can you please help me?" (Wente, 2004)

harmony. The surgery allows a woman to live her life in accordance with multiple beliefs and not have to choose any one set of beliefs at the expense of another. Although having hymen repair surgery would mean she was hiding her beliefs regarding pre-marital sex from her family, she is not denying these beliefs to herself, and therefore the decision to have hymen repair surgery would be rational.

There are practical, negative consequences to this deception. Having hymen repair surgery helps to maintain and reconfirm the virginity rule, and perpetuates the myth that all women have a hymen and will bleed upon penetration. The perpetuation of this myth undermines the development of a public debate which might change the expectation of bleeding with intercourse (Chambers 2004: 330, cf Saharso 2003: 207-208).

Won't the availability of hymen repair surgery bring harm to those women who *are* virgins but do not bleed on first coitus, by strengthening the norm that all virgins do bleed? Why is hymen repair surgery the appropriate response to the norms, rather than the provision of more shelters or, better still, better education and more opportunity for those women who wish to leave their communities or would otherwise be forced into prostitution? (Chambers 2004: 331).

Chambers is assuming that the choice to undergo hymen repair surgery indicates that if exit were a real alternative, women would choose to leave their cultural communities for the dominant culture. Yet many women have no desire to physically leave, or psychologically abandon many of the norms practiced within, their community. Instead, a woman may want the opportunity to selectively choose the norms she wishes to follow, without the risk of being ostracized from a community which she has no desire to leave, or bring shame on her family when she values honour. Having hymenoplasty allows women to practice individual sexual freedom while respecting and ensuring the honour and integrity of the collective (Saharso 2003).

The second marker of critical distance in liberal multiculturalism is revisability. If a woman is raised to believe that sex before marriage is wrong, the existence of hymen repair surgery provides her with the opportunity to decide if she wants to be sexually active before marriage, without fearing she will lose her family and community. The knowledge that she can have her hymen repaired allows her to revise her beliefs about sex, without revising her beliefs about the value of other aspects of her culture. Prior to having hymen repair surgery, the woman knows the surgery is not permanent. It will not prevent her from having and enjoying sex in the future. If a woman is concerned that she will regret having the surgery or feel that having the surgery was deceptive, she can easily reverse the procedure, either surgically or by having sex, and then sharing her beliefs with her family and accepting the consequences.

The ability to have this surgery is dependent on the third marker: resources. When young women and girls immigrate to a western society, they are suddenly in an environment where premarital sex is normalized and widely accepted. They are exposed to these beliefs in school, through visual and print media and by individuals from different cultures who have competing conceptions of the good life. Exposure to these competing values may trigger a re-evaluation of a woman's existing beliefs regarding pre-marital sex. Secondly, living in a society where doctors are allowed to perform hymen repair surgery with a greatly reduced fear of reprisal makes the surgery a more viable option. In the mid 1990s, when Egypt was becoming a center for hymen repair surgery for North Africa and the Middle East, the Egyptian Medical Association forbade its members from performing hymen repair surgery, and if found guilty, medical professionals risked being struck from the medical register and spending up to a year in

prison (Kandela, 1996). As there is significantly more permissibility regarding pre-marital sex in Western nations, it is easier and less dangerous to secure the procedure. The decision to have this surgery is highly dependent on a woman's ability to access these resources, usually without the help or knowledge of her family or community. A woman who is exposed to resources which challenge her beliefs, and who is able to evaluate competing conceptions of the good life, is demonstrating that she possess this marker of critical distance.

v) Hymen Repair Surgery: Relational Autonomy

I have identified three markers of critical distance within the relational autonomy approach: intersectionality, relationality and independence. Thinking about intersections can help understand some of the conflicts and tensions operating in an individual's decision making process. A woman who chooses to undergo hymen repair surgery most likely identifies as a woman, as a sexual being, perhaps as Muslim or member of another religious group, as a daughter, as a member of family, as a member of a community and many other identities. Having the surgery may be a woman's attempt to reconcile all these identities. Hymen repair surgery allows a woman from a cultural minority that requires virginity in unmarried women, to behave in a way that is both conformative and subversive. In choosing to have sex before marriage, a woman may be accepting a set of choices present in her adopted society while not conforming to the traditional set of choices present within her community. She can physically conform to the expectation of virginity, while simultaneously subverting that expectation, as she is not truly a virgin. She can better understand the conflicts and tension present within her intersectional

identity and act in such a way as to maintain ties to her family and community while not being limited in her set of choices and can choose to express herself sexually with a partner. She manages to both practice critical distance as an individual and endorse her commitment to her cultural community. In this case, her intersectional identity contributes to her critical distance.

