

Let me conclude this section. State law and its practices and place in state-society relations should be taken into account when legal culture is debated. This means that studies of legal culture need to explore two dimensions: first, state domination in political and legal cultures; and, second, communities and their legal consciousness, social being, identities, and practices. I argue that we need to know much more about these dimensions. This book attempts to contribute to that store of knowledge as it investigates and conceptualizes communal legal cultures as these are expressed in the experience of Arab-Palestinians, feminist women, and ultra-Orthodox Jews in Israel.

But does legal culture require abstraction, theorization, and research on communities—particularly nonruling communities—as components in its conceptualization as we enter the third millennium? In other words, who needs “communities” as a major subject of scholarship since “postmodern globalization” has entered our lives? Heated arguments on the subject are to be found in the literature (compare Benhabib 1992; Etzioni 1991, 2001; Fiss 1996; Greenhouse, Yngvesson, and Engel 1994; Lomosky 1987; and Selznick 1987). In response, this book presents a critical communitarian perspective on the subject while claiming that communities do indeed occupy a major space in law, society, and politics. The following section is devoted to elaborating this position.

Communities: Why Are They Important?

In democracies, majoritarian processes, even those that pretend to be deontological, should not be installed as the exclusive cornerstones of constitutionalism. The countermajoritarian problem is central to this position: to what degree can a minority, namely, a nonruling community, be protected and its rights entrenched in law against majoritarian tyranny (Cover 1992b)? In theory, judicial activism can generate minority rights. Yet, supreme courts, and the judiciary as a whole, often evade adjudication and judicial intervention for the protection of minorities unless that protection is empowered by some significant elite in combination with some measure of public support (Mishler and Sheehan 1993; Rosenberg 1991). Even when liberalism celebrates its triumph in cases in which the courts have defended

existing and generated new minority rights, the liberal rhetoric underscores individual rights, not the communal good, as the basis of equality (Glendon 1991; Spann 1993).

What, however, do we mean by community? Communities are collectivities that share common ontological characteristics; a common perception of the collective good; joint histories; collective memories; distinct practices and organizations; bounded spaces of politics, power, and culture; common identities and consciousness; and epistemological boundaries that separate it from other collectivities (Etzioni 1991, 1995a; Selznick 1987, 1992). In the last section of this chapter, I expand on this definition when explaining the choice of the communities selected for this study.

In many democracies, such as Australia, Austria, Canada, Cyprus, Czech Republic, France, Germany, Great Britain, India, Israel, Mexico, New Zealand, Peru, Slovakia, Spain, Turkey, and the United States, one finds a variety of nonruling communities that express distinct, even contradictory interpretations and practices when viewed against state narratives and state law (see Lijphart 1977). In these and other countries, communities provide the basis of distinct collective virtues, political participation, and resistance. I argue that nonruling communities generate justice because they represent identities that have no access to collective means of bargaining over power and goods. In the following chapters, I examine how each community generates its own form of collective action and its bargaining mode in and toward state law. *Prima facie*, national minorities (e.g., Palestinians), religious fundamentalists (e.g., ultra-Orthodox Jews), and gender minorities (e.g., feminist women) display distinct modes of collective action and bargaining that flow from their distinctive positions vis-à-vis the state.

As Robert Cover conceives of the process, each nonruling community develops alternative interpretive meanings of hegemonic state narratives and state law (1992a). While state narratives legitimize the historical illegality of the state's inception, communal interpretations of these narratives confer other ideological, political, and practical meanings on these narratives. This legalistic, pluralistic contention is based on the conceptualization of communities as meaning-providing discursive entities. The approach connects illegality/legality, language in the form of narratives, state law, communal law, and hermeneutics

to form an intricate network of meanings that support or resist state domination.

This book extends Cover's notion, as his argument is particularly relevant for the unfolding and examining of the concept of communal legal culture in the Israeli context. While reviewing the literature, I suggested that state domination and identity practices (e.g., mobilization through litigation or violence) should be considered as components of legal culture. This suggestion follows Cover and demands that the legal hermeneutics of nonruling communities be included among the crucial facets of legal practices to be stressed. At the state level, legal hermeneutics articulate and empower state narratives as well as legal ideology. At the communal level, legal hermeneutics instigate a variety of practices, some of which are unanticipated by state law. I go beyond Cover by explicating practices such as litigation and grassroots action in various communal contexts. For instance, the legal hermeneutics applied by Palestinian feminists in Israel have generated unanticipated coalitions and struggles (this is analyzed in chaps. 3 and 4).

For Cover, as for myself, law is neither a homogeneous nor an exclusively statist phenomenon. State law is one kind of law, but law in its generic form allows for a multiplicity of constitutive meanings and practices whose sources cannot be attributed to the state (Cover 1992a, 109; see also Santos 1995; Sarat et al. 1998; Twining 2000). These meanings and practices transcend the formal legal hermeneutics of the state's hegemonic legal culture; they are generated through interactions between the state and nonruling communities. The state's formal legal text may dominate, as it does in the case of the U.S. Constitution, *Basic Law* in Germany, or *Basic Law: Human Dignity and Freedom* in Israel. However, the meanings of such formal constitutional cornerstones are always contestable and contingent on communal identities and legal practices as these are realized in daily life.

Let me explain why Cover's work is important for the comprehension of communities'—especially nonruling communities'—law, politics, and culture. The distinction between law as power and law as meaning is central to Cover's work and to theorizing about legal cultures in a communal context. Cover conceptualizes state courts and the legal and sociopolitical stories they tell as the first dimension of analysis (i.e., law as power). Nonruling communities generate another dimension and different stories (i.e., law as meaning); these

emerge from their distinctive legal consciousness, identities, and practices as well as the constitutional worlds they articulate (Cover 1992a, 112–13). Later I will use this theoretical insight to illuminate the rulings of Israel's Supreme Court and the communal hermeneutics applied to those rulings by Arab-Palestinians, feminist women, and ultra-Orthodox Jews residing in Israel.

