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Legal Models For The Recognition Of Cultural Arguments In Criminal Law: A Normative Viewpoint

Guy Ben-David

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GUY BEN-DAVID*

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* Ph.d in Law, Bar Ilan University, Israel (2009); LL.M Bar Ilan University, *Magna Cum Laude* (2002); LL.B Netanya Academic College, *Magna Cum Laude* (1999); Faculty member, Netanya Academic College Law School; Adjunct Lecturer, Bar Ilan University Law School; Member of the Israeli Bar Association (2002). I would like to thank Professor Ruth Kanai from Bar Ilan University Law School, for her helpful comments.

ABSTRACT

Recognizing the cultural background of a defendant who belongs to a minority culture is known as "cultural defense," meaning that the minority member's cultural background is accepted as a form of "defense" in a criminal trial. In general, the term "defense" is not only applicable in the functional sense as a formal defense against criminal liability, but rather can be applied in its literal linguistic sense, meaning that the defendant's cultural background may grant them different types of special considerations during the criminal procedure.

This article aims to examine several legal models for the recognition of the cultural background of defendants belonging to minority groups during the criminal procedure. The first chapter (constituting the foundation for the discussion of the proposed legal models in the second chapter) discusses the justification for considering a defendant's culture during the criminal process, including discussion of the principle of culpability, the doctrine of equality, the right to culture, and the promotion of pluralism in

criminal law. The second chapter examines four possible models for the recognition of a defendant's culture in a criminal trial: the "complete cultural defense model," the "integrative model," the "punishment model," and the "disregarding model." Although the last model advocates that there should be no recognition of the defendant's culture during a criminal trial, the common denominator of the other three models is that they all recognize the defendant's culture, at different stages of the criminal trial. The "complete cultural defense model" recognizes the defendant's culture as an additional formal defense against criminal liability; the "integrated model" recognizes the inclusion of cultural arguments as part of the existing set of defenses against criminal liability, and the "punishment model" recognizes the defendant's culture as a mitigating factor in sentencing. Examination of the disadvantages and advantages of each model leads to the conclusion that the solution for the thesis discussed in this article necessitates the synthesis of several models to form a new "relative normative model."

INTRODUCTION

The term "culture" was first applied and broadly defined in the field of anthropology towards the end of the nineteenth century by Sir Edward Burnet Tylor (1871) as "that complex whole, which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[1] Later definitions of the term tended to draw a clear distinction between behavioral practices and values, the arts, and abstract perceptions of the world underlying this behavior.[2] In other words, culture is not just the visible behavior, but the shared ideals, beliefs, and values through which humans interpret their experiences that are reflected in their behavior.[3] The main core value of Liberalism is the individual's autonomous right

1. Edward B. Tylor, Primitive Culture (4th ed.1903).

2. William Haviland, for example, defined the term 'culture' as "a set of rules or values, that, when acted upon by members of a particular society, produce behavior that falls within a range of variance the members consider proper and acceptable." *See* William Haviland, Cultural Anthropology 49-50 (8th ed.1999). A similar definition is given by Robert Levine who defined the term 'culture' as: "A shared organization of ideas that includes the intellectual, moral, and aesthetic standards prevalent in a community and the meanings of communicative actions." Robert Levine**,** *Properties of Culture: An Ethnographic Vview*, *in* Culture Theory: Essays on Mind, Self, and Emotion 67, 67 (Richard A. Shweder & Robert A. LeVine eds., 1984).

3. Haviland, *supra* note 2.

to shape their life independently and according to their choice.[4] According to Will Kymlicha and Joseph Raz, the role of culture is to provide a reservoir of choices that people can use to realize their autonomy.[5] Avishay Margalit and Moshe Halbertal assert that culture can shape a person's identity.[6] It is in the interest of each person that they be allowed to continue to follow the culture that has formed their personality and consciousness and their daily life practices.[7] Defense of their culture actually represents the defense of the important values that constitute the core of their identity.

Each cultural group has its own unique lifestyle, rich in distinctive cultural customs, practices, beliefs, and meanings. Culture shapes the beliefs, behavior, and consciousness of each of the group's members. It equips its members with a basic cognitive and ethical perception of the world from early childhood, and helps the individual understand her position in the world.[8] This process, transmitting a culture from generation to generation, is known as "enculturation." Through enculturation, the culture's standards and meanings are internalized and assimilated as part of the individual's personality so that the culture actually shapes personality and becomes a significant factor influencing the way a person behaves.[9] The enculturation process in general, especially the influence of cultural background on the way an individual thinks and acts, constitutes the basis for recognizing the doctrine of "cultural defense." It is also the foundation for the thesis of the present article: In certain circumstances it is possible and appropriate to consider the cultural background of a defendant who belongs to a cultural minority within the framework of criminal proceedings.

