Criminal Law and Cultural Diversity

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1

Introduction: Criminal Law and Cultural Diversity

Will Kymlicka, Claes Lernestedt, and Matt Matravers

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Much has been written about the challenges that ethnic and religious diversity raise for modern nation-states, including issues of religious education, language rights, family law, and the accommodation of cultural practices in dress codes, public holidays, and so on. But there is one particularly important domain of public life where the challenge of cultural diversity has been under-explored: namely, the criminal law.[1] In writings on criminal law issues, hardly any attention has been paid to the challenge of multiculturalism and the extent to which criminal law rules are "cultured" to the advantage of the majority population has barely been touched upon.[2]

Yet, the criminal law is thought of as society's most powerful tool for regulating behavior, and just for that reason we apply particularly strong safeguards to ensure that criminal sanctions are applied in a fair and clear way. If there are good reasons to think that these requirements are not met in the way criminal law currently deals with issues related to "culture" and "cultural differences" then this is surely something that ought to compel the attention of legal theorists and practitioners. This collection aims to begin to redress this neglect.

It is important to distinguish two levels at which cultural diversity and criminal law interact. First, there are questions about *what to criminalize*, including whether cultural minorities should be exempted from criminal laws that

[1] This gap is puzzling given that other structural perspectives on the criminal law have been developed, such as gender and class perspectives. See, amongst many others, Lacey 1998; Norrie 2001. It is also surprising given the attention paid in the media to crimes with a supposedly "cultural" dimension (such as "honor killings").

[2] For two recent examples of normative theories regarding personal responsibility in the criminal law with almost no mention of "cultural" aspects, see Tadros 2005; Horder 2004. The result is the same in most textbooks on criminal law: e.g., Ashworth 2009; Simester and Sullivan 2010. The same gap is found in the literature on criminalization: e.g., Joel Feinberg's four-volume work on *The Moral Limits of the Criminal Law* (1984–88), Packer 1968; Schonsheck 1994.

would otherwise prohibit their traditional customs or practices. Second, there are questions about the rules for *ascribing responsibility* and assessing punishment for individuals who have allegedly violated the law, and whether individual members of cultural minorities should be able to invoke what might be labeled “cultural evidence” or a “cultural defense” as a justification, excuse, mitigation, or other means to avoid (full) liability.

These two sets of questions, although connected in several ways, raise quite different issues. Answers to the first question are based fundamentally on forward-looking considerations about the kind of society we want to live in, and the kinds of interactions we wish to permit or prohibit. Answers to the second question, by contrast, have a strong backward-looking element to them; we want our rules for judging responsibility and punishment to track the actual blameworthiness of the specific individual being prosecuted for a specific action in the past.

Questions of criminalization, and of the limits of the criminal law, have seen something of a revival in recent years (Schonsheck 1994; Husak 2008; Duff et al. 2010, 2011; Simester and von Hirsch 2011), but the main discussions of potential exemptions for minorities from criminal law provisions have been in political philosophy (Kymlicka 1995a, 1995b; Barry 2001; Parekh 2006). Although this literature boasts a great deal of disagreement, there is a broad consensus—one shared by politicians and most citizens—that forward-looking considerations (for example, of gender equality; the interests of children; public health and safety) often provide valid reasons for criminalizing behavior that has been traditional in one or more of the subgroups living in a country (including the majority).

There are of course competing values that must be borne in mind, such as religious freedom and tolerance, and one area of profound disagreement amongst both philosophers and the public concerns when exemptions to public regulation should be given to particular groups. For example, while there are valid forward-looking reasons for criminalizing the possession of narcotics, the fact that some indigenous American groups traditionally use peyote in their religious ceremonies may provide a valid reason to exempt them from this particular legal requirement.[3] However, the presence of debates over exemptions does not disprove the point: it is inevitable that the criminal law in modern multiethnic societies, in pursuit of legitimate forward-looking goals, will prohibit some activities that have been a part of the practices of some groups.

Although the essays in this collection touch on these issues, the main focus is on the second set of questions. These concern the legal assessment of individual blameworthiness. When someone commits an act prohibited in a

[3] This is acknowledged by the American Indian Religious Freedom Act, Public Law No. 95-341, 92 Stat. 469 (Aug. 11, 1978).