Cover's legal pluralist prism contributes to his denial of the ability of one historical narrative, in tandem with state violence, to hamper the creation of alternative and challenging meanings. Hence, from the perspective of law as meaning—in contrast to law as power—communal hermeneutics has generated multiple histories. When I discuss Zionism as a hegemonic metanarrative, Cover's argument becomes essential to gaining an understanding of Israel's communal legal cultures as possible counterhegemonic forces.

I do not wish to claim that Cover is a nihilist. He is not. On the contrary, he is a legal pluralist in that he claims that no one political or legal ideology or one hermeneutics should be considered superior to any other. This insight leads him to conceive of legal culture in the dual context of state violence on the one hand and communal pluralistic hermeneutics on the other. It raises a conundrum, one that is unsolvable within his theoretical prism. On the one hand, he conceives of state law as evil and condemns the agents of state violence who "kill" alternative interpretations. On the other hand, he does not propose any political alternative to the state, nor to liberal democracy, which he so vigorously criticizes (Minow, Ryan, and Sarat 1992).

As Austin Sarat correctly points out, Cover emphasizes the need for interpretative communities, although he is not a communitarian (Sarat 1992, 265). In contrast, this book constructs and examines a critical communitarian approach that places nonruling communities at the core of law, society, and politics; it reverses the order of Cover's dimensions by arguing for their primacy as producers of meaning and as participants in democratic regimes.

Communitarians do not criticize individualism as a value, although they do deny individualism as the sole foundation of democratic constitutionalism (Carter 1998; Selznick 1992; Taylor 1994; Van Dyke 1977, 1982, 1985). They further advocate, as I do, construction of a constitutional basis that can protect and empower nonruling communities with respect to their ontological virtues and rights. Contrary to lib-

eralism, and to Habermas's theory of communicative public spheres (Benhabib 1992), communitarians argue that no procedure can distinguish between communal ontological good and justice (Etzioni 1995a; Selznick 1992). As Selznick claims, even a procedure that sanctifies cultural relativism embodies a certain conception of "good" and cannot be completely objectified (91–116).

In the following pages, I criticize the ways in which liberals, including Cover, have ignored and marginalized nonruling communities. I then explicate the importance of nonruling communities as seen through the communitarian lens.

Liberalism identifies two mainstays of legal culture. First, it asserts the priority of individual rights over the communal good; second, it emphasizes "fair" procedures that are impartial under any definition of *communal good*. In the process, the state is considered to be disengaged from any effort to define specific collective goods while it generates a framework for the cultivation of individual rights in a pluralistic setting (Rawls 1971). The bearers of rights, then, are autonomous individuals who enjoy freedom of choice (Riker 1988). Democratic legal culture is consequently evaluated according to its ability to embody these two cultural fundamentals of individual rights and impartial procedures.

Paradoxically, however, liberalism sanctifies a strong state, a state that can respond to claims for rights and can protect those rights (Sandel 1992, 27). Moreover, as Sandel has correctly stated, liberalism shifts the focal point of action from legislatures and political parties to forums that are less attentive to communal pressures: judiciaries and bureaucracies that supposedly respond to litigation and demands grounded in the rhetoric of individual rights. This argument, which is essentially communitarian, is also important for the comprehension of legal cultures in Israel. There parliamentarianism has declined in the midst of a more vociferous liberal rhetoric and the soaring rise of the politics of adjudication since the 1980s (see figs. 1 and 2 in chap. 2).

Liberalism asserts that legal cultures should be inclusive and allow every individual to cultivate his or her values based on an autonomous set of preferences (for a systematic analytical approach, see Gans 2000; Raz 1994; and Tamir 1993). Associations should serve individuals in their choices (Rockefeller 1994; Putnam 2000). Nonetheless, liberalism neglects communities, the most fundamental "association"

in the individual's environment, as a vital component of our personalities (Glendon 1991; MacIntyre 1984, 1988; Selznick 1987, 1992; Sandel 1982, 1996; Taylor 1989). Hence, it likewise downplays the constraints placed on individuals within the communal context in which they are socialized. This erroneously assumes that communal practices are transcendent and marginal to constitutional models of democracy.

However, liberalism does not necessarily ignore communities (see the prominent works of Gans 2000; Raz 1994; and Smith 1997); while it recognizes their existence, it generally conceives of communities as ontologically subordinate to individuals and individual liberty. Hence, liberalism does not apprehend communities as self-generating entities embodied in collective identities, consciousness, practices, conceptions of the public good, or communal needs and rights (Dworkin 1992).

Joseph Raz, one of the most prominent contemporary liberals, considers multiculturalism to be an axiom of modern liberal democracy. His argument concerning nonruling communities as possible generators of multiculturalism is a traditional liberal argument. Communities should be respected, Raz contends, as long as they respect the individual freedom of their members. If communities are not liberal in themselves, Raz demands enforcement of individual freedom in them (1994). Four erroneous assumptions lead him to suggest the oxymoron of imposed freedom.

First, Raz assumes that most communities are liberal. Obviously, this is an error that articulates a Western epistemological bias that views liberalism as the sole criterion determining the quality of democratic life and its legal culture. In many democracies, nonruling communities are not liberal. Inter alia, one can mention Australia, Brazil, Canada, India, Israel, New Zealand, Peru, Turkey, and the United States, each of which is home to a range of nonruling communities. Second, Raz believes that individual freedom and its absence can be objectively defined. I agree with Raz's contention that if a person wants to leave a community he or she should be entitled to do so, notably when the community condones violence against him or her (see chap. 5). But these instances are rare. Often members of communities, including nonliberal communities, do not wish to leave their sources of identity and empowerment irrespective of their legal or political cultures (Renteln and Dundes 1994; Sheleff 2000).

How does Raz determine in which instances people do or do not have the freedom to choose their lifestyles in a nonliberal setting? He does not; he avoids this issue. As I show in the following chapters, nonliberal communities do offer space for individual practices, action, and choices. Raz, like many other liberals, has argued for a construction of deontological justice. He does conceptualize individual freedom as a legitimate public good, but the good he defines is relative to all other communal goods. As subsequent chapters will show, *individual freedom* by itself is a relative term ingrained in the liberal tradition yet culturally and contextually contingent on the specific community.