This theme carries into the second marker of critical distance: relationality. Having the option of the surgery allows a woman to exercise multiple personal values. Depending on the circumstances, a woman could value her family's belief in her virginity, her fiancé's family's belief in her virginity, her and her future husband's wish to have pre-marital sex, her wish to have sex before her marriage to someone who she will not marry, and preserving personal and familial honour in the case of rape. Although a woman should never feel guilt or shame if she is the victim of rape, for many women, their family and community may believe that the rape was her fault and she may be blamed and shunned. The ability to have the surgery, while clearly not reversing the deeply scarring psychological, emotional and physical aspects of the rape, will allow her to hide a rape so that she may not be further traumatized by expulsion from her family and community. A woman may also have the surgery as a way of saving face in front of her family and community. If a woman has sex but is embarrassed or ashamed that her family will find out, she might have the surgery. Making oneself look good might not be the noblest reason to have surgery, but it can demonstrate the relationality marker of critical distance.

The third relational autonomy marker of critical distance is independence. Independence is the ability to reach one's own conclusions, regardless of whether or not

they mirror those of one's family, friends or community. If someone is the victim of rape, the decision to have a hymenoplasty is not the result of an independent belief in the permissibility of pre-marital sex. However, it may be a way of reasserting bodily agency post-rape. It is a way for a woman to reclaim some power. If a woman deeply values her virginity, this cosmetic procedure to reclaim her physical virginity, in association with counselling for the emotional and psychological trauma, might allow her to reclaim some of the power taken from her when the violence of rape was inflicted upon her.

If a woman consensually chooses to have pre-marital sex and then a hymenoplasty, she is clearly exercising an independence of belief. If a woman has values that are different from her family it may be unfortunate that they need to remain a secret, and by extension, that her independence needs to remain a secret. However, a woman's decisions are no less independent if they are exercised secretly than if they are exercised publically. It is also possible that by undergoing the surgery and remaining a respected member of the community, a woman will be positioned to one day change the norms from within, by not valuing the presence of virginity in her daughters and daughters-in-law. The decision to have hymen repair surgery indicates that a woman possesses independence and is in possession of this marker of critical distance.

iv) Conclusion

There are many similarities between female genital cutting and hymen repair surgery. The two procedures are both performed on women. A small number of women who are members of cultural minorities have these procedures to conform to certain norms of femininity and to meet to their personal expectations, their families'

expectations, and their future husband and his family's expectations. As demonstrated in the evaluation of the presence of the markers of critical distance, it would not be difficult for a person who sought hymen repair surgery to demonstrate critical distance. Although it is not possible to draw conclusions that would be applicable to every case, an analysis of the markers of critical distance for a woman undergoing hymen repair surgery suggests that it would not be unusual for all six markers of critical distance to be present. The decision can be rational, revisable, and benefits from access to resources. The decision can also indicate intersectionality, relationality and independence. It is difficult to find a motivating factor based exclusively in culture for any of these markers. There would appear to be little reason to ascribe this behaviour to culture; if a woman has thought through all the consequences of hymen repair surgery, it is extremely likely that she will have demonstrated critical distance.

The primary difference between the two surgeries is that female genital cutting has greater physical and psychosexual consequences than hymen repair surgery. The consequences of female genital cutting may be so significant that it is impossible to truly obtain critical distance prior to having the procedure, however, this is not unique to female genital surgery and could equally apply to other invasive cosmetic procedures which have become routine in society. Although there may be a valid argument that one cannot obtain critical distance from female genital cutting, it would be hypocritical and unfair to ban this surgery for women while comparable surgeries are allowed. While these two procedures should both be regulated by public authorities, the severity of the consequences of female genital cutting suggests that it should be subject to stricter regulations than hymen repair surgery.

Conclusion

In this thesis, I have explored different explanations that are used to explain the problem of the inconsistent application of culture as explanatory variable for understanding an individual's decision-making process. Fournier, Razack and others make a compelling case that racism informs attitudes, institutions and policies about minority cultures within the dominant culture. Racism identifies a power imbalance which is rooted in misconceptions and false assumptions about the Other, which can lead to the inconsistent application of culture as an explanatory variable for racialized cultural minorities. The ideal solution to the problem of racism would be a change in the relationship between the dominant culture and racialized cultural minorities. In order for such a change to occur, the dominant culture and public authorities need to develop tools and techniques to create gradual changes to transform the relationship between the dominant culture and minority cultures. Although racism is successful at identifying the problem of the inconsistent application of culture as an explanatory variable, it does not lead to a strategy to resolve this problem or assess the application of culture as an explanatory variable within both the dominant culture and at the level of public policy.

Multicultural overreach identifies the danger of reifying a culture or attributing an individual's decisions to culture while ignoring other variables such as gender and class. Multicultural overreaches obscures attempts at assessing the legitimacy of culture as an explanatory variable, because it creates an environment in which the "their culture made them do it" argument can be applied to cultural minorities, but not to the dominant culture. Not only does this deny members of cultural minorities' agency, it denies the culture of the dominant culture.