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4. MENACHEM Mautner, Law and Culture in Israel at the Threshold of the Twenty First Century 370 (2008) (in Hebrew).

5. *See generally* Will Kymlicka, Contemporary Political Philosophy: An Introduction 339 (2d ed.2002); Joseph Raz, The Morality of Freedom 400-29 (1986); Joseph Raz, *Multiculturalism: A Liberal Perspective*, *in* Ethics in the Public Domain: Essays in the Morality of Law and Politics 155, 155-76 (1994); Will Kymlicka, Liberalism, Community, and Culture 164-65 (1989); Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 82-84 (1995).

6. Avishay Margalit & Moshe Halbertal, *Liberalism and The Right to Culture*, *in* Thoughts on Multiculturalism: Multiculturalism in a Democratic and Jewish State 97 (Menachem Mautner et al. eds., 1998) (in Hebrew).

7. Mautner, *supra* note 4.

8. Mautner and Sagi, *Thoughts on Multiculturalism, supra* note 6, at 67.

9. Alison Dundes Renteln, The Cultural Defense 12 (2004).

FIRST CHAPTER: DISCUSSION OF THE JUSTIFICATION FOR RECOGNITION OF CULTURAL BACKROUND IN CRIMINAL PROCEEDINGS

This chapter discusses the justification for the recognition of a defendant's culture during criminal proceedings. The conclusions from this chapter constitute the basis and principal building blocks for the discussion in the second chapter of the article concerning possible models for the recognition of the defendant's culture.

1. The Principle of Culpability

The main reason that "cultural defense" should be recognized in a criminal trial relates to the principle of culpability. Some legal scholars assert that the criminal defendant who acts according to a particular cultural dictate is relatively less culpable than the defendant who committed the same act, without the influence of any particular cultural background. In a case where the extent of culpability is diminished due to cultural argument, this must be reflected (1) in determining whether and to what extent criminal responsibility exists or (2) as a mitigating factor in sentencing.

The principle of culpability is a fundamental principle in criminal law.[10] According to this principle, there is no crime without culpability (*nullum crimen sine culpa*).[11] Modern codes typically follow the Model Penal Code section 2.02(1), which provides that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense." The comments to the Model Penal Code note that the "demand for culpability is articulated in the Code's insistence that an element of culpability is requisite for any valid criminal conviction."[12] Paul Robinson recognizes that the provision reflects the "criminal law's commitment to requiring not only a breach of society's

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10. *See* Mordechai Kremnitzer, *Justified Deviations from the Principle of Culpability*, 13 Bar-Ilan L. Rev. 109, (1996) (in Hebrew); Sh. Z. Feller, Criminal Law Basics, 39-44 (1984) (in Hebrew).

11. *See generally* Francis Bowes Sayre, *The Present Significance of Mens Rea in the Criminal Law*, *in* Harv. Legal Essays 399 (1934); *see also* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 687 (1983).

12. Model Penal Code § 2.02(1), explanatory note (1985). "The only exception to this general requirement is the narrow allowance for offenses of strict liability in Section 2.05, limited to cases where no severer sentence than a fine may be imposed." *Id*.

objective rules of conduct, but also an actor's culpability as to the conditions that make the conduct a breach."[13] Robinson notes that "without *mens rea*, there is little justification for condemning or punishing an actor. Without culpability in the actor, causing the injury may be seen as lacking in sufficient blameworthiness to deserve the condemnation and probation of criminal conviction."[14]

Culpability also significantly influences society's perception of the severity of a crime that has been committed, or in other words, the perceived severity of a crime that has been committed. According to this principle, no criminal responsibility or punishment should be imposed on a person beyond the extent of their culpability. In general, diminished culpability evokes a relatively milder social reaction as compared to a similar case with a higher level of culpability. For example, in homicide cases, the different levels of culpability (premeditation, negligence or recklessness) produce different social reactions regarding punishment.

When a member of a cultural minority commits a criminal act which is the product of a cultural dictate or practice, this person is generally criminally responsible for the act because he or she conducted the act out of "free will." However, the enculturation process may restrict the minority defendant's ability to choose an acceptable course of action. This is because the enculturated minority defendant can only choose between a limited number of alternatives offered by the culture. In such cases, although the defendant may have acted out of "free will," it can be argued that the defendant's choice was not the result of free rational decision making. Therefore, the defendant's cultural background may influence the extent of their culpability, insofar as the criminal act is the result of the influence of their cultural background.