Third, Raz presumes that individual freedom is an absolute value. But is it? Let us suppose that we can arrive at an “objective” definition of *individual freedom*; does this make it an absolute value? Do we know of any organization or political regime that has justified complete individual freedom, under all circumstances, and is it always desirable to maintain individual freedom, as an absolute value, at the expense of other values? If not, why presume that individual freedom is always superior to a communal right to preserve its nonliberal collective culture?

This leads us to the fourth error. If we perceive a certain antinomy between the value of individual freedom (in its absolute liberal terms) and the preservation of communal culture, how can we endorse the liberal argument for multiculturalism? To do so, we must presume—like Raz—that liberalism is superior to any other theory of democratic justice. However, if we claim the superiority of the liberal theory of justice we are forced to exclude the principle of cultural relativity, which is the basis of multiculturalism. Hence, Raz’s arguments do not respond to the needs of nonliberal and nonruling communities for protection in multicultural settings. Without such protection, multiculturalism cannot be embraced as a principle in law and politics as practiced in democracies.

Historically, liberal legal culture has been primarily individualistic (L. M. Friedman 1990), although liberals have emphasized the importance of groups to multicultural political articulation and participation in decision making. As “associations,” communities have not been considered as warranting collective rights and systematic collective protection in public policy and law (Lomosky 1987; Roberts 1999). In avoiding the logical consequences of this position, liberals have been

able to continue to embrace the primacy of individual rights (Dahl 1971, 1982; Kymlicka 1995; Smith 1997).

Liberalism's inability, lack of interest, and unwillingness to accommodate communal pressures in the midst of growing infrastate, in-state, and global transnational multicultural pressures (Santos 1995; Twining 2000) is a crucial issue in the following chapters. The critical communitarian approach, which combines analysis of the politics of identities, law, and state domination, allows me to confront liberalism's failure to recognize, protect, and empower those nonruling communities that the state has perceived as challenging its ideology and law. But, much more importantly, critical communitarianism enables me to explore how liberalism is directed toward subduing these communities, eroding their communal boundaries, and disempowering their counterhegemonic role in democracies.

Communitarians consider nonliberal and liberal communities as constitutive collectivities in democratic legal cultures because communities are central to the formation of human identity and prime agents for the fulfillment of human needs, interests, and desires. It follows that nonruling communities should be viewed as carriers of individual as well as group rights and duties, not as venues for excluding individual rights, individual duties, and individual dignity (Etzioni 1991, 1995a, 1995b; MacIntyre 1984, 1988; Putnam 2000; Sandel 1982, 1992, 1996; Selznick 1987, 1992; Taylor 1994; Van Dyke 1977, 1982, 1985; Walzer 1983). Further, as this book will show through the cases cited, nonruling communities should be protected because they are forces for the emancipation of individuals who have been marginalized due to their sociopolitical characteristics and embedded identities.

The issues of nonruling communities and collective rights lead, of course, to the issue of justice. Alasdair MacIntyre describes how various traditions and concepts of justice were generated through human history. He correctly points out that no modern political setting is capable of aggregating all those traditions into one comprehensive concept of justice (1984, 1988). States are not impartial; they have selected identities, which are ideologically advanced as "worthy objects" of justice. Therefore, constitutional and political generation of multiculturalism is impossible without substantive recognition of nonruling communities and without permitting expression of their con-

cepts of justice in law and public policy. This requires appropriate political regimes.

Arend Lijphart has devoted much comparative research to polarized and segmented societies characterized by severe sociopolitical cleavages. Lijphart's theoretical analysis of their political regimes notwithstanding, he has sought a prescription for stabilizing such societies through the procedural mechanisms of grand coalitions and the constitutional sharing of power and authority. Formal mechanisms of "consociational democracies," he contends, may create space for groups and communities that have distinct ontological virtues and precepts of distinct justice (1977). As a liberal pluralist, Lijphart seeks to discover the democratic procedures appropriate for attaining and maintaining political stability. His search is motivated by the assumption that under appropriate procedural formulas legalization of "justice" in divided societies can be refined through national arrangements of power sharing between various elites.

He is less interested in my topic, namely, nonruling communities, culture, and law under state domination. I assume—contrary to Lijphart—that any concept of justice is drastically contingent on communal social being, consciousness, identities, and practices under state domination. Hence, formalization of political regimes is only a second-order problem. It should follow the first-order problem of comprehending nonruling communities as bounded spaces of claims for justice and power, of rights and obligations.

Communitarians underscore the communal "good" of a community as the cultural infrastructure of human justice. All communitarians allege that no coherent theory of justice is possible without assigning prominence to the plurality and relativity of definitions of this concept (Sandel 1982, 1996; Selznick 1992; Taylor 1989). Communal good reflects attachments to tradition realized as a fundamental cultural characteristic; both significantly affect private and public life (Gutmann 1992; Miller 1992; Taylor 1989). Hence, communitarianism is as critical of the deontological self as it is of attempts to rationalize any one tradition of justice as both absolute truth and the objective criterion for legal order (MacIntyre 1984, 1988; Taylor 1989). This book adopts the communitarian stance and argues that theoretically nonruling communities are necessary for multicultural democracies.

As we shall see in our investigation of the Israeli case, Charles Taylor is correct in asking: "Again, what would happen if our legal cultures were not constantly sustained by a contact with our traditions of the rule of law and a confrontation with our contemporary moral institutions?" (De Shalit and Avineri 1992, 44). Concepts of justice apply here as well. Communal legal cultures, as we shall see, maintain various traditions of the "rule of law" and have different ways of interacting with state law, state ideology, and legal ideology. Hence, this book argues that a sustainable democratic culture should embrace, not exclude, nonruling communities and legal pluralism; in other words, it should accept multiculturalism.

It has frequently been asserted that communitarians prefer the communal good to personal liberties, an argument often raised by liberals, communitarians, and postmodernists. This book will show that the collision between the collective good and individual rights does indeed occur in communities. Yet, because subordinated communities empower their members and enable them to gain and utilize personal rights, in this sense nonruling communities are sources of collective participation and personal emancipation. In other words, while communities may confine individual autonomy in its liberal sense, they enhance the ability of their members to preserve their ontological identities and enjoy their rights to be whatever they wish.

