

The Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act

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I. INTRODUCTION

I wrote this essay after participating in a 2006 workshop on Criminal Law and Cultural Diversity, which discussed, among other subjects, the wisdom of providing a “cultural defense.”¹ Uncertain just how far such a defense might expand on defenses already available, I undertook to explore that topic.

The phrase “a cultural defense” suggests an either/or choice that any legal system might make. That matters are much more complex than this is part of the burden of this essay. A “cultural defense” in its most general sense refers to a wide range of ways in which evidence about a defendant’s cultural upbringing or practices could influence legal judgment about his guilt or responsibility. So understood, the phrase could refer not only to a general, separate defense labeled a “cultural defense,” but also claims about culture that either are relevant under standard defenses in the criminal law, such as duress and provocation, or could be relevant were those traditional defenses expanded in some way.

Much of this essay is an inquiry into just how cultural factors might figure in claims about elements of offenses, justifications, excuses, and mitigations under the Model Penal Code—still the most comprehensive and systematic code of criminal law in the United States. That exploration gives us a sense of how culture may matter for criminal liability absent a specifically labeled “cultural defense”; it also provides an idea of how much could be accomplished by expansions of the standard defenses.

In the latter part of the essay, I think about cultural practices as a potential justification or generalized exemption in advance, comparing such a defense with an analogous defense based on religious belief and practice that now exists in many American jurisdictions.

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¹ Criminal Law and Cultural Diversity Workshop, held at Columbia Law School, March 10–11, 2006, co-sponsored by the Columbia University Center for Law and Philosophy and the Forum for Philosophy and Public Policy of Queen’s University, and led by Will Kymlicka, Claes Lernestedt, and Jeremy Waldron. Revised versions of the conference papers, as well as this essay, are to be published by Oxford University Press in 2009, edited by Professors Kymlicka, Lernestedt, and Waldron, under the title of *Criminal Law and Cultural Diversity*.

II. DRAWING SOME IMPORTANT DISTINCTIONS

If one understands a “cultural defense” as a general defense that is labeled as such and that reaches beyond more traditional, standard defenses as they now are formulated, or as they could comfortably be revised, one needs to situate a cultural defense among a range of possibilities and approaches. Whether having a specific cultural defense makes good sense depends greatly on whether other responses to cultural traditions and assumptions meet whatever needs there may be for accommodation and fairness.

A. A Cultural Defense in Criminal Law Versus Other Forms of Accommodation Outside the Criminal Law

A cultural defense concerns the criminal law. There are many other ways in which cultural traditions and practices may be accommodated. Allowing for the use of a cultural defense in the criminal law is sometimes described as an example of “multiculturalism,” and it is often assumed that people’s positions in respect to a cultural defense follow from their more general attitudes towards accommodating cultural diversity outside the criminal law. However, we should not conflate debates about the cultural defense with broader debates about multicultural accommodations, since the criminal law is unique in many ways.

On the one hand, there may be reasons why people who support multiculturalism in general would not support the cultural defense. Someone might think that society has an obligation to accommodate the cultural practices of minorities even when these impose some cost or inconvenience on society, but no corresponding obligation to accommodate practices when they impose harm. On this view, there might be an obligation to adapt the workplace to accommodate a minority’s group holidays, traditional dress, or cuisine, or to publicly fund a minority group’s cultural activities, but no obligation to allow defendants to invoke culture as a defense for conduct that has harmed other people.

On the other hand, there might be reasons why people who oppose multiculturalism in general might nonetheless support greater scope for evidence of cultural norms in criminal cases. Given that the criminal law has the potential to deprive individuals of their life and liberty, one might think that the perspectives of defendants should matter to a degree that they do not even for civil damages, as to which the fair expectations of those who are injured should control. Perhaps criminal defendants should be allowed every opportunity to demonstrate that they are not appropriately held blameworthy or responsible, even if one does not agree that the state generally has any duty to fund or accommodate cultural practices in, say, the schools or public media. The cultural defense in criminal law must be assessed on its own terms.

B. A Cultural Defense Versus Choices Not to Criminalize Behavior

If a person's behavior is not covered by the law of crimes in the first place, he obviously does not need a defense. Suppose that a small ethnic minority in a country engages in a traditional practice that would violate a law that legislators are considering: Sikh men cannot wear motorcycle helmets because their cultural practice requires that they wear turbans; the traditional life of the Inuit depends upon killing a limited number of a protected species of whales. Legislators may respond by declining to adopt the general restriction, e.g., allowing everyone to ride motorcycles without helmets, or by exempting members of a particular cultural group from a mandate that applies to everyone else, what we may call the exemption strategy. As I shall explore in more detail in the last part of this paper, I assume that the exemption strategy is sometimes justified. Any need for a general cultural defense depends partly on the legislature not having achieved all the desirable accommodations to cultural practices (such as riding without helmets) by leaving activities free of any regulation or through specific exemptions.

C. A Cultural Defense Versus Jurisdictional Allocation

One way in which the legal system can accommodate minority cultures is to grant them jurisdiction to regulate their own affairs in certain respects. Some countries assign matters of marriage and divorce to various religious groups. This is not done in the United States, although general principles allowing private arbitration permit members of religious and cultural groups who have civil disputes to choose arbitrators from their own traditions.

Native American tribes are given jurisdiction over minor criminal matters within their reservations. That assignment rests on a legal notion that the tribes are semi-sovereign, but the strategy of jurisdictional autonomy could be followed with respect to other cultural minorities, although any such scheme faces arguments by victims about their constitutional rights. That is a very different approach from creating defenses within the ordinary criminal law, and it is not a promising approach for serious crimes like murder and rape.

D. Substantive Liability Versus Sentencing

Many factors count for sentencing that are not relevant for underlying criminal liability. One might think that the right place to consider diverse cultural influences is in sentencing, not the substantive criminal law. The plausibility of this position rests significantly on how much sentencing discretion judges enjoy. If their choices are tightly circumscribed according to a range of considerations that omit cultural influences, then judges imposing sentences will be unable to give much weight to cultural factors. Even if judges have broad discretion, there are two strong reasons not to remit everything to sentencing.

The first is that even a light sentence is misguided if the proper response to someone's behavior is that he committed no wrong. The second is that if judges have wide sentencing discretion (and there is not extensive review of sentences by appellate courts), different judges may reach radically different conclusions about the relevance of cultural traditions. (The concern about differential treatment will follow us in the rest of this essay.)