In this thesis I have suggested a method to end this madness which I have termed critical distance. I have identified a way to understand the decision making process of individuals through the lens of culture and agency simultaneously. I have done this by identifying markers within two theories that combine agency and culture: liberal multiculturalism and relational autonomy. I chose these theories because both identify autonomy as important for living a meaningful and valuable life while simultaneously emphasizing that culture is central to establishing and creating the context in which autonomy is exercised. The work I have done in this thesis opens up a new method of understanding an individual's decision making process.

Liberal multiculturalism and relational autonomy are two strong and helpful approaches, and I believe they are successful at providing an analysis of what motivates individual behaviour. However, it is likely that there are additional theories that could complement, or even replace one or both of these theories in my analysis and create a stronger method of examining the relationship between critical distance and the explanatory power of culture. Liberal multiculturalism and relational autonomy were both developed to be more inclusive than traditional liberal theories of autonomy; however, both were developed in large part by the dominant culture. In some respects this is not problematic. If the goal of this project is to develop tools that can help the dominant culture and public authorities develop insight into certain actions and behaviours of cultural minorities, it may be necessary to develop these tools in a language that is easily accessible to the dominant culture. The inability of the dominant culture to understand certain behaviours of individuals from cultural minorities without relying on racism or multicultural overreach is the problem this thesis is trying to address.

However, I believe my analysis could be expanded to identify more variables from non-western theories of culture and critical distance. Critical distance could include markers from theories based in African or Asian or Aboriginal traditions. I do not believe that the assumption that everyone can exercise critical distance is imposing a western-centric view on individuals from all cultures.¹⁸

There is a possibility that the structure of my argument suggests that an individual either possesses critical distance or else that an individual's behaviour can be understood as being completely influenced by his culture, as though the two concepts were absolutes; however, this is not the case. Just because someone does not possess a marker of critical distance, does not mean that the motivation for his actions can be located in his culture. This is true in *R v. Lucien*. In this case, the defendants' behaviour was not rational, but nor was it motivated by culture. An exploration of the relationship between critical distance and the explanatory power of culture needs to have space for situations where neither is appropriate, applicable or present. Sometimes deviant behaviour is just deviant behaviour. Both the dominant culture and minority cultures can create a context in which deviant behaviour manifests itself; however, this does not mean that there is a relationship between the culture and the behaviour. A theory of critical distance needs to be able to demonstrate when there is a correlation between behaviour and culture, and when what might first appear to be a positive correlation is spurious.

¹⁸ Katherine Ewing's psychoanalytic analysis of intra-physic and inter-personal autonomy demonstrates how almost everyone exercises critical distance, regardless of gender or culture (1991). Intra-physic autonomy is the ability to mentally separate one's personal interests from the interests of those around her and to understand oneself as separate from other individuals and as possessing different interests. Interpersonal autonomy is the ability to argue for and act on one's own interests, regardless of the interests and opinions of other individuals. Ewing argues that everyone, regardless of culture, possesses intra-physic autonomy and therefore autonomy (at the psychic level) is universal.

Throughout my analysis I have identified how various institutions could apply a more nuanced analysis to situations concerning members of ethnic minority cultures using the method of critical distance. I examined how this analysis could be used within the legal system, specifically, how it could inform the decisions made by judges and prosecutors. I have also implicitly reviewed how my analysis could be applied by social workers and members of the medical profession when making decisions regarding the treatment of women from cultural minorities. My approach to culture and critical distance could also be used by educational, caring and psychological professionals to help members of minority cultures develop decision-making tools. Many younger and second-generation immigrants have a difficult time negotiating the desire to retain their parents' cultural traditions and the desire to adopt the traditions and behaviours of the society in which they live. If members of social services in western democracies were familiar with the tools of critical distance, they could provide guidance to individuals who are feeling conflicted about their choices and provide them with highly specialized tools to determine the best way to negotiate difficult decisions and find a balance between conflicting cultural norms.

Within the dominant culture, it may be difficult to notice the inconsistent application of culture as an explanatory variable, let alone recognize that it is a problem. In this thesis I have demonstrated how the inconsistent application of culture as an explanatory variable is problematic. The racism explanation and the multicultural overreach explanation both acknowledge the problem, but neither offers a strategy to address the problem and to assess how culture acts as an explanatory variable. In examining the resources provided in liberal multiculturalism and relational autonomy, I

have chosen two theories which identify both autonomy and culture as necessary for an individual to pursue her conception of the good life. These two theories provide a framework in which the language and the values of both culture and autonomy are privileged. The six markers of critical distance I identified provide a framework for how to determine when the application of culture as an explanatory variable is legitimate and when it is not legitimate. Utilising critical distance to consistently determine if culture can act as an explanatory variable does not guarantee either autonomy or cultural protection. However, it does offer a measure of protection against mistaking culture for autonomy or autonomy for culture. The ability to distinguish these two aspects of an individual's decision making process is necessary to one day guarantee both autonomy and cultural protection to members of the dominant culture and members of cultural minorities.

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