Liberalism, like many other traditions, is not static. Will Kymlicka, one of the most vibrant liberal students of contemporary politics, has attempted to envision a different type of liberal legal culture, one that acknowledges certain types of group rights (1995). Kymlicka's liberal premise that individual rights precede the communal good notwithstanding, he has grasped that societies are inclined to be multicultural and that groups in multicultural contexts strive to articulate their distinctive characteristics, needs, and interests. Hence, legal cultures expounding pure individualism, if they hamper group demands for protection and empowerment, contribute to the delegitimization of democracies.

In response to this predicament, Kymlicka makes a distinction between "external protections" and "internal restrictions" (1995, 35-44). External protections shield minorities from majoritarian democratic procedures that may drastically limit the ability of nonruling community members to enjoy their unique characteristics in a liberal context.

External protections belong to liberal theory because they occupy the juncture between liberal concepts of fairness and communal ontological virtues. Thus, external protections do not represent drastic alterations of liberal constitutional democracy; instead, they allow minorities to participate in constitutional democracy as required by “procedural fairness.” In contrast, internal restrictions aim—according to Kymlicka—to discipline nonruling community members while preventing the state from interfering with internal communal life. According to liberal theory, internal restrictions should be considered undesirable in principle because they may empower the communal elite to transgress the individual rights of community members. Conceptually appealing as these distinctions may be, in proposing them Kymlicka expresses the erroneous liberal proclivity to identify communal practices with the restriction of individualism while ignoring communality as a source of individual identity and empowerment.

Consider the right to education. My right to educate in my communal language and according to my communal values (external protection) is also my right to impose restrictions (internal restrictions) that preserve the collective ontological virtues of my community and defend them from state interference in their content. If we assume, as I do, that communities are confined spaces of embedded identities and practices, is it possible to distinguish between internal restrictions and external protections in such cases, and can we seriously respect the notion of “community” if our normative model of constitutional democracy is liberal? Stated simply, how can we endorse the right to external protection, on the one hand, and condemn it as an internal restriction on the other?

Kymlicka is correct, however, in his contention that communitarians fall short in their attempts to explain how an individual is protected if he or she is not the primary carrier of rights (for a similar contention, see Kukathas 1992). Moreover, communitarians tend to evade the issue of nonliberal communities in liberal states or in states, such as Israel, that exhibit some liberal characteristics. What, then, distinguishes a desirable boundary between the state and its nonliberal communities? Later I will address these issues theoretically and empirically, especially with respect to the communal life of ultra-Orthodox Jews and Arab-Palestinians in Israel.

While many liberals emphasize citizenship as the common bond

that unites individuals and resolves the problem of self-fulfillment in pluralistic societies, Kymlicka takes an additional step. He recognizes the value of legal cultures that accentuate group-differentiated rights as a source of civil identity. "Differentiated citizenship" is a concept that attempts to empower legal cultures that perceive of groups as a way to incorporate individuals into a liberal political culture (1995, 173–92).

Accordingly, Kymlicka points out that if a culture is inclusive then minorities are entitled to demand some group rights (external protections) in order to participate in the political process. Under these conditions, the peril to a stable democracy is minimal and group-differentiated rights represent a solution in situations of severe political conflict in multicultural settings in which a conception of common citizenship has failed (1995, 176–81). The issue of the ability to preserve a stable democracy based on group rights is relevant to the research on Israel's legal culture, especially but not exclusively because it so intimately touches on the interactions maintained between Jews and Arab-Palestinians.

Given this analysis, it is understandable that communitarians and liberals have generated different models of legal cultures. In the following chapters, the empirical and theoretical analysis will evaluate the main characteristics of the communal legal cultures inherent in these models and assess the success and failure of each model to render rights and empower human beings belonging to nonruling communities. In other words, this book explores whether the adoption of individualistic liberalism is sufficient when nonruling communities attempt to address their needs and empower their members.

As you, the reader, may have noticed, the differences between these models are not entirely diametric. Communitarianism does not dismiss the normative demand and sociopolitical need for individual rights as a sanctified principle of constitutional democracy. Liberals acknowledge the possible usefulness of some collective (group) rights and their reconciliation, however problematic, with liberal tenets. Rogers M. Smith, in his monumental study of American citizenship, elaborates the reasons why liberal democratic visions of citizenship should include communities as enlargements of civic cultural and political space (1997).

Moreover, among the critics of liberalism who have recognized the vitality of multicultural contexts and the centrality of communities,

few have been supportive of any constitutional alternative to liberal democracy (Shapiro 1999). Jurgen Habermas (1994) has made a major effort to synthesize critiques of liberalism with an attempt to construct a procedural and institutional alternative to declining social democratic states. This new political structure would be based on autonomous interactions between individuals and among communities. The somewhat blurred intellectual boundaries notwithstanding, the communitarian criticism of liberalism, as it is explicated and advocated in this book, addresses the liberal neglect of the need to protect and empower nonruling communities, particularly nonliberal communities.

My argument here is that the comprehension of democratic political cultures, and legal cultures in particular, should not rely solely on an investigation of the politics of individual rights. We should look very carefully and systematically at nonruling communities that have developed distinctive identities and practice their unique perceptions of the collective good. We need to study these communities' characteristics, identities, legal consciousness, and practices toward law and in law through their own voices. I agree with MacIntyre's communitarian (1988) and Benhabib's postmodern neo-Habermasian (1992) claims that comprehension of the "other" collectivity is possible only by probing its voices. Communal legal culture, as we now understand it, is not only about social being and legal consciousness but about the ways in which collective identities of nonruling communities are expressed in law and toward law.

One point warrants repeating here. I have constructed critical communitarianism as my theoretical approach because it delves into communal legal cultures while stressing two rather neglected aspects in the communitarian model: state domination and the politics of identities. State domination in communal legal cultures was elaborated earlier and will be further explored in the following chapters. The next section is devoted to a theoretical contemplation of identity in a communal context.