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criminal statute, he or she may be punished for it *if and only if* a long list of additional requirements is met. The ground of such requirements is the idea of individual *blameworthiness*, meant to *justify* the infliction of punishment: the specific individual must be deemed to *deserve* punishment.[4]

The importance of blame to our judgments in the criminal law—and not only there—is immediately apparent if one considers our different reactions to some examples. Think of those who commit otherwise blameworthy acts when sleepwalking or hypnotized. In these cases, blame does not attach to the person because the person's actions cannot be traced back in the right kind of way to his or her agency. In other cases, agency is present, but the agent is not blameworthy because his or her action was justified (as in self-defense). In still others, our judgments of blame are mitigated as when we find out that an offender acted out of character having been subject to stress (say, losing his job). In all these cases, our judgments of the blameworthiness of the agent are responsive to what we think the agent deserves, if anything, by way of punishment. In some cases, we may think the agent has a full or partial defense; in others merely a plea for mitigation (or, of course, our judgments of blameworthiness can be exacerbated by so-called "aggravating" factors).

Precisely how defenses (such as justifications and excuses) work is a complicated—and contentious—area in both legal and moral philosophy and it is into this controversial area that the idea of "cultural evidence" or "cultural defenses" enters. This is because according to some scholars, cultural or religious factors are amongst the range of considerations capable of influencing the individual's thoughts and behavior in ways that render the individual less legally blameworthy. For this reason, the argument continues, what might be labeled as "cultural evidence" may be essential in improving our backward-looking judgments of individual blameworthiness and desert; indeed, taking cultural evidence into account might in some cases even be necessary if the practice of punishing individuals is to be legitimate and equitable. According to proponents of the so-called "cultural defense," the use of cultural evidence when judging individual blameworthiness is a natural application or extension of the logic of existing criminal law doctrines regarding defenses, and of the logic of current philosophical theories of responsibility and agency.[5]

[4] It is worth noting that this claim applies more widely than merely to what are normally called "retributivist" theories of punishment. For example, sophisticated (indirect, rule, or side-constrained) consequentialists will also endorse the claim that the offender must deserve punishment (in light of his or her offending act) albeit that the ultimate justification of the system of punishment lies in its good consequences.

[5] This naturally raises the question of how we determine what counts as "cultural." In our view, there is little to be gained by trying to come up with a definition of "culture." This has proven to be a hopeless task in many disciplines. Even sophisticated attempts to define the concept of culture quickly prove unwieldy. Speaking of a book by Clyde Kluckhorn, Clifford Geertz noted:

> In some twenty-seven pages of his chapter on the concept, Kluckhorn managed to define culture in turn as: (1) "the total way of life of a people"; (2) "the social legacy the individual

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It is this second question that is explored in depth in this volume, since it raises a number of complex questions at the boundaries of criminal law and political philosophy. These questions are neither new to criminal law nor unique to "multiculturalism," but they are becoming increasingly urgent, and remain surprisingly under-studied.[6] In the rest of this Introduction, we provide some context for the discussion and an overview of the contributions made by each of the authors.

Above it was noted that the proponents of a "cultural defense" hold that cultural or religious norms are amongst those factors that influence individuals' thoughts and actions in ways that may render them less blameworthy in the relevant legal sense. It is important that there are two steps in this argument. First, that cultural or religious norms are influential in people's actions. Second, that this influence is, or ought to be, such as to render the person less legally blameworthy. It is important to note the two steps in order to avoid what the legal philosopher Stephen Morse (Morse 2000: 130) calls the "fundamental psycholegal error," which is to presume that "if science or common sense identifies a cause for human action…then the conduct is necessarily excused." That is, unless one is committed to a very odd account of human action, the claim that a person's cultural or religious background will influence

> acquires from his group"; (3) "a way of thinking, feeling, and believing"; (4) "an abstraction from behavior"; (5) a theory on the part of the anthropologist about the way in which a group of people in fact behave; (6) a "store-house of pooled learning"; (7) "a set of standardized orientations to recurrent problems"; (8) "learned behavior"; (9) a mechanism for the normative regulation of behavior; (10) a set of techniques for adjusting both to the external environment and to other men"; (11) "a precipitate of history"; and turning, perhaps in desperation, to similes, as a map, as a sieve, as a matrix. (Geertz 1973: 4–5)

There is growing consensus that we should focus less on what culture *is*, and focus instead on what work the concept of culture *does* in particular contexts. In the context of "cultural defenses" in criminal law, we argue appeals to culture are intended and used primarily to inform our conception of the responsible individual, and to complicate our judgments about blameworthiness and desert. We discuss below several different ways in which cultural factors might be thought to do work in this regard. We can make progress in thinking through these specific ways that appeals to culture work in criminal law without having resolved the perennial debate about what defines "culture" or "a culture."