An inseparable part of determining the culpability of a defendant—who committed a criminal act according to a traditional cultural practice—is to uncover the special meaning a particular culture attributes to its cultural practices.[15] The justification for considering the defendant's enculturation, according to this argument, stems from the concern that the liberal state (the legislator, courts, and public prosecutor) may not correctly interpret the meaning given to the

13. Paul R. Robinson, Structure and Function in Criminal Law 207 (1997).

14. *Id*.

15. Mautner, *supra* note 4, at 376-79.

cultural practice.[16] Each practice has meaning, and the authentic meaning of the cultural practices in which people participate may be different from the meaning attributed to those practices from a liberal viewpoint.[17] A court must first understand the meaning of the cultural practice before it can correctly assess a criminal act that stems from the practice. In other words, a court needs to understand the defendant's "cultural language." Cultural language is a constituent language[18] that directs the individual to behave in a certain manner; the comprehension of cultural narratives is a necessary precondition for the correct interpretation and evaluation of the defendant's act.

For example, in *State v. Kargar*, the defendant—who emigrated to the United States from Afghanistan—was indicted for federal crimes relating to sexual assault of a minor because he had kissed his baby son's genitals.[19] The defendant explained that the act constituted an expression of affection towards the child without any sexual connotation. The fact that the defendant was indicted for such an act, and was even convicted in the first instance, reflects that the prosecutor and the court misinterpreted the meaning of the act. The gap between the court's "liberal interpretation" and the Afghani "cultural interpretation" of the act, led to the unjust or disproportionate imposition of culpability and disgrace on the defendant.

An additional example is the practice of "female circumcision." Western feminists have fought the practice of female circumcision because they see it as a male means to "police" and subjugate women's sexuality. In contrast, feminists from the third world and other authors have have argued that Western feminists do not understand the significance of "women's circumcision" in the context of the cultures that engage in the practice.[20] These critics claim that "female

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16. *Id.*; *see generally* Erin R. Melnick, Note, *Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change* 75 Ind. L.J. 711 (2000); Homi K. Bhaba, *Liberalism's Sacred Cow*, *in* Is Multiculturalism Bad for Women? 79, 81 (Joshua Cohen, et al. eds., 1999); John Frow, *Economies of Value*, *in* Multiculturalism States 53 (David Bennett ed., 1998).

17. Mautner, *supra* note 4, at 376, 384.

18. Gershon Gontovnik, *The Right to Culture in a Liberal Society and in the State of Israel*, 27 Tel Aviv L. Rev. 23, 28 (2003) (in Hebrew).

19. 679 A.2d 81 (Me. 1996) (hereinafter "Kargar"). For a more detailed explanation of the Kargar case, *see generally* Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime:* Kargar *and the Existing Framework for a Cultural Defense*, 47 Buff. L. Rev. 829 (1999).

20. *See* Mautner,, *supra* note 4, at 377-79; Bettina Shell-Duncan & Ylva Herlund, *Dimensions of the Practice and Debates, in* Female "Circumcision" in Africa 1, 1-19

circumcision" improves hygiene and health, contributes to fertility, and establishes feminine identity. Further, proponents of female circumcision claim that it is a sign of courage for a woman to endure much suffering; it reinforces her ability to withstand the tribulations of life and also indicates her membership of a higher social echelon in her society.[21]

According to Menachem Mautner, Liberalists tends to interpret the practice of "female circumcision" as an expression of suppressing female sexuality. However, in the groups where it exists the practice has many varied meanings, most of which are unconnected with sexual suppression by men. Instead, the practice is associated with values considered respectable in liberal cultures (i.e. courage, ability to withstand suffering, and camaraderie). Exposure to the meaning of the practice, in the eyes of those who practice it, reflects on the perception of culpability of the accused. In cases where a criminal act is the result of a cultural dictate or practice for which a defendant's culture has ascribed a positive meaning, the minority defendant appears less culpable than other defendants in general.

One of the arguments against the recognition of "cultural defense" is that considering the defendant's culture in a criminal trial will undermine the principle of public deterrence because people will not be deterred from performing the same or similar acts.[22] Further, because the accused would be absolved of her act(s), she would also be undeterred from similar conduct in the future. However, it should be remembered that society's need for deterrence cannot justify convicting someone who is not culpable. Moreover, general deterrence (deterrence of the public) cannot justify a more severe punishment than would be proper to impose on a defendant based on that defendant's level of culpability. Imposing punishment beyond what is appropriate

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(Bettina Shell-Duncan & Ylva Hernlund, eds., 2000); Richard A Shweder, "*What About Female Genital Mutilation?" and Why Understanding Culture Matters in the First Place, in* Engaging Cultural Differences: The Multiculturalism Challenge in Liberal Democracies 216, 220 (Richard A. Shweder et al. eds.,;(2002 Naomi Mendelsohn, Note, *At the Crossroads: The Case For and Against a Cultural Defense to Female Genital Mutilation,* 56 Rutgers L. Rev. 1011, 1031 (2004); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices",* 40 Harv. C.R.-C.L. L. Rev. 71, 71 (2005); Holly Maguigan, *Will Prosecutions for "Female Genital Mutilation" Stop the Practice in the U.S.?,* 8 Temp. Pol. & Civ. Rts. L. Rev. 391, 391-93 (1999).