E. *Alleviation in the Application of the Substantive Law Versus Nullification*

Juries (and judges) can refuse to apply the applicable law. Jury nullification occupies a paradoxical position in American law. Judges do not tell juries they can nullify, and lawyers have no general right to present facts and arguments that might lead juries to do so. But the practice of jury nullification is praised as a safeguard of justice and is protected by constitutional doctrines regarding jury verdicts.² One question about cultural influences is whether defendants should have an opportunity to present such factors if they might lead a jury (or judge) to refuse to follow legal requirements. I disregard this possibility in what follows and concentrate on how cultural influences might affect applications of the law, not nullifications of it.

F. *Minority Cultures Versus Majority Culture*

What counts as culture in the inquiry whether to create a general cultural defense? Suppose a member of the dominant culture claims that his perspective was strongly supported by aspects of that culture. Nicola Lacey provides the example of a young man who believes, according to traditional assumptions (among men) that a woman who says "no" to sexual intercourse in certain circumstances really means "yes."³ Is he to have some kind of defense? Insofar as "culture" figures in the application of standard defenses, a defendant could rely on how he was affected by the majority culture, but I am assuming in this essay that a general cultural defense, labeled as such, would refer to minority cultures. This definitional gambit leaves us with the questions: even taking into account that the substantive criminal law will mainly reflect majority values, *why* should minority cultures get a defense that members of the majority do not enjoy?; and how should one determine exactly which minority cultures may benefit from such a defense?

G. *A Cultural Defense Versus Aggravation*

The assumption underlying the phrase "a cultural defense" is that the connection to culture will count in favor of a defendant if it counts at all. However, cultural factors could be introduced against a defendant. This is evident in relation to ordinary

² See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 360–67 (1987).

³ Nicola Lacey, *Culture and Criminalization*, in *CRIMINAL LAW AND CULTURAL DIVERSITY* (Will Kymlicka, Claes Lernerstedt & Jeremy Waldron eds., Oxford Univ. Press, forthcoming 2009).

standards of liability. Suppose a defendant claims that he acted on a momentary impulse. Evidence that according to his cultural traditions, a person in his position—he is, say, the brother of a woman his victim seduced a month ago—has a responsibility to kill the victim, could support the prosecution's argument that he killed after deliberation.

The second way in which cultural factors might work against the defendant is less obvious and more debatable. Conceivably, evidence that someone was raised in a Nazi culture and retained its perspectives might make him seem a worse person than he would otherwise. I am doubtful about the persuasiveness of this illustration. That someone is a Nazi might well make him seem worse, but a person raised in the general (non-Nazi) culture who freely chooses Nazism may seem worse to us than someone raised in a Nazi culture. Thus, the particular claim of continuing connection to a culture might even here seem to mitigate blameworthiness. In any event, it is at least possible that cultural influence might make a person seem more, rather than less, blameworthy. This raises the question whether, were some general reference to culture to be included in the criminal law, judges and juries should be able to count culture *against* defendants as well as for them.

H. A General Defense Versus Evidence That Is Relevant to Components of Liability

The idea of a "cultural defense" sounds like a general defense, something on which a defendant might rely independent of evidence that would be relevant to ordinary matters of *mens rea*, excuse, and justification. Whether a general defense is needed depends heavily on the adequacy of evidence of cultural factors as parts of ordinary assessments of criminal wrongdoing.

To investigate that adequacy, we may take the standards of a legal system as they now exist, as they now exist (or might exist) if debatable open-ended issues are resolved in favor of admitting cultural factors, or as they would exist with discrete reforms that fall short of a general defense. My inquiry in Part III proceeds along these lines in respect to the Model Penal Code.

Were a legal system to employ some general requirement of personal blameworthiness in addition to all particular requisites of criminal behavior, the difference between admitting into evidence relevant cultural factors and having a specific cultural defense would recede in significance.⁴ In either event, a defendant could claim that her having acted in accord with her cultural traditions rendered her not liable or less liable than she would otherwise be. In this essay, I adhere to the assumption of common law jurisdictions that there is no general defense of lack of blameworthiness if the prosecution establishes all the specific elements necessary for a criminal conviction.⁵

⁴ One might reach the same conclusion if one thought that the system's ordinary, more particular standards of criminality included all the bases of personal blameworthiness that might be affected by cultural factors.

⁵ The closest approximation of such a general defense is the defense of diminished responsibility

I. *Cultural Factors Versus Other Potentially Relevant Factors*

A crucial question about *both* a general cultural defense *and* evidence of cultural factors as part of the ordinary criminal process is how cultural factors figure in relation to other possible factors. If one cannot come up with some reasonably persuasive distinctions between the kind of cultural factors that would make a difference and other factors, one must conclude that culture should not count, to put it crudely, or that other factors should also count.

If we think of cultural tradition as a basis for *excuse* or *mitigation*, comparison with factors such as abusive parents, brain damage, deprived neighborhoods, and violent “subcultures” (such as gang life) may seem relevant. If we suppose that cultural tradition might actually supply a *justification* for behavior that would otherwise violate the criminal law, we can compare it with standard practices within the majority culture, such as physical aggression in sports like boxing and ice hockey. We can also compare the norms of cultural traditions with religious practices and claims of conscience (religious and nonreligious). Of course, religious practice and cultural tradition overlap to a considerable degree, but a legal protection of religious practices does not embrace all cultural practices, and many religious claims do not attach to minority cultures. Part IV of my essay engages the comparison of cultural tradition with religion and conscience.

Whether one is focusing on excuse or justification, one must decide what constitutes a relevant culture. I am assuming in this essay that the protection of a “cultural defense” would go to minority cultures of an “ethnic” or “national” sort, not to the subculture of sadists and masochists or gangs within the dominant culture or the “culture” of particular households or neighborhoods. Were a defense to be cast along these lines, one would need reasons to favor the kinds of “minority” cultures that would be included over those that would be excluded.

III. CULTURAL FACTORS AND THE MODEL PENAL CODE: IS A GENERAL DEFENSE NEEDED AS A SUPPLEMENT?

As we have already explored in a preliminary way, whether a special cultural defense is needed in American criminal law depends substantially on how cultural factors might figure in ordinary standards of criminal liability. It is time now to engage this inquiry about one coherent set of standards, the Model Penal Code.⁶

A. *Why Look at the Model Penal Code?*

Some initial words of explanation are needed for those who are not familiar with the place of the Model Penal Code in American law, and a few further words are needed about my degree of involvement with its commentary. Within the United

that reduces murder to manslaughter in some jurisdictions.

⁶ MODEL PENAL CODE AND COMMENTARIES (1985).

States, principles of criminal law are left to individual states, so we have no criminal law of the entire country. There is, instead, the criminal law of fifty-three jurisdictions—the fifty states, the District of Columbia, Puerto Rico, and the federal jurisdiction. Up through the 1950s, basic principles of criminal law were developed by occasional judicial decisions and by piecemeal legislation that amounted to much less than comprehensive codes.