[6] For a representative sample of works on this topic, see Brelvi 1996–97; Coleman 1996; Lyman 1986; Macklem and Gardner 2001; Maguigan 1995; Okin 1999; Phillips 2003; Renteln 1993; Sing 1998–99; Waldron 2002; Volpp 1994, 1996, 2000; Wanderer and Connors 1999; and above all, the comprehensive overviews in Renteln 2004; and Foblets and Renteln 2009. However, as we discuss below, with a few notable exceptions, this literature tends to either apply traditional criminal law perspectives without attending to the challenges raised by philosophical discussions of multiculturalism, or conversely applies philosophical theories of multiculturalism without attending to the specificities of the criminal law. Anthony Connolly's recent book, *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding* (2010) uses the courtroom to explore a different philosophical issue of cultural difference. He is interested in the very possibility of cross-cultural understanding, using courtroom procedures as a test case. This is an interesting question in the philosophy of mind and language—the framework of his analysis—but does not directly address the issue of the relevance of cultural diversity for how criminal law and political philosophy conceive of responsibility and blameworthiness.

his or her action is obviously right. But, this does not necessarily mean that those actions are any less his or hers; on the orthodox picture of the criminal law, causes are not excuses just like that.

The "cultural defense," then, can enter into this debate in one of two ways. Proponents can try to show that admitting such a defense is consistent with other defenses in the criminal law or a natural extension of the reasoning that underpins those existing defenses. Or, they can argue that the significance of cultural or religious factors in people's lives is such as to force us to rethink the criminal law more radically. In both cases, many orthodox criminal law theorists are skeptical. For some, the "cultural defense"—like proposed defenses based on rotten social background or battered-woman syndrome—commit the error of thinking that causes—and particularly unusual causes—excuse. For others, the allowing of cultural factors into the courts—or what they often describe as "cultural relativism"—would breach principles of equality under the law and undermine the picture and rhetoric of the law as neutral, non-political, "one law for all," etc.; ideas that preserve the self-image and legitimize law.

One task of this volume, therefore, is to encourage criminal law scholars to reflect upon where, and how, information that could be called "cultural" should be deemed relevant, especially in the application of the rules regarding personal responsibility and blameworthiness. Here some of the debates in contemporary political philosophy about the social construction of the individual, the nature of the "self," and the relations between individuals, groups, and society (for example, the liberal/communitarian debate as well as the general debate on "multicultural" questions) can help in opening up the debate.

However, the target of the essays is not just those working in criminal law and legal theory. As noted above, much of the literature on what ought or ought not be criminalized and which groups, if any, ought to be granted exemptions from some of the demands of the law, has been written by political philosophers working on issues of multiculturalism. Many such theorists have looked at debates around cultural defenses as a test case for the "limits" or "paradoxes" of multiculturalism.[7] However, most of these scholars focus primarily on the first societal level mentioned above; i.e., on decisions about what to criminalize, and why it is appropriate for countries to maintain criminal prohibitions on certain conduct even if these prohibitions contradict the cultural practices of minority groups. Less has been written on the second individual level; i.e.,

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[7] The specificity of the criminal law context is rarely discussed in these philosophical works. In effect, political theorists of multiculturalism, when they discuss the issue at all, simply pick examples of the cultural defense, take them out of their criminal law context, and use them as fodder for more general arguments about cultural relativism, say, or the conflict between multiculturalism and gender equality. The discussion of cultural defenses in Okin 1999 is a paradigm instance of this.

about how the courts should assess personal blameworthiness. In our view, political philosophers need to contemplate the individual level more carefully, examining the extent to which "culture" should be seen as having the possibility of affecting a specific person's behavior, perception, etc., to such an extent that he or she should be deemed less blameworthy. Moreover, this needs to be done with knowledge of the basic structures of the criminal law, in relation to the other factors that are accepted as reducing blameworthiness. Some philosophers seem prepared to sacrifice fundamental criminal law principles in cultural cases, eliminating scope for defendants to raise issues of desert and blameworthiness. Exposure to general debates within the criminal law would help ensure that the philosophical literature on these topics is cognizant of the special issues raised when applying criminal law at the individual level.