21. Mautner, *supra* note 4, at 377-79.

22. Valerie L. Sacks, *An Indefensible Defense: On The Misuse of Culture in Criminal Law*, 13 Ariz. J. Int'l & Comp. L. 523, 541 (1996).

for the criminal's culpability, in order to deter others, would be exploitative.

2. The Doctrine of Equality

One argument against recognizing a defendant's culture in a criminal trial is that it undermines the doctrine of equality.[23] The message conveyed by the doctrine of equality is that everyone is equal before the law. "Cultural defense" may offend the principle of equality because it differentiates between defendants belonging to minority cultures and those of the majority culture, giving the minority defendant certain protection not afforded to most citizens. The argument here is that the law should pardon everyone equally—any other application would be impermissibly arbitrary and discriminatory.

The doctrine of equality is interpreted in two ways: formal equality and substantive equality. Formal equality means "equal treatment for all,"[24] while substantive equality aspires to attain just results, that is, equality of results. According to substantive equality, when examining whether a particular situation is unequal, it is necessary to determine whether the results are equal.[25] Thus, when claiming wrongful discrimination, it is insufficient to argue that the criminal law treats cultural minorities differently. It must be demonstrated that people who share the same relevant characteristics are treated differently and that the different treatment stems from improper reasons. In this situation, where the accused's cultural backround is a relevant circumstance, considering it should not be regarded as wrongful discrimination, but as an acceptable distinction.[26]

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23. *Id*. at 542-44.

24. For example, when admission requirements for law school at a university are the same for everyone, the academic institution acts according to the principle of formal equality.

25. The notion of substantive equality has weaved its way through the feminist movement because the promises of formal equality failed to realize the goals of feminist reformers. *See* Melnick, *supra* note 16, at 711; *see generally* Ruth Bader Ginsburg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. Chi. Legal F. 9 (1989)

26. It was well described by Judge Theodor Or in the case of *Avitan*: "It is not the 'technical' or 'formal' equality which is worthy of protection, but substantive equality, that is equality among equals. Persons, or groups of people, often differ one from the other, in their circumstances, characteristics and needs, and sometimes it is necessary to discriminate between those who are not equal in order to protect the weak or needy, and encourage them. Therefore, the question is not only whether a person is discriminated against in relation to another, but it must also be discovered whether the

Some scholars may argue that a "cultural defense" will create different standards for different groups,[27] casting doubt that the results are just. Because any group could arbitrarily decide which standards it consents to obey and which it ignores, a "cultural defense" may undermine public order and even lead to anarchy. However, this argument would only be correct if a "cultural defense" existed that pardoned members of minority cultures in a sweeping unconditional manner. Obviously, there are clearly defined conditions for applying each criminal defense, such that the law will not pardon behavior that harms important public values or interests. Moreover, a "cultural defense" does not create different standards of behavior. Such standards exist by virtue of cultural diversity. A "cultural defense" takes such existing cultural difference into consideration and recognizes those standards. "Cultural defense" is, therefore, in line with the doctrine of substantive equality and cannot be considered as wrongful discrimination.

Further criticism that the law is not applied equally and does not pretend to be so, is heard from the Critical Legal Studies movement. According to this movement, courts reflect the values and ideology of the powerful members of society and serve the interests of those members alone.[28] To retain the elite in its privileged position, to prevent radical changes, and protect the *status quo*, the law plays a particular role in maintaining social, financial, and political inequality by acting only for those who are strong.[29] If the majority is powerful and the law represents those with power, then the values protected by the law are the values that those with power wish to protect.

Two conclusions can be deduced: first, the fact that there is not a formal "cultural defense" in existing legal systems is, *inter alia*, the result of the legal subjugation and weakness of cultural minorities, which is in turn the result of their political subjugation and weakness.

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discrimination is unjustified. The distinction between different parties, however, does not constitute discrimination." *Avitan v. Israel Lands Administration*, 43(4) PADI 297, 299 (1989).

27. James G. Connell, III & Rene L. Valladares, Cultural Issues in Criminal Defenses, 7.41-7.43 (Juris Publishing 2003).

28. Omer Shapira, Jurisprudence 435-436 (2007) (in Hebrew). For the history of the Critical Legal Studies, *see generally* John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 Stan. L. Rev. 391, 400-03 (1984); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515 (1991).