The Model Penal Code project of the American Law Institute was an effort to rectify this situation, to provide a model for states that was cohesive and comprehensive, that would clarify some aspects of the law and improve upon aspects that were irrational or unwise. The bulk of the project was completed in the 1950s under the leadership of Herbert Wechsler, widely regarded as our country's greatest criminal law theorist and reformer. The Code became official in 1962, with the approval of the membership of the Institute. At that point, the major sections we shall examine had extensive comments that explained their texts and rationales. The comments for many individual crimes and for sentencing and jurisdictional provisions were much less fully developed.

In the late 1970s, the Institute received a federal grant to complete the Commentaries. I was brought into that project as Chief Reporter, but in actuality under the very active supervision of Professor Wechsler. The aim was to finish explanatory comments and to trace the influence of the Code up to that time in actual jurisdictions. Those of us who were working at that stage had no authority to alter the Code's text (except to change an occasional "which" to "that" and to correct mispunctuation), and the comments were (for the most part) to continue to explain and defend what the Code did, not to provide a critical perspective after two decades. We *were* free to consider how the Code might apply to phenomena not dealt with in the original comments.

Most of the sections I shall be discussing are in the General Part, for which I was responsible at that point in the commentary's revision. On rereading the comments, I have been struck by their inattention to cultural factors. No doubt, a substantial part of the explanation was the focus of the drafters on individual psychological characteristics that could affect culpability, rather than attachments to groups with traditions and norms that varied from those in the dominant culture. What the comments say needs to be understood as the thoughtful work of Wechsler and his collaborators roughly fifty years ago, but the failure to comprehend and consider some nuances in ways defendants might introduce cultural influences is partially mine.

Why consider the Model Penal Code, now more than forty-five years old? It is still by far the most systematic and comprehensive approach to a criminal code in the United States, and although not *the law* in any jurisdiction, it has been drawn upon heavily by many states in their revisions of their own penal codes. Its Commentaries are often relied upon when state courts interpret provisions that are worded similarly to those of the Code, and even courts in jurisdictions without revised codes sometimes rely on Code approaches to develop their own law. The Code figures prominently in many of the casebooks used to teach criminal law to American students. Very importantly, the Model Penal Code adopts statutory formulations for general

principles of liability as well as for specific crimes; one need not search patterns of judicial decisions to try to discern just what counts as duress or necessity. Thus, it is much easier to say what defendants can or cannot claim.

Were one to carry out the exercise I shall perform for any actual jurisdiction, one would need to see how far its approaches deviate from those of the Code. In my own more limited endeavor, I will comment on some aspects of the Code that have not been widely followed. If one can summarize the overall effect of these differences, it is that most actual jurisdictions are somewhat less hospitable to the introduction of cultural factors than is the Model Code itself.

B. *Basic Standards of Culpability*

Although the Model Penal Code requires an *actus reus*, i.e., a voluntary act or omission, and it is conceivable that a defendant might rely on a cultural practice to claim that he did not meet even the minimal standard of voluntariness, we can move beyond this possibility and focus on the Code's four standards of culpability—purpose, knowledge, recklessness, and negligence. In contrast with vague ideas of “intention” characteristic of much preceding law, Section 2.02(2)(a)(i) treats purpose as a “conscious object to engage in conduct” of a defined kind or “to cause such a result.” *A* has a purpose to kill *B* only if that is his conscious object.

In a case that raises issues about the relevance of cultural traditions, Kargar kissed his baby son's penis.⁷ If the crime charged is defined solely as requiring contact between a person's mouth and a child's genitals, Kargar had that purpose. If sexual arousal is an element of the crime, Kargar lacked that purpose. He could establish his absence of that purpose by pointing to the cultural tradition in Afghanistan, his country of origin, that fathers kiss the penises of their baby sons.

We can see that cultural practice could count *against* a defendant. In a variation on an illustration that I used previously, if a defendant claims that his fatal striking of a victim was accidental, evidence that according to his culture, he had a duty to kill that person could help establish a purpose to kill.

Under the Model Code, a person acts knowingly with regard to a result if he is “aware that it is practically certain” his conduct will cause it.⁸ Thus, a person who plants a bomb in a car with the purpose of killing one of its occupants knows that it will with practical certainty kill others whom he realizes will also be in the car. Cultural factors could be introduced by a defendant to show he was ignorant of causal consequences other people would take as practically certain, or to show that he was practically certain of consequences others might take as unlikely.

The standards for both purpose and knowledge are rigorously subjective;⁹ they depend on what an actual defendant aimed to do and understood. Thus, any evidence

⁷ State v. Kargar, 679 A.2d 81 (Me. 1996). Kargar, an Afghani refugee, was convicted of gross sexual assault.

⁸ MODEL PENAL CODE § 2.02(b)(ii) (1985).

⁹ Knowledge does have an objective element as well. Suppose *A* believes that he has magical

bearing on a defendant's state of mind in regard to these elements of a crime could be relevant. No need arises for any special consideration of cultural factors, since they could be introduced like anything else.

However, we can see that if a crime is defined so that the crucial purpose depends only upon aiming to perform a certain physical act, one *might* need a general defense to exonerate the person whose tradition gives him an unusual, unthreatening reason to perform that physical act.

Whether a general defense *would* be needed to exonerate defendants like Kargar could depend on whether a jurisdiction has a provision covering *de minimis* infractions. In Section 2.12, not widely followed by states, which mainly leave judgments about unharmed behavior to prosecutorial discretion and to sentencing, the Model Code authorizes a court to dismiss a prosecution if a defendant's conduct did not cause the harm the law aimed to prevent or involved some other extenuation such that one cannot think the legislature envisaged it.¹⁰ The way this language is formulated, it could help a defendant like Kargar, who relied on cultural tradition to show he did no real harm. It would not help a defendant who caused *some harm* (from the standpoint of the majority's culture) but argued either that his cultural tradition shows that the harm was less than in the more ordinary context or that he was much less blameworthy than the typical defendant.

When we turn to recklessness and negligence, matters become more complicated. Recklessness involves conscious risk creation. According to § 2.02(2)(c), a person must "consciously disregard a substantial and unjustifiable risk . . . The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct . . . , its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Insofar as the issue is what risks a person actually perceives, analysis is the same as with respect to purpose and knowledge.

Cultural factors could be introduced to show that a parent did or did not perceive the risk of failing to take a child with a high fever to the doctor. Although this is not quite so clear, the actor's perception of the degree of risk is what should count, not an objective appraisal. If the actor perceives one chance in ten thousand whereas the actual risk is one in ten, his sense should control evaluation of whether the risk was substantial.