Communities, Differences, and Identities

Identities are subject to the conflicts waged between states and nonruling communities and among communities (Crenshaw 1995;

Crenshaw et al. 1995). The democratic state in multicultural societies often ignores and/or suppresses the distinctive identities of nonruling communities; in turn, it asserts "social integration" and claims that civic culture ensures multicultural "harmony" (Danielsen and Engle 1995; Nader 1990). Courts frequently embrace such views and nurture the norms dictated by the hegemonic culture (Jacob et al. 1996). Non-ruling communities, however, continue to construct distinctive collective identities—which are unrecognized and restrained by the state—and assert their collective expectations regarding recognition, protection, and empowerment in culture, law, and politics (Danielsen and Engle 1995).

Robert Cover has clarified how judges obey state law and adhere to the legal ideology promoted by the state and why they prefer state legality to the alternative hermeneutics originating in other views of justice and normative order. He argues that judges are state organs whose preference for the exhibition of their supposed powerlessness allows them to disregard or subdue options offered by alternative communal settings (Cover 1975; Minow, Ryan, and Sarat 1992). Current circumstances demand that we ask whether globalization and intercommunal unrest change such a judicial proclivity or challenge hegemonic hermeneutics. In his *Justice Accused* (1975), Cover responds negatively to a similar question concerning natural law. He describes how judges ignored natural redemptive law when they were willingly cooperating with slavery in the period preceding the American Civil War. Unfortunately, Cover passed away before contemporary neoliberal globalization became prominent; we can only wonder what his response to this situation might have been.

The following chapters examine whether Cover's main arguments about the unwillingness of state judges to alter realities by embracing counterhegemonic communal hermeneutics are still valid. The contingencies of globalization are significant for the exploration of state-community interactions in and through a decentered approach to state law. Analytically speaking, globalization itself should be decentered as well.

Santos has hypothesized that communities may be affected through globalization, a process that involves reconstruction of their local cultures. He has also hypothesized that alternatively local communities can globalize their cultures (Santos 1995). The first process entails the

localization of globalization, the second the globalization of locality. Following Santos, I hypothesize a similar process concerning the politics of identities in communal legal cultures. Accordingly, communities can localize the contemporary international language of human rights, reshape communal practices, and thereby raise claims designed to anchor their local identities in state law. Alternatively, communities can engender practices that transcend a specific communal identity and thus benefit others through the transnational language of human rights to the extent that those rights exist. To ascertain the empirical applicability of this model, throughout this book I examine how each community practices its identities as demanded by different political purposes and how globalization affects counterhegemonic and communal legal cultures.

Further, within this framework a nonruling community, as a construct, does not represent a unified social unit with one identity. Numerous identities and other differences are included in the intersectoral practices that are articulated and constituted within any particular communal legal culture. Intersectoral identities, on the other hand, can result in diverse and even contradictory legal practices. This does not exclude the possibility that specific groups within a nonruling community may still be deprived of their ability to maintain their preferred identities. Kimberley Crenshaw (1995) demonstrates how African American females suffer from the lack of legal mobilization because of intersectoral deprivation. Because they are embedded in the African American community, they are not thought to fully represent a distinctive collectivity. The result is paradoxical: as African Americans, they are disempowered within the feminine community; and as women they are disempowered within the African American community.

Crenshaw concentrates on the dilemma faced by African American battered women. Should they privilege their female identity and inform the police, the representatives of the ruling white social class, or should they privilege their ethnic identity and prevent the arrest of their violent African American partners? As Crenshaw has rightly noted, this is not an abstract dilemma but an acute and personal plight, one that determines who will survive and who will not.

The case that Crenshaw discusses helps us to comprehend the actuality together with the potentiality of identities in each community as sources of various and often irreconcilable legal practices (Danielsen

and Engle 1995, 332–54). Stated differently, I hypothesize that each community is a multifaceted entity that displays a diversity of identities, each of which articulates differences and generates varied and even opposing legal practices.

A multiplicity of identities and contradictory legal practices are also assumed under theories of postcolonialism. The postcolonial literature correctly contends that communal identities are not shaped in empty spaces (Garth and Sterling 1998; Harrington and Merry 1988; Merry 1998; Nader 1990; Santos 1995; Shamir 2000). State law is a colonizing power because, like invading powers, it constructs identities through marginalization and for the purpose of subordination. In postcolonial states such as Israel, state law and its ideology display ambivalent elements (Shamir 2000). For example, in Israel they have generated a new identity for the hegemonic, Jewish-Zionist ruling community, which is now considered to be the exclusive national force of liberation. In parallel, state law and its ideology have induced the marginalization and subservience of those counterhegemonic identities associated with nonruling communities, particularly those of Arab-Palestinians (chap. 3) and ultra-Orthodox Jews (chap. 5), which are remote from the state's metanarratives of national liberation.

The application of critical communitarianism allows us to examine this contention about postcolonial communal liberation-subordination in a broader context while emphasizing variables that the postcolonial literature has played down: multiculturalism, communal legal cultures, and the interactive practices of states and nonruling communities in and toward law. But it also allows us to proceed one step further: as an extension of communitarianism, critical communitarianism underscores the interplay between state domination and the politics of identities in a communal context. The latter deserves elaboration.

Law relies on, just as it actuates, the coercive power of the state (Gordon 1990; Scheingold 1974). But this does not apply to all types of law, only to state law. For Michel Foucault, the innovative and intriguing post-Marxist, Western cultures of rights attempt to legitimize sovereign power and legalize obedience to the monarch/ruler (1977; Gordon 1980). Bourgeois legal culture is accordingly not a "veil of ignorance" (to use a Rawlsian term) but a veil meant to promote state domination. Legality, in post-Marxist phraseology, is a state-produced illusion that

disguises the micromechanisms of power in which discipline enforces subordination.

While Foucault emphasizes the localization of power, he conceptualizes law as a centralized state organ, a view that leads him to overshadow law's contextual and communal meanings. On the contrary, as I argue here, other types of laws exist; they have been constituted by and are contingent on communal identity practices. As we shall see in the following chapters, these identity practices reflect at the same time that they constitute the communal organization of power and resistance. If this analysis is correct, the eruption of communal resistance need not be solely a reaction to state law; it may also represent a response to the intracommunal organization of power and injustice.