29. Shapira, *supra* note 28, at 428-29.

Second, the values of minority cultures will not be granted protection and will not be promoted in any fashion so long as those cultures do not possess political and legal power.

An additional argument asserted by the Critical Legal Studies movement is that the law has a calming effect, which generates stagnation and hinders change.[30] According to Omer Shapira, legal discourse relating to rights and duties—which involve the weighing and balancing of different interests and juridical decisions—conveys a calming message to the entire community that the situation is as it should be. This process spreads a message that there is no need for change and that there are no genuine better alternatives. Consequently, greater social involvement in decision-making is avoided. Instead of taking the initiative and more actively participating in the decision-making process, citizens leave decisions concerning policy on social issues to politicians (the legislator) and courts, so that those who make the decisions gain the upper hand.[31] This phenomenon is expressed in criminal procedure when a defendant who belongs to a minority culture commits a criminal act in accordance with the ethics and dictates of their culture. In this situation, the legal system assesses this act according to the accepted rules, applying existing objective doctrines (such as "the reasonable man"), while disregarding the need to apply specialized consideration in the particular case according to the defendant's cultural background. This situation is an expression of inequality that may lead to unjust results.

To conclude, the doctrine of equality constitutes a double-edged sword in relation to "cultural defense." The doctrine requires equality before the law so that everyone must obey its stipulations without distinction. However, in an unequal social and legal reality, a "cultural defense"actually promotes the equality of the cultural minority defendant.

3. The Right to Culture

The "right to culture" is founded on the perception that culture is an all-encompassing lifestyle that covers all aspects of human existence.[32] This right is granted at three levels.[33] The first level is the individual's right to live according to her own culture without

30. *Id*. at 429-30.
31. *Id*. at 430.
32. Margalit & Halbertal, *supra* note 6, at 97.
33. *Id*. at 97-98.

interference from broader society—with the single restriction that she does not harm others. The second level includes the first level in addition to right for the cultural community's lifestyle to be recognized alongside the general society. The third level includes the previous two levels plus the right to receive support for the particular lifestyle from state institutions so that the culture may prosper.

In line with liberal values, Will Kymlicha ("Kymlicka") derives the right to culture from the right to liberty. According to Kymlicka, liberty includes being able to make choices from a variety of alternatives, and the individual's culture not only provides these alternatives but also gives them meaning.[34] The individual's choices depend upon and are linked to the cultural context. In other words, the value of "cultural affiliation" is derived from a higher primary value: liberty. In contrast to Kymlicha, Margalit and Halbertal assert that the right to culture stems from the right to an identity. The significance of an individual's identity is evidenced by the supreme importance that the individual attributes to maintaining a lifestyle acceptable to her. This includes the right to adopt what the individual considers—in her own view and that of her cultural group—are the identifying features of her culture.[35] Unlike Kymlicha, who sees the role of culture as providing a choice between alternatives, Margalit and Halbertal suggest that a particular culture is cherished by its members because it provides their lives with profound significance—not because it can offer a choice of alternatives.

Regardless of whether it is derived from the right to liberty or the right to an identity, the right to culture, like any right, imposes a duty. In this case, the right to culture imposes a duty on the liberal state to allow minority cultures to act according to their cultural traditions. The United Nations has recognized this right in clause 27 of International Covenant on Civil and Policy Rights (ICCPR):

> In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their

34. *See* Ronald Dworkin, A Matter of Principle 223-29 (1985); *see also* Kymlicka, Contemporary Political Philosophy**,** *supra* note 5, at 339; Kymlicka, Liberalism, Community and Culture, *supra* note 5.

35. Margalit & Halbertal, *supra* note 6, at 100.

own language.[36]

Although an individual may have a right to culture in international law, the recognition of this right in the criminal justice domain has engendered dilemmas. First, to what extent, if at all, should the right to culture be superseded when it conflicts with other rights and values? What is the relative weight of the right to culture when it is set against other human rights? Which cultural traditions should be protected? To answer these questions, a distinction should be drawn between accepted cultural traditions (practices) and those which are not accepted. In order to draw this distinction, we need different approaches for determining when to recognize cultural traditions.