In short, criminal law scholars working in this area could benefit from exposure to philosophical debates about the relationship between culture, agency, and responsibility, and conversely philosophers could benefit from exposure to criminal law doctrines regarding blame, excuses, defenses, and so on. At the heart of these debates is the political, philosophical, and legal construction of the responsible, blameworthy individual, especially concerning that part of the individual that could be referred to as his or her "culture." It is in order to make progress on these issues that we have brought together both groups of scholars in a common dialogue.[8]

As noted above, we start from the premise that once we properly distinguish forward-looking issues of criminalization from (primarily) backward-looking issues of assessing blameworthiness, there is a prima facie case for allowing various kinds of cultural evidence, or if you prefer, for allowing various kinds of "cultural defenses." Both the logic of existing criminal law doctrines of defenses, and the logic of current philosophical theories of responsibility and agency, push us in this direction. But this is just the starting point of our project, and the chapters in this volume offer a number of caveats and complications. In particular, some of our authors question whether rules of responsibility should be seen as entirely or primarily backward-looking, while others question whether (or how) cultural evidence really serves the goal of backward-looking judgments of individual blameworthiness.

To take the first issue, some authors argue that rules of responsibility should not be purely "backward-looking," but are inevitably (and appropriately) designed in light of the broader forward-looking goals of the criminal law as a whole. There are several ways in which forward-looking considerations may

[8] Our main goal is to discuss how these issues *ought* to be resolved, and not simply to catalogue how they actually *have* been tackled in various countries. Nevertheless, we have deliberately included participants from different countries and legal traditions, since different legal systems have different views—and different procedures—regarding the assessment of guilt and desert. We hope to learn from these national and tradition-related specificities, while simultaneously seeking a level of generality that can inform debates across a broad range of contexts.

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shape our rules of responsibility: (a) the system of criminal law can only function if it has a level of public legitimacy, and this requires that assessments of individual guilt/punishment, as much as decisions about what to criminalize in the first place, be in line with "common sense"; (b) just as it appropriate for the state to use the power of criminalization to change traditional assumptions and behavior (e.g., by prohibiting marital rape), so it is appropriate for the state to use control over the rules of responsibility to change traditional assumptions about what counts as a "reasonable" effort to comply with the law (e.g., by stipulating that it is not enough that a man believed that a woman consented to sex—he actually has to try to find out); (c) the criminal law is intended to provide a "third force" standing above all of the subgroups in a society as the basis for mutual confidence when interacting with strangers, and this function is jeopardized if people believe that some of the strangers with whom they interact will not in fact be held accountable for prima facie violations of criminal prohibitions.

It is often assumed that once we incorporate these forward-looking considerations, the scope for cultural evidence/defense is likely to diminish, as compared to a purely backward-looking theory of responsibility. But in principle one could imagine forward-looking arguments *in favor* of broadening the scope for cultural evidence. For example, one could argue that it will increase the sense of legitimacy of the criminal law within minority communities, and hence help stabilize the system generally, or that it will provide an avenue for beneficial forms of cross-cultural learning and understanding, reducing overall levels of prejudice and distrust in society.

Assuming that such forward-looking considerations are indeed appropriate to take into account when designing rules of responsibility—and assuming we have some way of predicting the impact of different rules on these forward-looking goals—they raise the obvious question: how do we balance or integrate these forward-looking justifications with backward-looking considerations of individual blameworthiness? Which forms of cultural evidence/defense are most likely to be subversive of these legitimate forward-looking goals, and why? Is there some bedrock judgment of backward-looking blameworthiness—some (perhaps minimal) notion of a "fair opportunity to comply"—that cannot be sacrificed in the name of forward-looking goals?