The determination of what degree of risk is substantial is not left to the actor; that is decided by the jury. The crucial question about recklessness is what makes a risk unjustifiable. One asks whether there is a "gross deviation" from how "a law-abiding person" would perform "in the actor's situation."¹¹

powers and that if he slaps *B* in the face, *B* will die. He does not want *B* to die and regrets that his slapping *B* will have that consequence. *A* slaps *B* and causes *B* to have a heart attack; *B* dies. If that outcome was from an objective point of view highly unlikely, *B* could not have been "aware that it (was) practically certain."

¹⁰ MODEL PENAL CODE § 2.12(2)-(3) (1985).

¹¹ MODEL PENAL CODE § 2.02(2)(c) (1985).

Consider the following hypothetical case. According to the traditions of a cultural group, boys of fourteen should be exposed to a seriously dangerous situation—say confronting a wild animal or being exposed to the elements in a remote location—as part of the process of developing into manhood. The parents who put their sons in these situations realize that the danger they will die is real, and of the last one hundred boys in similar situations, two have in fact died.¹² If a boy now dies, have the parents committed reckless homicide?

Let us assume that in the majority culture, everyone would agree that short of authorizing medical treatment needed to preserve life or health, exposing a child to a two percent chance of death would be a substantial risk and that it would be clearly unjustified, a gross deviation from the standard a law-abiding person would observe. But from the perspective of the minority culture, this rite of initiation is so important, it justifies the risk. Does “the actor’s situation” include his being embedded in the culture? And are the parents less than “law-abiding person[s]” because they are willing to take this particular risk? We can see quickly that the Code’s standard might be understood to address this question “objectively” in terms of the values of the majority culture *or* to take into account the special perspectives of the minority culture.

The comment gives us some guidance, but it is of a peculiar sort: “the point is that the jury must evaluate the actor’s conduct and determine whether it should be condemned.”¹³ The Model Code, in other words, does not tell us whether the jury should treat the parents whose exposed son dies according to the standards of the general culture or to give weight to the standards of the parents’ minority culture. The Code’s language and the comment do strongly suggest, however, that the parents should be able to present evidence about their cultural traditions and to argue that that is part of their situation and that they are not less than law-abiding persons.

The issues about negligence are similar to those concerning recklessness. Negligence does not depend on awareness of risk; it is enough that the actor should have been aware of a risk. For negligence under the Model Penal Code, the actor’s failure must involve “a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”¹⁴ Again, we have a reference to the actor’s situation, which might or might not include his cultural practices. Again, the Commentary tells us that the jury is to determine if the defendant’s failure justifies condemnation,¹⁵ and adds that “[t]here is an inevitable ambiguity in ‘situation.’”¹⁶

Certainly it would matter, it says, if a defendant were blind or had just suffered a heart attack, but “heredity, intelligence or temperament” would not be material and

¹² To shift to the mythical, in Mozart’s opera *The Magic Flute*, part of the significance of the trials of fire and water is that Tamino and Pamina might actually die.

¹³ MODEL PENAL CODE § 2.02 cmt. at 237 (1985).

¹⁴ MODEL PENAL CODE § 2.02(2)(d) (1985).

¹⁵ MODEL PENAL CODE § 2.02 cmt. at 241 (1985).

¹⁶ *Id.* at 242.

“could not be without depriving the criterion of all its objectivity.”¹⁷ The issue about such discriminations is left “to the courts.”¹⁸ If we put these various passages together, the court is to decide that some claims cannot be offered in respect to negligence—the standard is not the reasonable angry person—but that for others the jury is to determine their significance. For me, the language of the negligence subsection and its commentary sound slightly less promising for evidence of cultural factors than the analogous passages on recklessness, but I would nevertheless conclude that defendants typically should be able to argue that cultural traditions are part of the situation against which negligence should be determined.

C. Justifications

I turn now to two justifications for behavior that would otherwise be criminal—self-defense and general justification (or necessity). The Model Penal Code treats mistakes about justifying circumstances as matters of justification, not excuse.¹⁹ Contrary to the law of most jurisdictions, it correlates culpability about justifying circumstances to the culpability level of the underlying offense. To take an example, one form of aggravated assault is purposely or knowingly causing bodily injury with a deadly weapon.²⁰ If *A* intends to scare *B* by shooting near him, but the bullet creases the flesh of *B*'s leg,²¹ *A* has not committed this form of assault, even if his assumption that he would not hit *B* was unreasonable (negligence), and even if he was aware of a risk he might hit *B* (recklessness).

Now, suppose *A*, acting under an unreasonable belief that *B* is about to shoot him, intends to hit *B* with his shot but without injuring him seriously, and he does inflict minor injury. In a jurisdiction in which a belief in justifying circumstances must be reasonable to provide a defense, *A* would be guilty of this form of aggravated assault. Under the Model Code he would not, because his culpability about his possible justification (negligence, or perhaps recklessness) is less than the culpability level for the underlying offense.²² A negligent belief in justifying facts will, under the Model Code, provide a defense to a crime of purpose or recklessness, but in most jurisdictions it will provide no defense at all.

Section 3.04 of the Model Code allows the use of force for self-protection “when

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ There is disagreement among theorists whether mistakes about justifying circumstances give rise to justifications or excuses. I have claimed that when a person has made the best judgment possible in the situation, but it turns out to be mistaken, he should definitely be viewed as justified. And I have also defended the Model Code's approach as one among appropriate options. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

²⁰ MODEL PENAL CODE § 211.1(2)(b) (1985).

²¹ I have put *B*'s injury so that it is “bodily injury” under the Code but not “serious bodily injury.” See MODEL PENAL CODE § 210.0 (1985).

²² See MODEL PENAL CODE § 3.09(2) (1985).

the actor believes that such force is immediately necessary” to protect himself against the use of unlawful force.²³ Deadly force is justifiable if “the actor believes [it] is necessary to protect . . . against death, serious bodily injury, kidnapping,” or forcible sexual intercourse.²⁴ Section 3.05 contains similar standards for the use of force to protect third persons.

Consider this fanciful illustration.²⁵ Members of an African tribe that have moved to the United States believe that witches can cause people to die immediately by casting certain spells. *B*, believing he is a witch, begins casting a spell which both *B* and *A* believe will quickly kill *A* and her family. *A* shoots *B* dead. *A* has believed that deadly force was immediately necessary to protect herself and others against death.²⁶ *A* is not guilty of purposeful or knowing homicide under the Code, because she believes she has a justification. But is *A* is guilty of reckless or negligent homicide? She is not guilty of reckless homicide unless she was aware of a risk that the facts did not justify her action. Apart from that problem, we are left with the question whether her belief was reasonable.