Thus, feminist Palestinians have protested against the Israeli state not merely in response to its law and ideology as Jewish and Zionist; the crux of their dissent is rooted in the coalition of the Jewish state and the Muslim male elite represented by the *kadies* (ecclesiastical judges). Oriental ultra-Orthodox Jews have dissented from state authority as part of their conflict with ultra-Orthodox Ashkenazi Jews. In another example, the lesbian feminists' condemnation of the state originated in their conflict with the hegemonic heterosexual ideology prevalent among other feminists.

Critical communitarianism maintains that as a substantial component of communal power and identities law is pervasive and immanent (Ewick and Silbey 1998; Sarat and Kearns 1993, 1998, 1999). Through identity practices, law generates, forms, and expresses human interests, expectations, desires, fears, and behavior. It also produces a sense of political belonging and, alternatively, of political alienation. Thus, many facets of human life are meaningless without communities. Communities largely construct identities, and our personalities are partially embedded in them (Etzioni 1995a, 1995b; Hardin 1999; Hoebel 1969; MacIntyre 1984, 1988; Minow and Rakoff 1998; Selznick 1987, 1992; Taylor 1994). Indeed, law extends beyond the courts and other adjudicative institutions (Brigham 1987, 1996, 1998; Ewick and Silbey 1998; Scheingold 1974). If we accept this analysis, we can argue that law, culture, and identity, both in communities and through them, are constituents of everyday life and that everyday life is to a large extent a

narrative about process, about how communities and law penetrate politics.

Even state law, which is generally viewed as a more formal and stable *lex scripta* than other legalities (Galanter 1969; Renteln and Dundes 1994), is not a fixed entity having firm and coherent interests together with a single identity. Instead, we find associated with ruling groups a profusion of interests that generate complex and contradictory identity practices (Feeley and Rubin 1998). Identity practices, then, are multidimensional phenomena in state law as well.

In the next section, I turn to the important efforts made by legal pluralists to grasp the meaning of identities in the arena of legality. Following this analysis, an additional hypothesis, formulated from a critical communitarian outlook, is addressed.

Law as Practices in Everyday Life

Scholars of "law in everyday life," an approach that focuses on everyday practices, emphasize the quintessential role of legal practice in the formation and generation of cultural control and resistance. Hegemonic legal practices, they contend, articulate as well as constitute social stratification and inequality. In this light, Sally Engle Merry examines processes of criminalization of the local activities of Native Americans in the public schools and Hawaiians in the courts and public agencies. The practice of criminalization, she concludes, is integral to colonization in that legality constructs selected hegemonic cultural aspects as "good" and "proper." Unique cultural aspects of nonruling communities are subsequently framed as evil and their associated practices as illegal (Merry 1998; see also Calavita 1998; and Merry 1991).

Such a multicultural approach delves into the localities of informal law that are constructed through as well as generating commonplace actions, daily practices, and hermeneutics. Feminist criticism of man-made law, critical linguistic studies of law, sociological analyses of local knowledge, and the postcolonial literature inform the insights gained by this perspective (Abu-Lughod 1995; Bourdieu 1977; Derrida 1981, 1992, 1994; Geertz 1983; Yngvesson 1993). For example, Martha Minow, Todd Rakoff, Menachem Mautner, and Ronen Shamir have demystified the "reasonable person" formula. They have deconstructed the "objectivity" of that formula and explored its impact as

constitutive of the hegemony imposed by ruling communities in a multicultural world displaying diverse legal practices regularly suppressed by state law in the course of everyday life (Mautner 1994; Minow and Rakoff 1998; Shamir 1994).

In applying this analytic approach, the genealogy of law is reconceptualized and shifted to the context of legal pluralism and decentered law. The underlying supposition is that law is culturally framed by the everyday practices performed by ordinary human beings (Engel and Munger 1996). Under the rubric of grassroots practices, Austin Sarat and Thomas R. Kearns explored this process in their pioneering 1993 volume, which compiled studies illustrating how law is constituted in and through everyday practices. Local practices form communities, and community members then apply grassroots law (Sarat and Kearns 1993, 60). It should be noted, however, that due to the salience of antistructuralism state law is conceived as given and deserving of only limited attention (for a good study, see Engle 1993).

As a result, scholars of legal pluralism and decentered law have increasingly shifted to the study of informal and even invisible localities of cultural practices. Within the context of this new literature, for instance, Patricia Ewick and Susan Silbey focus their attention on the personal stories of ordinary citizens in their daily interactions with the law (1998). At this point the "law in everyday life" approach considers personal affiliations with nonruling communities only marginally (Engel and Munger 1996).

Like the law in everyday life approach (Merry 1988), liberal structuralism claims that the courts should not be conceived as major agents for social change—unless their rulings are embodied in legislation enforced by an enthusiastic bureaucracy and generated in a majoritarian public mood (Rosenberg 1991; see also Barzilai and Sened 1997; Epstein and Knight 1998; Epstein and Kobylka 1992; Knight and Epstein 1996; and Mishler and Sheehan 1993). Court rulings are inclined, therefore, to reinforce the social and political status quo insofar as they are framed within prevailing political and social boundaries, whether hegemonic or multicultural (Rosenberg 1991; for a broader criticism from a neo-Marxist cultural perspective, see Horwitz 1977, 1992). Critics have also argued that state courts shy away from the reform of hegemonic cultures and tend not to challenge them

even to protect minorities (Crenshaw et al. 1995; Glendon 1991). Nevertheless, rare occurrences of social change have followed in the wake of successful legal mobilization (Epp 1998; McCann 1994).

The law in everyday life approach extends this argument about the confined social role of the courts even further. John Brigham shifts from the decentralization of the courts in legal cultures to their deconstruction as cultural entities. He also delves into those everyday practices through which cultural images and symbols construct the normative supremacy of federal courts in the public mind (1987; 1998). While Brigham accepts the notion of the courts as hegemonic institutions, he employs critical linguistic analysis to explore localities of identities, practices, and symbols as the compelling forces motivating judicial supremacy.