Regarding the second issue, our authors explore a number of different ways in which cultural evidence might be relevant for backward-looking judgments of responsibility. The starting assumption, as we noted above, is that introducing cultural evidence can improve our judgments about an individual defendant's blameworthiness, and might indeed be necessary to give credibility to the idea of punishing according to blameworthiness. But how exactly do the facts of cultural socialization relate to judgments of individual responsibility? One story, implicit in much of the existing literature, goes like this: someone who is deeply "embedded" in a minority culture is likely to feel certain "cultural

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imperatives" to act in a certain way, reducing their capacity to control their behavior so as to comply with the law of the larger society, and the existence of this imperative justifies, excuses, or mitigates the crime. An equally common response to this story is to say that it overstates the way in which people are "embedded" in cultures, and underestimates the way in which so-called "imperatives" are continuously being challenged from within and without the group. For such critics, the facts of cultural socialization do not compromise the basic capacity of individuals to understand themselves as making choices for which they can rightly be held responsible, and hence do not disprove that someone had a "fair opportunity to comply" with the law.

This is the familiar pattern of debate found in much of the existing literature. But the chapters in our volume reveal a wealth of examples that do not fit this familiar pattern, including:

(1) Ignorance of the law: newcomers may not realize that X is criminalized in their new country, or may not realize that a particular action would be interpreted as a case of X, since it has a different meaning to them.

(2) Mistake of fact: other kinds of mistaken (or alternative) perceptions of reality due to the fact that behavior or situation X has a different social meaning for someone from a minority culture than it has for someone from the majority culture.

(3) Duress: a woman from a traditional culture may not feel able to question her husband's or father's command to engage in a criminal activity, due to a fear of ostracism or violence.

(4) Provocation: a culturally specific insult provokes someone to commit a criminal activity, emotionally overriding their rational self-control.

(5) Conscientious objection: despite having full rational self-control, and full knowledge of the law, and not being subject to duress, an individual belonging to a certain group nonetheless consciously and deliberately acts in a way prescribed by the group's cultural tradition although prohibited by the criminal law, on the grounds that they believe themselves to be duty-bound to follow the authority of their cultural tradition (or, without feeling strongly "duty-bound" by it, they see strong and good reasons for following what is considered a valuable tradition).

Many of the real-world cases of a "cultural defense" fall into one or more of these categories, none of which exactly fits the familiar "cultural imperative" story. (In fact, the cultural imperative story seems to be a conflation of the third or fourth with the fifth: the third and fourth involve reduced capacity to override an inherited cultural script, without necessarily any endorsement

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of the normative authority of that script; the fifth involves a conscientious endorsement of the cultural script as a normative imperative, but not necessarily any reduced capacity.)

Once we recognize the breadth of cases we are dealing with—and no doubt there are yet further types of cases that can and should be distinguished—it seems unlikely that we will find any simple generalization about the connection between cultural socialization and judgments of individual responsibility. Rather than very general debates about whether people are culturally "embedded" or subject to cultural "imperatives," we instead face more discrete debates about how facts of culture-related ignorance, mistake, duress, provocation, conscience, and so on bear on judgments of responsibility and blameworthiness. We need to ask, in each of these cases, how we decide whether individuals had a "fair opportunity to comply," and how these cases relate to cases of ignorance, mistake, duress, provocation, or conscience that are not defined as "cultural"—i.e., that are not the result of being socialized in a distinct ethnocultural group. For which of these cases is there something special about "culture" as a source of ignorance, mistake, duress, provocation, and conscience that distinguishes it from other sources, and is a separate formal "cultural defense" needed to capture this special character?

In this respect, talk of "*the* cultural defense" (as opposed to "*a* cultural defense," or simply "cultural evidence") is misleading, suggesting as it does that we already have some clear and well-defined idea of what such a defense is, which one must either reject or accept. Instead, there are a range of ways in which cultural evidence might be invoked as part of a defense, each involving different putative links between facts of enculturation and judgments of responsibility and blameworthiness.

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OUTLINE OF THE VOLUME

This is the complex territory that we aim to map and evaluate in the volume, bringing together scholars of both criminal law and political philosophy (as well as scholars from both the Anglo-American and continental legal traditions). Each of the chapters addresses a different dimension of the issue, and from a range of perspectives, with varying degrees of sympathy or skepticism regarding cultural defenses. But the volume is united by the three core issues outlined above: (i) the distinction between societal decisions about criminalization and individual assessments of blameworthiness; (ii) the mix of forward- and backward-looking goals in the rules of responsibility; and (iii) the diverse ways cultural socialization can be invoked to inform judgments of individual responsibility.