The relevant sections and comments on justification²⁷ do not provide as full an account of recklessness and negligence as do the section and commentary on the basic standards of culpability.²⁸ The earlier account of what those standards mean is incorporated for claims of justification. Thus, to take negligence, we are referred to what a reasonable person would do “in the actor’s situation,”²⁹ and to the commentary that tells us that the jury needs to decide if *A*’s failure justifies condemnation.³⁰ Here, *A*’s failure involves a gross mistake about the nature of reality (at least as that is understood in the majority culture). When a person has killed another based on such a serious mistake, one strongly doubts that a jury would be inclined to say that she does not deserve condemnation for the least grave form of homicide, negligent homicide. And I am inclined to think that a judge could fairly refuse to allow the defense to raise that claim.³¹ If these judgments are correct, one might think that a special cultural defense would be needed here to exonerate *A*, but would one conclude that *A should* be relieved of liability for even negligent homicide? I doubt it.

Jurisdictions in which belief in justification must be reasonable to count at all would be much harsher on *A*’s claim in these circumstances. If reasonableness were assessed according to the majority culture, *A* would definitely lack a reasonable belief

²³ MODEL PENAL CODE § 3.04(1) (1985).

²⁴ MODEL PENAL CODE § 3.04(2)(b) (1985).

²⁵ This is a variation of a Kongolese case discussed in Claes Lernestedt, *Criminal Law and Culture*, in CRIMINAL LAW AND CULTURAL DIVERSITY, *supra* note 3.

²⁶ A minor hurdle is that *B*’s spell must count as unlawful force if it would work.

²⁷ MODEL PENAL CODE §§ 3.04, 3.05, 3.09 and comments (1985).

²⁸ MODEL PENAL CODE § 2.02(2)(c), (d) and comments (1985).

²⁹ MODEL PENAL CODE § 2.02 cmt. at 241.

³⁰ *Id.* at 237.

³¹ Thus, I distinguish this case from the one in which parents risk their son’s life in an effort to help him move towards manhood.

in justifying facts, and she would be guilty of murder, since she killed purposefully. For such a jurisdiction, the argument for some special cultural defense (or mitigation) would seem much more powerful.

The Model Code's general justification defense, in Section 3.02, applies, subject to some exceptions, if the actor thinks his conduct is necessary to avoid a harm that is "greater than that sought to be prevented by the law defining the offense charged." Although the section's language is not entirely clear on the point, the section does justify taking one life if that is necessary to save many.³² Thus, *A*, in our witch hypothetical, might be able to claim that she believed she was avoiding a harm that was greater than the death of *B*. If, as Section 3.02 seems to provide, she succeeded in defending against a prosecution for murder,³³ the question would remain whether she would be guilty of reckless or negligent homicide.

New York's statute, which some other states have followed, gives a general justification only if "such conduct is necessary as an emergency measure to avoid an imminent public or private injury. . ."³⁴ This standard is decisively objective; if *A* makes an unreasonable mistake about justifying circumstances, she has no justification defense to any crime, and reasonableness is to be determined according to the dominant perspective about reality.

D. Duress and Mitigation from Murder to Manslaughter

Under the Model Code, duress, set out in Section 2.09, is an excuse. We need to be clear initially about how duress fits with the general justification defense. Some courts have used duress for all situations in which one responds to human threats by committing a criminal act, reserving the necessity defense for natural circumstances, such as a snowstorm that causes a mountaineer seeking shelter to break into someone else's cabin. Under the Model Code, the general justification defense reaches both natural emergencies and human threats. If I steal a watch in response to a credible threat that I will be shot to death if I do not, I have a defense of general justification.

What is left for duress are circumstances in which a person is not actually justified in responding to a threat but cannot fairly be blamed for yielding. The formulation covers coercion by force or threatened force "that a person of reasonable firmness in his situation would have been unable to resist."³⁵ What of a wife who belongs to a minority culture in which women are expected to do what their husbands tell them, and who carries heroin on an airplane in response to her husband's threat that he will beat her if she does not? In the majority culture, a wife of reasonable

³² MODEL PENAL CODE § 3.02 (1985).

³³ One wonders whether a court would really entertain this defense for purposeful murder if a person said he was complying with God's orders and that killing his victim was immediately necessary to save multiple lives.

³⁴ N.Y. PENAL LAW, § 35.05 (2008).

³⁵ MODEL PENAL CODE § 2.09(1) (1985).

firmness would not submit.³⁶ But most wives in the minority culture would submit. The question is whether membership in that culture is part of “her situation.” The commentary refers back to the standards for recklessness and negligence; it tells us that factors like size, strength, age, and health are relevant, but temperament is not.³⁷ The commentary also indicates that the defense could be available to someone who was “brainwashed,”³⁸ and the wife might argue that being involved in a minority culture is analogous to being “brainwashed.” As with many of the other sections we have looked at, this section leaves it to the jury to decide if the threat of force exculpates, and that judgment is inextricable from how the actor’s “situation” is understood.

Something similar is true about the section that authorizes mitigation of murder to manslaughter. The Model Code greatly broadened the traditional rule that certain provocations, a limited number, could warrant reducing intentional killing from murder to manslaughter. According to Section 210.3(1)(b), a homicide that would otherwise be murder is reduced to manslaughter if it is “committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.” That is to be determined “from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”³⁹ The commentary explains that the trier of fact must take the circumstances as the actor perceives them.⁴⁰ (However, the commentary does not focus on the circumstance when the actor’s basic view about physical reality is fundamentally distorted, as in the belief about deadly magic, from the standpoint of the majority culture.)

Assessing the basic facts accurately, a Japanese woman kills her two children and tries to kill herself because she has been deeply shamed by her husband’s infidelity. Let us assume that that would not provide a sufficient emotional disturbance for which there is a reasonable explanation or excuse in the majority culture. Might it nevertheless be such an excuse for a woman raised in a culture in which the humiliation she suffered would be horrible and would include her children?

The comment provides the familiar line that “situation” is ambiguous.⁴¹ Blindness, shock from traumatic injury, and extreme grief would be included in one’s situation, idiosyncratic moral values would not. The language aims for “flexibility,” allowing argument about what is a reasonable explanation or excuse.⁴² “In the end, the question is whether the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.”⁴³ Given these portions of the commentary,

³⁶ However, one might argue that being a battered woman is part of one’s situation and that the standard for a woman whose husband beats her should not be wives in general.

³⁷ MODEL PENAL CODE § 2.09 cmt. at 375 (1985).

³⁸ *Id.* at 376–77.

³⁹ MODEL PENAL CODE § 210.3(1)(b) (1985).

⁴⁰ MODEL PENAL CODE § 210.3 cmt. at 68.

⁴¹ *Id.* at 62.

⁴² *Id.* at 63.

⁴³ *Id.* The comment does not make clear when a judge may refuse to allow a defendant’s claim

the Japanese defendant clearly should be able to argue that she was acting under the influence of an emotional disturbance that would qualify.