Sebastian Poulter relies on the standard of human rights to determine when a cultural tradition should be allowed.[37] For Poulter, a cultural tradition that transgresses human rights should be restricted. If it does not transgress any human right then it should be allowed. Alison Renteln criticizes this approach, pointing out that the right to culture can itself be seen as a human right.[38] In fact, Poulter's position—that tradition should be restricted in cases where there is a clash between cultural tradition and any human right—assumes that cultural rights are on a lower level of values than other human rights. Renteln does not accept this assumption because human rights are culturally neutral; moreover clause 27 of the ICCPR does not stipulate that the right to culture is subordinate to other human rights.[39] An additional reason to resist Poulter's approach is that universal principles are by nature open to many interpretations and meanings; they are subject to disagreement; they are ambiguous and insufficiently clear to grant them the significant power of restricting cultural traditions.

Renteln suggests a different approach to determine when to allow or disallow the existence of cultural tradition. For Renteln, the right to culture should be restricted when it engenders "irreparable physical harm."[40] For Parekh Bhikku, it should be restricted whenever it

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36. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), ¶ 27, (Mar. 23, 1976).

37. *See* Sebastian Poulter, *Ethnic Minority Customs, English Law and Human Rights*, 36 Int'l & Comp. L.Q. 589-615 (1987) *cited with approval* in Renteln, *supra* note 9, at 215.

38. Renteln, *supra* note 9, at 215.

39. *Id*.

40. *Id*. at 217.

conflicts with an "operative societal value."[41] Renteln criticizes Bhikku's approach on the ground that not all traditions which contradict operative social values cause damage, and as for those traditions, there is no need to restrict them.[42] A relevant example is polygamy. According to Bhikku, polygamy clashes with the value of equality between the sexes, and should therefore not be allowed. In contrast, Renteln would argue that since polygamy does not cause irreversible damage, it should therefore be permitted.

However, even Renteln's approach is not without its difficulties. The main difficulty is the definition of "damage" varies between communities. The fact that the majority group considers that a particular practice of a minority cultural group causes damage does not mean that members of that culture would see the practice as damaging. For example, Western cultures consider that "female circumcision" causes irreversible physical damage to the woman's sexual organs. In contrast, members of the cultures that perform the ritual consider any such "damage" acceptable because the practice improves several aspects of the condition of those who are circumcised.

Similarly, Western culture sees the practice of "coining"—treating influenza in children by rubbing a hot coin on the body of the child—as damaging to the child because it leaves temporary bruising that passes with time. However, those who perform the practice do not consider the temporary bruising as damage, but rather a means for healing. Likewise, scarring is a practice used in some cultures as a means of beautification and to indicate that the child belongs to a particular tribe—and it is not seen as "damage" by the cultural members (like the way it is seen by the majority population).

To summarize, it can be argued that the right to culture is a principle that supports consideration of the defendant's culture. However, the right to culture—like any right—is relative (and not absolute). Therefore, it should be weighed in relation to other rights, interests, and values. I opine that it is doubtful whether the right to culture can have the upper hand in the face of more "eminent" rights and values protected by the criminal law such as the sanctity of life, respect for one's fellow man, and the individual's right to bodily integrity. Therefore, although the right to culture constitutes an additional reason for recognizing a defendant's culture during criminal

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41. *See* Bhikhu Parekh, *Minority Practices and Principles of Toleration*, 30 Int'l Migration Rev. 251, 251-84 (2000), *questioned in* Renteln, *supra* note 9, at 217.

42. Renteln, supra note 9, at 216-217.

proceedings, it cannot by itself justify such recognition.

4. Promoting Cultural Pluralism in Criminal Law

The term "cultural pluralism" describes a situation in which small groups coexisting within a larger society maintain their unique identities. In a pluralistic society, these minority groups are considered valuable for the dominant cultures.[43] Those who advocate the adoption of "cultural defense" within the legal system claim, *inter alia*, that "cultural defense" constitutes a means to support and promote the value of "cultural pluralism."[44] Liberal society is committed to "cultural pluralism" for a number of reasons.[45] One reason stems from the perception that pluralism maintains social vivacity, so that absorption of cultural elements from a broad spectrum of ethnic groups contributes to the dynamism and development of society as a whole. The second reason is that "cultural pluralism" is the product of the doctrine of equality. Maintaining equality between different ethnic groups requires that each group respect the right of the other groups to be different; the majority cannot punish the minority group just because it is different.[46] The third reason that "cultural pluralism" should be encouraged is because it reflects the majority's confirmation of the importance of "liberty."

Cultural pluralism is an inevitable product of a democratic society's commitment to liberty. If a multicultural state premits its citizens to live according to their traditional values, this should lead to a culturally pluralistic society. Commitment to a pluralistic policy helps to sustain different cultural identities because important ethnic values are maintained. *Cultural* identity is the main core of an *individual's* identity: it provides a fundamental component of an individual's self-definition and boosts confidence in the individual's affiliations. Thus, the promotion of cultural pluralism sustains the personal identity of minority group members and also the cultural identity of the minority group as a whole.