Chapter 2, by Claes Lernestedt, focuses on the second and third issues. He starts from the idea that both forward- and backward-looking considerations

operate within the criminal law, and that while none should fully trump the other, backward-looking considerations must have considerable weight in the rules for ascribing responsibility. Lernestedt then situates "cultural defense" and "cultural evidence" within this general criminal law framework. In some situations, Lernestedt argues, cultural evidence is required in order for defendants to be treated equally before the law in its most narrow, demanding sense, whereas in other situations the taking into account of cultural factors amounts to preferential treatment. Thus, once we situate issues of cultural evidence within this larger criminal law framework, it becomes clear that the common "either–or" approach to cultural evidence is unsustainable, and that we need more refined criteria or principles for evaluating what effects "cultural" evidence should have. Lernestedt argues that a separate, formal "cultural defense" is a bad idea: this could easily convey the impression that the "cultural" is something additional or "extra." Lernestedt suggests instead that, at least as a long-term goal, "cultural" considerations would not be considered as a separate or exceptional issue, but would be naturally integrated into criminal law's image of the responsible person.

Nicola Lacey also argues that the criminal law combines forward- and backward-looking considerations, but she is less optimistic about combining these without remainder. Lacey considers the argument that the inclusion of cultural evidence in determining blameworthiness is a natural extension of how the criminal law already treats other mitigating factors that affect a person's ability to comply with the law. Lacey explores this claim in depth, focusing in particular on how cultural influences compare with other kinds of influences such as being raised in a broken family or in a poor neighborhood where violence and criminality are common. She argues that while one can indeed make a good philosophical argument why, for example, the victims of poor upbringing should be seen as less blameworthy, there are also good reasons why the criminal law system does not, and should not, view poor upbringing as a mitigating factor. For Lacey, the ends of the criminal law—in particular, the goal of steering the population's behavior—override philosophical arguments about individual blameworthiness and thus there may be only limited room for cultural defenses. Moreover, Lacey argues, the criminal law is "in the business of applying standards" and these standards are, in liberal democracies, general.

The theme of general standards that bind persons as legal citizens is picked up by Kimmo Nuotio. Nuotio locates his argument more on the terrain of political philosophy. For Nuotio, philosophers such as Taylor, Habermas, and Rawls have developed broad theories of how the law in general can operate in a pluralistic society. However, these multicultural theories need to be refined or adapted to the particular aims, demands, and restrictions of criminal law. Modern criminal law requires strong presuppositions of legal personhood; that is, it treats people as responsible and rational individual agents. These

presuppositions differ from those of traditional communities, but are now essentially irreversible. The legitimacy of modern law requires people to think of themselves as "citizens" bound together in a political project, and not just as individuals who belong to pre-political cultural groups. Like Lacey, then, Nuotio concludes that issues of legal responsibility cannot be reduced to "mere moral blameworthiness," and that the state has a legitimate interest in preserving the conditions that sustain the mutual recognition of people as *citizens*.

Matt Matravers, too, focuses on the practice of holding citizens responsible, but argues that the conception of responsibility at play in the context of criminal law is different from our everyday conceptions. He argues that responsibility in the criminal law context is best understood in terms of a doctrine of *answerability*, in which both the defendant and the society can be held to account. For someone to be held answerable for a committed act certain conditions must be met. Specifically, the person must be capable of responding to, and acting on, reasons. Equally, certain conditions must be fulfilled for a specific society to have a right to hold him or her answerable. Specifically, the society must have (moral) standing. Matravers considers both of these sets of conditions and the ways in which many accounts of the cultural defense interact with them. He argues that these accounts identify real issues that need to be addressed, but that the significant influence of culture on individuals in most cases neither undermines the responsibility of the agent nor the standing of the state to hold that agent to account for his or her (criminal) actions.

If Lacey, Nuotio, and Matravers can be thought of as skeptical about the reach of the cultural defense each sees the importance of cultural evidence. This is something shared with Bhikhu Parekh and Ayelet Shachar.