Although the Model Code greatly broadens the circumstances that could allow a “provocation” mitigation to manslaughter and renders the relevant inquiry significantly more subjective than it had previously been, the Code lacks any general diminished responsibility mitigation. A defendant must be able to make an argument under the sections I have mentioned or other sections of a similar sort.

E. *Ignorance of the Law*

One kind of argument that a defendant might offer is that his cultural traditions left him unaware that his behavior was criminal. Kargar, for example, would not have assumed that kissing the penis of his son was actually a criminal act in the state of Maine.⁴⁴

The common law’s traditional harshness about ignorance of the law is captured by the phrase, “Ignorance of the law is no excuse.” What is meant in this respect is ignorance about the law defining an offense, not every mistake about what the law provides. Suppose a woman breaks off an engagement, removing her engagement ring and placing it on a table in her apartment. Her fiancé mistakenly thinks he then becomes the legal owner of the ring he gave her months earlier. His taking of the ring is not theft. Given his mistake about the law of property, he has not knowingly taken the property of another.

The Model Code continues the tradition of not excusing ignorance of the relevant penal law, but it creates two exceptions. Section 2.04(3)(b) concerns people who rely on reasonable official statements about the law’s content—not likely to be much help for recent immigrants from diverse cultural traditions. Section 2.04(3)(a) covers situations in which the law is “not known to the actor and has not been published or reasonably been made available.” The language about “published” or “made available” focuses on general availability, not on whether people in subgroups of society had an adequate opportunity to be aware of the law.

The comment does say that “[t]here can be no point in punishing someone who neither knows his behavior is criminal nor has that information reasonably available to him.”⁴⁵ But the comment acknowledges that the Code’s language does not protect defendants who had no reason to suppose that a mere failure to register might be criminal, a situation in which the Supreme Court had discerned a constitutional defense.⁴⁶ Before suggesting that a broadened defense might lead to spurious claims and reduce incentives to learn the law, the comment remarks, “A legislative broadening of the defense to excuse all those who could not reasonably be expected to

that she qualifies under this section to be put to the jury.

⁴⁴ State v. Kargar, 679 A.2d 81 (Me. 1996).

⁴⁵ MODEL PENAL CODE § 2.04 cmt. at 276 (1985).

⁴⁶ The Supreme Court held that such a defendant had a due process right not to be convicted in *Lambert v. California*, 355 U.S. 225 (1957).

be aware of a law's existence would bar conviction in some cases that are not reached by the Code's language but in which liability may seem unjust.⁴⁷ (Except for a few provisions as to which prevailing sentiment had radically altered, this is about as close as the comments get to criticizing formulations in the Code.) Such a broadening would give a foothold for claims of recent immigrants that they could not be expected to be aware of laws, but the comment is clear that Section 2.04 as it stands does not provide a defense in these cases.

IV. A GENERAL CULTURAL DEFENSE—EXCUSE OR MITIGATION

Is there any need for a general cultural defense that would allow the introduction of cultural traditions to excuse defendants or mitigate their liability? The argument for such a defense is much weaker for the Model Code than for jurisdictions with more objective standards of recklessness and negligence, with requirements that all justifications be reasonable, and with narrower standards for duress and provocation. We saw in connection with *Kargar* that the definitions of specific crimes are also important. If definitions are exclusively in terms of physical acts that may have vastly different significance among different cultural groups (and if a jurisdiction lacks a *de minimis* provision), there may be more need for a special cultural defense than if crimes are defined more flexibly in terms of antisocial purposes.

In the most extensive treatment of a cultural defense, Alison Dundes Renteln has suggested that defendants should be able to introduce cultural traditions to be considered by judges and juries when that might lead someone to believe their actions are excused or less culpable.⁴⁸ As it stands, this proposal suffers two serious flaws: a lack of clarity about just how the defense is supposed to work, and inattention to how this proposed defense might relate to other proposed defenses.

The first point is fairly easy to understand now that we have run through some major provisions of the Model Code. A penal code has general principles, definitions of specific crimes, and provisions for sentencing. Sentencing in the United States is (with the exception of capital punishment) generally left to judges. I am assuming, without examining precise schemes of sentencing, that cultural traditions could be relevant at sentencing, whether they suggest lower or higher penalties for a defendant.

But how is the general cultural defense to work at trial? Juries rendering verdicts decide whether defendants are guilty of crimes with which they are charged. Sometimes juries may determine that defendants are guilty of lesser included offenses—a man charged with murder may be guilty only of manslaughter, a woman charged with grand larceny may be guilty only of petit larceny.⁴⁹ A jury may excuse a defendant who acted under duress. It may choose to nullify the law by acquitting someone who it believes is guilty of the crime charged.

⁴⁷ MODEL PENAL CODE § 2.04 cmt. at 276 (1985).

⁴⁸ See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004).

⁴⁹ The prosecution may fail to prove that jewelry she stole was worth the amount required for grand larceny.

But, and here is the point, criminal codes confer no power on juries or judges simply to reduce the level of offenses based on a sense that the defendant is less culpable than the typical defendant charged with that species of crime. For homicide, the provocation defense and its expanded Model Code counterpart do allow a reduction in the category of crime from murder to manslaughter; so also does the yet more general “diminished responsibility” defense for jurisdictions that recognize that defense. But the law contains no similar defenses for crimes of larceny, rape, and selling proscribed drugs. If cultural evidence does not show that a defendant lacked the basic culpability as prescribed in the offense, or that he acted under duress, or that his crime was *de minimis*, *what* is the jury to do if the evidence leads it to conclude that the defendant was less culpable than the typical offender? It is called upon to render a verdict of guilty or not guilty for the crime charged. Of course, it is free to acquit in the face of convincing evidence of guilt, but Professor Renteln seems to have in mind something more subtle than cultural evidence producing jury nullification.⁵⁰

A jury *might* use cultural evidence to reduce the level of offense in a way not authorized by the criminal code—what we might consider a qualified form of nullification. Thus, assume that a woman has stolen \$100,000 worth of diamonds. The jury, after hearing cultural evidence that makes her appear relatively sympathetic, convicts her only of petit larceny.

A simple proposal to allow evidence and argument about why cultural practice should reduce liability, even when it does not bear on the elements of a crime, founders on the problem of its relevance for what a jury must actually decide. I see only two ways out of this bind. One is to provide that for specific defenses with which we are familiar, cultural factors could relieve a defendant of liability, with the reference to cultural factors supplementing the more general formulation of the defenses. Thus, a criminal code could make reasonable ignorance of the law an excuse for a recent immigrant with a cultural background that differs significantly from that of the majority culture. That would then be a special added ignorance of law defense, limited only to cultural claims.