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43. Nationamaster.com, *available at*, http://www.nationmaster.com/encyclopedia/Cultural-pluralism (last visited Nov. 5, 2011).

44. Pieter A. Carstens, *The Cultural Defense in The Criminal Law,* 99 Harv. L. Rev. 1293, 1300 (1986).

45. *Id*. at 1300-07.

46. *Id*. at 1301.

Yet another reason to promote cultural pluralism is that the respect of the majority for the values of the minority facilitates the adaptation of the minority to the majority culture. Nevertheless, there may be a fear that "cultural defense" will actually lead to the isolation and empowerment of the minority cultural community at the expense of the individual's autonomy, and engender a sense of lack of protection for potential victims of the culture.

An additional argument that supports cultural pluralism is that ignoring the minority culture would be perceived as contempt for the minority values, engendering alienation and conflict between different groups. At least one commentator argues that "cultural defense" is necessary in a pluralistic society in order to protect different beliefs and practices from vilification, slander, and condemnation.[47] This is correct with regard to "liberal" practices that do not transgress values protected by the criminal law. However, when harmful practices are involved, this reasoning is weakened.

Post-modernist theories support the perception that the law, as it exists, is the product of the specific thoughts and "voices" of those who drafted it.[48] Scholars who espouse the Critical Approach to Law, Critical Race Theories, and Feminist Legal Theory claim that throughout history, American law has been directed by the "voice" of the white American male.[49] Some of the proponents of these approaches have asserted that the criminal law should be pluralistic (or more pluralistic than it is today), meaning that the criminal procedure should more accurately reflect the variety of voices present in society.[50] They argue that without such a change it will be impossible to ensure the fairness and justice that constitute fundamental principles of the modern liberal approach.[51] Liberals, who support the concept of

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47. Alec Samuels, *Legal Recognition and Provocation of Minority Customs in a Plural Society in England* 10 Anglo-Am. L. Rev. 241, 248 (1981).

48. Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 8 (1991).

49. Katharine T. Bartlett, Gender and Law: Theory, Doctrine, Commentary (2d. ed. 1993).

50. *Id*. Feminists, advocates of the Multiculturalism, and liberal Afro-Americans oppose the cultural domination of European-origin male descendants. They are interested in ensuring that the American culture changes, so that it will equally express the different voices of immigrants, women, and minority groups. These groups also oppose the idea that the majority reflects the "objective truth." *See* TRIBE & DORF, *supra* note 48, at 19.

51. Doriane L. Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 Colum. L. Rev. 1093, 1118 (1996).

cultural pluralism, argue that immigrants and other minority groups in the state have experience and perspectives ("voices") that differ from those of the majority and that this difference has an internal value that should be maintained.

In conclusion, the recognition of the fundamental power of culture, its influence on the individual's level of culpability, shaping of the individual's identity, and the different meanings that the culture provides for its practices, constitute the basic premises to recognize "cultural defense." Insofar as the burden of criminal responsibility is qualified by criminal culpability, the defendant's cultural influences should be exposed in the criminal trial to the extent it bears on their culpability. Additional factors such as substantive equality, individual justice, and promotion of values—such as cultural pluralism and the right to culture in a multicultural liberal state—reinforce the main argument for considering cultural arguments in a criminal procedure. Such arguments should be considered, relying on the principle of culpability, to the extent that they are relevant, genuine, and true.

This conclusion constitutes the foundation for the next chapter of this article that examines four legal models, each of which represents a different perception to recognizing a minority defendant's cultural background during a criminal procedure.

SECOND CHAPTER: LEGAL MODELS FOR THE RECOGNITION OF A DEFENDANT'S CULTURE DURING CRIMINAL PROCEEDINGS

1. The "Complete Cultural Defense Model" - Cultural Background as a New Independent Criminal Defense

One possible way to recognize the defendant's cultural background during criminal proceedings is through a new defense against criminal liability. In such a case, the defendant's cultural background constitutes an independent formal defense that eventually may exempt the defendant from bearing criminal liability. This is a radical and especially far-reaching method, and as far as I could ascertain, is not recognized in different legal systems because of reasons detailed below. Nevertheless, this is an optional model for the recognition of the defendant's culture, which has sometimes been offered but also criticized in legal literature. The model supports the creation of a new independent doctrine of "cultural defense" that constitutes an exemption for a defendant from criminal liability.

a. Arguments Against the Application of the Model of "Complete Cultural Defense"

Reduction of Culpability Does Not Justify Acquittal on the Basis of Cultural Background. The purpose of "cultural defense" is to enable defendants to present their cultural background in the court so that the court can consider this background when determining criminal liability and/or punishment. Consideration of cultural background may lead to one of two conclusions, or both. Firstly, that the defendant did not know that his acts contravened the law. Secondly, that the defendant acted according to the dictates of cultural norms and values.