We can conclude by stating that law in everyday life as an analytic vehicle, simultaneously reduces and elevates law from the institutional and neo-institutional levels to the level of communal practices and sometimes to the nuclear level of personal practices embodied in grassroots law. Several principles of this approach are adopted here. First, the approach views law as culture in its political context. Second, it probes practices of identity. Third, it explores the plurality of legal orders in a decentered legal fabric but does not celebrate legal pluralism as a political reality. Inclusion of these principles, however, need not alter the book's critical communitarian stance, which focuses on nonruling communities and their legal cultures under state domination. That being said, the question still arises as to what meaning communal and individual legal practices can carry if, and to the extent to which, a global culture is created. This is discussed next.

*Relativism, Localities, and Globalization: Critical
Communitarian Reflections on Cultural Homogenization*

As we approached the third millennium, it seemed that Immanuel Kant's vision of cosmopolitan experience, universal legality, and global justice had been accomplished. The world—especially in Western segments—had experienced a soaring sense of immanent global peace since the end of the Cold War. For some students of the international system, war had become obsolete (Fukuyama 1989, 1992). This was not, however, the first time in human history that a Pax Romana had

been widely articulated in academic and nonacademic circles. Regrettably, it also was not the first time that human beings observed the demise of their dreams, or should we say fantasies?

Even before the devastating and unimaginable terror attack on the United States on September 11, 2001, terrible events had shown how violent our world remains. Consider the Gulf War (1990–91) and the hostilities in the former Yugoslavia. Other examples are the massacres in Rwanda; violent conflicts in Algeria, Angola, Burma, China, India, Indonesia, Lebanon, Mexico, Nigeria, Northern Ireland, Pakistan, Peru, Russia, South Korea, Turkey, and Uganda; and the continuing struggle in the occupied territories of Palestine. All these instances point to the irrelevance of an inclusive concept of global peace in the post–Cold War era.

Amid global violence, illusions about cosmopolitanism have been propelled largely by and through the international and transnational interactive economy, which has made an American-led neoliberal capitalist epistemology ever more prevalent. The world has experienced an increase in capital flows, innovative computerized technologies, global trade (including the rise of e-commerce), massive international migration, expanding labor markets, and economic integration within the European Community (Grossman and Helpman 1997).

Correspondingly, the world has experienced increasing regional (primarily European) and international legalism articulated in international covenants of human rights, evolving international criminal law, multilateral economic agreements, and extensive adjudication, unprecedented in scope, by national and international courts. This legalism has been partially addressed to resolving problems that arose in the age of the global capitalist economy. Adjudication has accordingly embraced issues of property, vocation, intellectual property, computer and Internet law, immigration, labor relations, corporate law, and individual rights. Generally, and without completely downplaying regional effects, the American-led liberal approach to human rights and constitutionalism has dominated this trend (Scheppelle 1999).

What we call globalization is in practice a set of legal-economic interactions that are constituted as well as articulated in increasing international and national regulation, which is sometimes experienced as local economic deregulation (Kagan 1991, 1999). But has this phenomenon created a global legal culture? At this point, several

distinctions should be made. Humanity does not share a cosmopolitan culture. Scrutiny of data bases containing several hundred empirical studies of communal localities throughout the world reveals the opposite. There is more than ample evidence that no cosmopolitan culture has arisen in the post-Cold War period. The diversity of counterhegemonic cultures in local communities remains prominent. Before I detail some of those studies, another associated claim should be mentioned.

If culture is taken seriously, the need for a global culture evaporates. Culture—as defined previously—is a web of multicolored threads articulating multifarious aspects of social being, consciousness, identities, and practices. Is it desirable to assume that distinctive collectivities embedded in disparate traditions should be stripped of their ontological virtues and robed in a uniform culture? Is it not reasonable to assume that each culture will continue to carry its expectations and transcend its own concept of justice as a prerequisite of universal justice? Do we already have or can we arrive at a transcendental and universal criterion under which to judge disparate cultures and ascertain which ones are deserving of our favor? Even if we accept Kant's dictum of cosmopolitan freedom, the various intellectual traditions of liberalism and communitarianism incorporate different concepts of freedom, as we have seen. Later we shall observe the same phenomenon of cultural contingency and relativism in our analysis of communal voices in and toward law.

Historically speaking, the end of the Cold War fostered multiculturalism, often expressed as nationalism; this trend challenged what was perceived as global culture. Moreover, nonruling communities in numerous countries became localities of cultural resistance and challenged hegemonic assertions about cultural homogenization. The empirical studies cover such diverse countries as Brazil, Canada, Denmark, France, India, Israel, Mexico, the Netherlands, and the United States (Croucher 1996; Legare 1995; Lemish et al. 1998; Mato 1997; Mele 1996; Raz 1999; Shamir and Shamir 2000).

The reactions to universal cultural relativism are expressed in three problematic concepts. Samuel Huntington, with his "clashes of civilizations" theory, has articulated one of them (1993). He acknowledges the existence of a multicultural world but believes in the need to ensure the triumph of the "Judeo-Christian" tradition, which accord-

ing to him will forestall the Islamic menace to modern civilization. This binary, antirelativistic concept expresses a cultural prohegemonic preference, that of American-led individual liberalism, and an intellectual endeavor to formulate that preference as superior.

Liberal multiculturalism is the second of these concepts. Although it is sensitive to the variance in cultural hermeneutics, it has been intolerant toward nonliberal communities and has endeavored to impose Western concepts of freedom on them. Joseph Raz and to a lesser degree Will Kymlicka have promulgated it. The third concept is that of universal cultural "harmony," typified by Ronald Inglehart's arguments about the gradual prevalence of postmaterialistic culture. Inglehart and his colleague Paul Abramson have conducted comparative studies of political cultures in dozens of countries (Abramson and Inglehart 1995) and concluded that, the diversity of localities of cultures notwithstanding, postindustrial values emphasizing quality of life have become more diffuse from a cross-national perspective. Even if we accept their findings on their merits, and even if we are ready to indulge in the erroneous Western infatuation with its cultural dominance, Inglehart and Abramson do not exhibit a set of cross-national values that constitute a global culture of shared transnational traditions, memories, identities, and practices.