The second strategy would be to adopt a more general provision for cultural factors along the lines of:

- (1) When a defendant’s conduct is grounded in minority cultural traditions in such a way that his behavior is excusable, though not covered by any specific excuses, he shall not be guilty.
- (2) When a defendant’s conduct is grounded in minority cultural traditions in such a way that his behavior is less culpable than is typical for an offense, he shall be guilty of a lesser offense (to whatever degree the jury deems appropriate), whether or not the definitions of specific offenses make such factors relevant.

⁵⁰ See generally RENTELN, *supra* note 48.

Either of these two approaches raises the question why cultural traditions should be treated differently from other factors that might reduce culpability, but do not connect to the basic elements of offenses in their standard formulations, such as violently abusive parents, dire poverty, growing up as a member of a neighborhood gang, brain damage, or a genetic predisposition to violent action. Someone with any of these disadvantages might claim that he is less culpable than the typical offender.

One might answer that recognizing cultural factors would be less threatening to the overall deterrent objectives of the penal law or would be less subject to spurious claims than allowing these other factors to reduce culpability. Perhaps it matters that minority cultures form kinds of communities with their own norms and sanctions, ones that, unlike the norms and sanctions within gangs, may not *in general* be opposed to the basic norms of the dominant culture. I shall not try to engage the inquiry comparing cultural and other factors in detail here, but I do want to stress that a component of any plausible argument for a general cultural defense, conceived mainly as involving excuse and mitigation, must be an explanation of why a connection to an ethnic or national minority culture should to be treated differently from other bases for arguments that a defendant's culpability is reduced. Of course, one might instead build from these cultural factors to conclude that other factors should be similarly treated, but then one would end up recommending reforms that would be much broader than introducing a general cultural defense or an explicit cultural defense supplement to existing defenses.

In concentrating on how the structure of defenses in the Model Penal Code relates to the possibility of a general cultural defense, I have slighted important aspects of the problem that deserve mention, however brief. The need for a specific defense (or specific additions to existing defenses) may seem greater if the sentencing discretion of judges is constrained. Adopted in a different era, the Model Code embodied highly discretionary, flexible, sentencing; that approach has been rejected in the United States in favor of a model in which guidelines sharply reduce discretion, and, therefore, variations among sentences. The need to recognize relevant factors in the substantive criminal law is more pressing if they cannot be given due weight in sentencing.

A serious difficulty with creating a specific cultural defense is the burden it would place on judicial administration. Judges would need to determine exactly what kinds of factors could be "cultural" in the right sense and which of these might plausibly bear on culpability. (Otherwise, a judge should not allow such evidence to go to a jury.) The judge would then have to decide how much evidence to allow about cultural traditions and practices *and* about whether a defendant was himself or herself connected to those traditions and practices in the necessary way.

A member of an ethnic minority, even one who engages in particular practices of that culture, may not regard those practices as including norms he should follow if he has reasons to act otherwise.⁵¹ If a defendant was a member of a minority with

⁵¹ Samuel Scheffler, *Immigration and the Significance of Culture*, 35 PHIL. & PUB. AFF. 98, 119–24 (2007). Scheffler, points out that not all aspects of "cultures" carry normative authority for members.

distinctive practices, but had lived in the United States for more than a decade and had developed an attitude of indifference to those practices, he should not be able to claim successfully that he was constrained by culture to engage in the particular practice that constituted the criminal act for which he was prosecuted; but a judge would be hard put to identify this attitude of indifference at the outset and he would have difficulty deciding just how much evidence to allow about the defendant's degree of adherence to cultural norms. (A judge under the Model Penal Code already faces somewhat similar questions about what evidence to allow about a defendant's "situation" under the various provisions where that is relevant, but she need not worry about the specific boundary lines of (relevant) culture.)

Three more general concerns reach beyond these worries about practical implementation. People, especially people who emigrate to a country with a different culture, have a range of choice about what to accept and reject, and immigration itself often, though not always, signals rejection of aspects of the culture from which the immigrant comes.⁵² The "melting pot" tradition (or myth) in the United States assumes that immigrants of highly diverse traditions will absorb the general culture. However benighted this tradition may be about broad cultural diversity, perhaps we should think of those who come to the country as free enough to conform with basic criminal standards. And often the victims of crimes for which there is a cultural explanation may be members of the minority culture who themselves have rejected the norms that guide the actors who harm them. Finally, decisions by judges or juries that an actor is less culpable because he was behaving in accord with cultural practices of his minority may be regarded as regrettable stereotyping by other members of the same minority who disagree about what their cultural practices and norms have been or who have come to reject as long outmoded the practices on which the defendant has relied.

V. A GENERAL CULTURAL DEFENSE OR EXEMPTION: A CONCEPT OF JUSTIFIED ACTION

In some circumstances, the claim about cultural tradition is that members of the majority culture should recognize that people have a right to act according to their cultural practices, even if this contravenes ordinary legal standards. One might think of this as one form of a claimed right to one's culture. Thus, Kargar argued on appeal that he had a constitutional right to kiss his son's penis (although he later did not claim he should be allowed to continue the practice).⁵³ I have already discussed the possibility of specific exemptions for conduct that is required or encouraged by cultural traditions. Undoubtedly, such exemptions are sometimes warranted. The question here is the possibility of a general exemption—that is, an exemption cast in

⁵² See *id.* at 99–103.

⁵³ RENTELN, *supra* note 48, at 245 nn.53 & 55. No claim of constitutional right is addressed by the court's opinion.

terms of a general formula to be applied by administrators, judges, or juries on a case-by-case basis.

One inquiry along these lines is to ask how cultural traditions relate to religious traditions. That inquiry is not the only analogy one might choose in thinking about justified behavior,⁵⁴ but it has special interest because of the overlap of religions and cultures and because the law in many American jurisdictions does provide a general exemption—limited in scope as it may be—for religious practices.⁵⁵ Although the circle of religious practices intersects with the circle of cultural practices, some cultural practices are not religious (or not religious enough) and many religious practices do not attach to minority cultures. If a general exemption for religious practices is warranted, as much American law now assumes, should practices of minority cultures that members take as having normative force, but are not religious (enough), be treated similarly?

We can illustrate this issue in light of a recent Supreme Court decision upholding the right of a small Brazilian religious group to import a hallucinogenic tea used in worship.⁵⁶ Suppose a cultural group had a strong nonreligious tradition that that tea should be used in family celebrations. Should members have a similar right, or at least have their claims to drink the tea assessed by standards similar to those used for the religious group?