For Parekh, issues of a cultural defense must be situated within a broader theory about how conflicts of value between minorities and the majority society should be dealt with. Parekh highlights the significance of cultural meanings across the criminal law: in defining its scope; the definition of crimes; the gradations of crime seriousness and penalty severity; the determination of individual responsibility; the range of mitigating factors and defenses accepted; and in its administration. Given this, he thinks that "there is on balance a good case for finding a place" for a partial cultural defense. However, such a defense would need to be constrained and, as noted above, understood in the context of conflicts of value between majorities and minorities. Such disputes, Parekh argues, must be addressed through extensive discussion and argument, rather than the unilateral or coercive imposition of one side's values on the other. Given this, creating legal space for a cultural defense can serve both forward- and backward-looking goals. That is, the use of a cultural defense would help track and assess personal blameworthiness more correctly, but Parekh insists it would also provide a useful forum for intercultural, future-oriented learning.

If we are to use the cultural defense, or admit cultural evidence in the court, we must know *how* to do so. Critics of the cultural defense often argue that

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attempting to assess the significance (or even the content) of someone's "culture" is beyond the capacity of courts, and will inevitably lead to arbitrary results. Shachar argues that we can shed light on this concern by examining a closely related field of law: namely, family law. As she shows, there has been considerable experience in the use of "cultural" evidence in family law court cases, including in assessments of the behavior of parents. Shachar advocates what she calls a "culture-demystifying" approach that permits the court to treat cultural factors as one of many relevant elements in its adjudications. This she contrasts with two "absolutist" alternatives: a "culture-blindness" approach that permits no formal place for cultural considerations, and a "culture-override" approach in which culture is treated as determinative. Shachar's preferred demystifying approach might be thought too ad hoc or to allow too much discretion to courts. However, through a close examination of cases, Shachar identifies a number of safeguards and principles that emerge from the family law context that might be applicable to the context of criminal law.

These practical, legal questions are picked up by Kent Greenawalt. Greenawalt notes that decisions about whether to accept cultural evidence have, to date, primarily been left to the discretion of individual judges, resulting in considerable unevenness, if not arbitrariness, across cases. On the legislative level, such issues have rarely been touched upon. In his chapter, Greenawalt examines the most ambitious attempt in the United States to draft a systematic criminal code: the influential Model Penal Code, and its commentaries. Greenawalt examines what mention is made of, and what room might exist for, cultural factors within the Code. In general, his analysis is that the Code pays little attention to cultural factors. However, Greenawalt's argument is that there is room for such factors; the question is how best to accommodate them. Greenawalt considers both the idea of a general privilege for cultural practice along the lines of the Religious Freedom Restoration Act and the clarification and expansion of existing defenses. His conclusion is that the latter offers "the more promising strategy" as it does not require—as would a general cultural defense—judges to decide between those cultural factors that count and those that do not and those that are "really" part of the culture (or the defendant's cultural identity) and those that are not.

In the concluding chapter, Alison Dundes Renteln asks why legal and political theorists have been so cautious about (what she refers to as) the cultural defense. She notes that critics of the cultural defense have often argued that while it might help improve our backward-looking judgments of personal responsibility, it would have serious if not catastrophic consequences for the future operation of the legal system. Renteln distinguishes a number of different versions of this argument—identifying a set of perverse effects that the cultural defense might generate, from concerns about reducing the deterrent effect of criminalization on potential transgressors in minority communities to reducing the sense of legitimacy of the legal system as a whole

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amongst members of the dominant group. In response to each of these concerns, Renteln examines what evidence, if any, exists to support these speculations, and concludes that fear of the consequences is largely overblown. In the absence of credible evidence for forward-looking harms, she argues, there are "compelling principled grounds" for the adoption of a cultural defense for its backward-looking benefits. Such a policy could then be reviewed if its implementation gave grounds for belief that it had demonstrable ill-effects on the behavior of individuals.

Together these essays explore why cultural diversity raises distinctive challenges in the criminal law context, not found in other domains of the multiculturalism debate, while also exploring how this particular context raises fundamental issues of agency and responsibility that are at the heart of broader debates in political philosophy. Much of course remains to be done in this area. What these essays demonstrate is that progress on these issues will require political philosophers to better understand the specificity of criminal law, and for criminal law scholars to better understand philosophical debates on culture and agency.

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