In contrast, when viewed from the perspective of a global economy, it is often argued that the international economy, characterized by sophisticated information systems, virtual spaces, and e-commerce, may well reduce the power of the state to control its subjects in such crucial spheres as communications, voluntary associations, financial investments, and political participation. Even if such a scenario is realized, how will the process affect consciousness, identities, and practices in the legal and sociopolitical settings?

As Michael Sandel points out, the future decline of the state and the possible dissemination of its political hegemony will amplify the importance of communities (1996). The difficulties human beings face in attempting to identify with international and transnational economic organizations will induce localization and greater involvement by the nonruling community. Due to the inability of universality as an organizing principle to address distinctive and numerous cultures in diverse localities, and due to the human need to be (at least) partially embedded in collectivities, nonruling communities will become ever more

important sources of consciousness, identities, and practices. It appears that the cosmopolitan universal space is incapable of addressing the plethora of perceptions of good and evil, of justice and injustice, and the associated practices that originate in communal localities (Derrida 1994; Scott 1997).

Capitalism in its intensive, interactive, economic and technological dimensions has already reduced the relevance of international borders (Grossman and Helpman 1993, 1997; Helpman and Coe 1993, 1995; Helpman and Razin 1991; Hollingsworth et al. 1994); probably, it will continue to nourish that proclivity. Nevertheless, capitalism can neither replace all of our epistemological boundaries nor provide a communal space that contains all our identities and practices. We can assume, therefore, that nonruling communities are crucial sources of alternative cultures and challenges to hegemonic forces.

This does not imply the absence of change. New communities will emerge, and new spaces, perhaps as virtual entities, will be created in which nonruling communities can thrive. While these developments may spur greater international and transnational communication, they also may augment the ethnocentrism already exhibited in ethnic conflicts and violence around the globe (Linz 1997). Critical communitarianism, as portrayed in this book, offers the intellectual tools necessary to deal with communities as premodern, modern, and postmodern collectivities in the midst of the globalization of local values and accompanied by the localization of global values. It may therefore help us to conceptually grasp and behaviorally respond to the violence that may result from the interaction between globalized local (e.g., religious extremism) and localized global (e.g., transnational neoliberalism) practices.

Violence: The Critical Communitarian Challenge

As our analysis of Robert Cover's work has shown, violence is not necessarily physical. Violence is any practice whose aim is to systematically subdue alternative hermeneutics; similarly, it is any practice intended to systematically eliminate the other's practices and meanings. Violence is intrinsic to the jurispathic characteristics of contemporary state law. From the perspective developed here, state law is jurispathic because it is paternalistic, coercive, and destructive toward the alterna-

tive hermeneutics proffered by rival communities (Cover 1975; Minow 1992). Yet, as Cover has shown, violence is not a fixed phenomenon; it is multifaceted and capable of being at once challenged and mobilized. This book therefore extends the work of Robert Cover in its conceptualization of violence in the context of nonruling communities and in its examination of violent practices as they are expressed in the concrete political contexts of state-community relations.

It follows that communities can be characterized as violent if violence is part of the repertoire of internal mechanisms used to enforce discipline among their members. The statement that all communities are essentially violent is erroneous, however. Liberals, liberal feminists, and postmodernists perceive communities as close authoritative spaces because they presumably impose the complete embodiment of the individual self in their cultures. In contrast, I claim that while communities are distinctive collective spaces they are neither harmonious nor coercive in principle; therefore, individual autonomy in nonruling communities is possible.

More precisely, while several nonruling communities are violent, similar to organizations designed to enforce cultural discipline, many other nonruling communities focus on combating violence. My analysis in the succeeding chapters will likewise show that *violence*, like other cultural terms, is relative, possessing contradictory meanings in specific legal cultural contexts. For instance, comparative studies show that some communities (e.g., feminists) have participated in organizing collective efforts to combat violence (Weiss and Friedman 1995). This finding permits me to argue that feminist communitarianism should and can be helpful in the struggle against male subjugation of women in the communal as well as the legal cultural space.

To be more precise, the exploration of violence in nonruling communities should be conducted within the larger framework of multiculturalism through the examination of state domination, the politics of identity and social being, and transnational liberalism in and toward law. Several kinds of violence may be observed in state-community relations.

First, state violence against nonruling communities should be studied through critical analysis of the legalistic categorization of collectivities inside as well as outside state narratives. Chapter 2 will explore these narratives and categories, followed by a discussion of the

ramifications of state violence for each of the nonruling communities surveyed. Critics of communities as “violent spaces” and critics of communitarianism as “traditionalist coercive essentialism” have ignored or understated the possibility that nonruling communities may defend, represent, and empower individuals who refuse to be stripped of their nonhegemonic identities. This book will demonstrate why state interference in internal communal legal practices is often violent. I will argue, by means of this analysis, that such state interference is justified only in rare instances such as violence against members who are unable to exit the community.

Second, community members may use their collective organizations to counteract the violence originating externally. Because one main feature of communality may be its formation through apparatuses of mutual assistance, the possibility of communal struggles against nonstate and state violence should be examined by delving into internal communal processes in and toward law.

Third, violence may be utilized against the state as a part of communal resistance to state domination. Because the state activates violence through legality, nonruling communities may legitimate and generate violence as a mechanism of resistance. This possibility will be examined primarily in chapter 3, which deals with the Arab-Palestinian minority. Fourth, some community members may activate violence against others in the same community. This book examines the possibility of violence as a component in the production of intracommunal hegemony within nonhegemonic communities and as a communal counterhegemonic practice against hegemonic communal authorities. These possibilities are examined when we delve into the legal cultures of Arab-Palestinian women struggling against male religious dogmatism; conflict among fundamentalist Jews over normative order and power; and friction among feminist women over hermeneutics, feminist consciousness, and heterosexual versus lesbian representation.

Violence as a communal and intersectoral phenomenon should be investigated in the dynamic political juncture between culture in law and law in culture. Clearly, violence can be employed for purposes of liberation or coercion. The chaotic and sometimes unpredictable meanings of violence can be comprehended only in terms of its role within the communal legal culture investigated. Such an analytic stance requires a comparative approach. Here I adopt such an approach.