In this brief discussion, I shall omit constitutional arguments that religion must be, or may be, given a special status. And by assuming that some cultural traditions are not religious (enough), I shall disregard the rich variety of connections between cultural practices and religion, which can present formidable difficulties in determining whether a particular practice should count as a form of religious exercise.⁵⁷

A brief amount of legal history and explication is needed to set our inquiry in context. In 1963, the Supreme Court decided that a Seventh Day Adventist could not be denied unemployment compensation because she was unwilling to work on Saturday, her Sabbath.⁵⁸ It indicated more generally that, under the Free Exercise Clause, the government could not impinge on religious practices unless it had a compelling interest that could not be accomplished by less restrictive means.⁵⁹ Using that approach the Court later held that Amish families could withdraw children from

⁵⁴ One might, for example, consider how justifications arising out of familiar contact sports might relate to cultural practices.

⁵⁵ I am particularly interested in this comparison because some of my recent work has focused on free exercise exemptions. See 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* (2006); 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008).

⁵⁶ *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (applying the Religious Freedom Restoration Act).

⁵⁷ For my views about “defining religion,” see 1 GREENAWALT, *supra* note 55, at 124–56.

⁵⁸ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁵⁹ *Id.* at 406–08.

school at the age of fourteen to undertake community vocational education, despite a state law requiring schooling until the age of sixteen.⁶⁰

For these constitutional exemption cases, the language of “compelling interest” was always a bit misleading. That language was drawn from cases involving racial discrimination and legislative measures that curtailed freedom of speech. In *those cases*, it was very difficult for the government to establish a sufficient interest. By contrast, when religious claimants sought to be free of regulations that validly applied against everyone else, the showing of interest the government needed to make was less.

In 1990, the Supreme Court withdrew this protection as a matter of constitutional right for almost all areas.⁶¹ If a law was neutral in respect to religion and of general application, that was essentially the end of the inquiry.⁶² Thus, no matter how important peyote was for worship services of the Native American Church, members had no right to disregard a general ban on the use of peyote.⁶³ Congress responded by adopting a Religious Freedom Restoration Act (RFRA), explicitly incorporating a standard meant to track the constitutional test of the unemployment compensation and Amish schooling cases.⁶⁴ The Supreme Court subsequently declared this law invalid as it applied to states and localities,⁶⁵ but RFRA still restricts actions of the federal government. Congress has since adopted a more limited law covering land use and prisons that does apply to states.⁶⁶ A number of states have adopted their own RFRA, and some state courts continue to apply the compelling interest standard as interpretations of their own state free exercise clauses. In sum, a standard like that in RFRA applies to a significant range of situations in American jurisdictions.

The crucial language of RFRA is this: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.”⁶⁷ Among the circumstances to which this act, and its state analogues, could apply are criminal prosecutions of people who use proscribed drugs in worship services, who withdraw their children from school, who violate humane slaughter laws, or who refuse to serve on juries. Obviously this language will not help people who commit intentional homicides or inflict serious physical harm; the government has a compelling interest in preventing that behavior.

RFRA and its analogues already protect those traditional practices of cultural

⁶⁰ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁶¹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁶² *Id.* at 879–82.

⁶³ *Id.* at 890.

⁶⁴ 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

⁶⁵ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶⁶ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

⁶⁷ *Id.* § 2000bb-1 (a)–(b) (2006).

minorities that are themselves religious. Should the act be extended to reach nonreligious minority cultural practices, so that the government may not “substantially burden a person’s exercise of practices within a minority cultural tradition of which he is a part” unless it satisfies the (weak version of the) compelling interest test?

An argument in favor of this result is that such a right would go some distance toward recognizing equality among cultural traditions and would properly accommodate minority traditions when that could be done without serious cost to the general society. But there are some obvious difficulties. Exactly what would count as a minority culture? How attached would a person have to be to the minority culture in which he was raised? Insofar as the law is trying to shift people away from cultural practices that do not fit well with the majority culture, should it have to rest on “a compelling interest,” even a watered down compelling interest?

Another objection, often made as to *any* general cultural defense, could be raised here. The government should be protecting members of the minority culture, especially women, who are being treated unfairly *and* who may want protections they do not get within that culture. In response to this objection, it may be said that the government will have a compelling interest in protecting such victims. Thus whatever *excuses* their oppressors might have, a kind of RFRA extended to cultural practices would not give rights to oppress women and children. This response is adequate for most circumstances in which woman and children might be victims, but it does not quite answer every situation. Most courts have supposed that religious organizations have a right to discriminate by gender in choosing their leaders. Would one wish to confer such a privilege on nonreligious organizations of traditional cultural groups? That seems debatable.⁶⁸

Extension of federal and state RFRAs to cover nonreligious minority cultural practices would have relatively little practical effect in respect to criminal prohibitions. That is, it would not privilege many activities that are now made criminal. Its symbolic effect might be welcomed or not, depending on one’s overall views about multiculturalism. Probably its main practical significance would be in areas of law other than criminal law.

My “on balance” view at this point is that such an extension would not be a good idea, but I believe the comparison with religious claims, and also with nonreligious claims of conscience (protected by some laws), is one fruitful perspective for thought about justifying acts based on cultural practices.⁶⁹

⁶⁸ Under present First Amendment law regarding freedom of association, an expressive association would have a plausible constitutional argument that such discrimination is protected.

⁶⁹ For such thought, personality disorders and parental abuse are inapposite comparisons, since no one believes such factors should actually underlie privileges to act.

VI. CONCLUSION

We have seen that how cultural traditions and practices should figure in criminal law defenses is a complex inquiry. One can make an argument for creating a general privilege to rely on the norms of minority cultures if that does not impair significant state interests, an analogue to the treatment of religion in a number of American jurisdictions. And one can make an argument for a general defense that could eliminate or reduce liability for acts that are not actually privileged. Just how persuasive this latter argument is depends on a number of factors: how crimes are defined; ordinary standards of culpability, excuse, and justification; a feasible assignment of roles to judges and juries; and the potentiality to expand existing defenses by particular references to cultural practices.

My own assessment is that a general privilege for cultural practice along the lines of the Religious Freedom Restoration Act would not be desirable, and that, at least in jurisdictions whose criminal law resembles that of the Model Penal Code, clarification and expansion of existing defenses that allow culture to be taken into account is a more promising strategy than the creation of a general cultural defense. Unlike a general cultural defense, such a strategy does not encourage (to the same degree) defenses based on cultural traditions sharply opposed to the values of the dominant society; it does not require judges to draw somewhat arbitrary lines between cultural factors that count and those that do not; and it does not entail all the problems of evidence and stereotyping involved in establishing what is an accurate portrayal of minority cultural practices and a defendant's attachment to those practices.⁷⁰

⁷⁰ Of course, these drawbacks *are* present if the addition to a specific existing defense, such as ignorance of law, itself makes reference to minority cultural traditions. But then the drawbacks are contained to limited defenses as opposed to the sweeping coverage of a general cultural defense.