In both of these situations, the defendant is less culpable than would ordinarily be the case.[52] The defendant's culpability is reduced, yet this does not mean that it is negated. This is the main reason for my opposition to the application of a model that recognizes cultural background as an independent criminal defense. Thus, so long as the defendant is in any way culpable, the accurate way to consider the defendant's culture is through more moderate models. Whether any jurisdiction has completely exonerated a cultural minority defendant based on "cultural defense" as an independent defense is doubtful. However, some jurisdictions have used more moderate models. These models consider whether the defendant has diminished liability, due to the "cultural motive," and the defendant's culture constitutes special circumstances of the crime's perpetration. If the defendant acted under conditions that warrant a criminal defense under the penal code, a variety of defenses are available to the defendant. I propose that in some cases, when the act was not committed under circumstances that warrant a criminal defense, the defendant can still claim mitigation of punishment due to the influence of culture on their acts.

The Fact That Suitable Tools and Doctrines Already Exist in Criminal Law Does Not Necessitate the Creation of a Cultural Restriction. The need for "cultural defense" as an independent defense exists in those cases in which the defendant is completely devoid of any culpability and existing defenses will not relieve him of criminal liability—even if the defendant's culture is taken into consideration. Does this exceptional situation justify the creation of a new separate formal defense? I believe that other tools exist to cope with such a case.

One tool that the investigative body possesses in a case of this

52. Renteln, *supra* note 9, at 187.

sort is prosecutorial discretion. These types of cases can be concluded without any ongoing criminal proceedings in court if the prosecutor recommends closing the case on grounds of "lack of public interest" or "lack of guilt." Another strategy that can be used when the prosecutor is impressed by the specific circumstances of the case and decides to charge the defendant with a lesser offence. An additional means involves the defendant's confession as part of a plea bargain, which may lead to conviction for a lesser crime and/or a milder punishment, such as supervision by a probation officer or community service for the benefit of the public. A further method which can be used in "lighter" offences is to claim the offence was "*de minimis*:" an act of little significance. Thus, even in cases where cultural background should exempt the defendant from any culpability, there is no need to create a new independent doctrine of "cultural defense."

Ignorance of the Law Does Not Constitute an Excuse. One argument against "cultural defense" is the possibility that the cultural minority defendant could claim exemption from criminal liability because she performed the criminal act without knowing that the act was forbidden under the criminal code.[53] However, a "cultural defense" does not only deal with the question of whether the defendant was aware of the law (because the assumption is that ignorance of the law does not constitute an excuse). Instead, the court focuses on ascertaining whether the defendant knew that their (criminal) act was forbidden, yet committed the act under the influence of cultural dictates, beliefs, customs and values that were instilled in their personality from early childhood.

Practical Difficulties. Critics of "cultural defense" claim that even if the law's recognition of "cultural defense" as an independent defense is justified, the application of the defense in practice is a task strewn with difficulties.[54]

Firstly, because "culture" has various meanings, it is unclear how the term should be defined in applying "cultural defense" as an independent defense. Another issue arises in determining which

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53. *See* Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 Ga. J. Int'l & Comp. L. 335, 335 (1986); John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 Crim. Just. J. 87, 108-09 (1986); Sacks, *supra* note 22, at 534.

54. *See* Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 Cal. L. Rev. 1053, 1054 (1994); Michal Fischer, *The Human Rights Implications of a "Cultural Defense"*, 6 S. Cal. Interdisc. L.J. 663, 688 (1998).

cultures should enjoy this defense. Should the defense also be available to sub-cultures, religious groups, or mystic cults of various sorts? How can a boundary be drawn to determine those people for whom the defense should be available from those for whom the defense should not (because they are expected to adapt their behavior to societal norms)? How is it possible to distinguish immigrants who have assimilated within the majority culture from those who have not?[55]

Another dilemma focuses on the difficulty in identifying the motive behind a criminal act.[56] Moreover, it can be argued that those who support the creation of an independent "cultural defense" have not provided a basic criterion to distinguish which practices or type of practices should be covered by this defense. Questions like these make it problematic to apply the defense, and generate controversy concerning legal and moral definitions, applications, and principles. On the other hand, it can be argued that these cases occur rarely, and even then the court may obtain experts to clarify the lifestyle, values, and norms of the defendant's cultural group. In this way, the court can use its discretion to decide whether or not to recognize the defendant's culture in the specific circumstances of the case.

Encouraging Violence Against Women: One of the criticisms against "cultural defense" is that it may encourage violence against women.[57] If the courts recognize this defense, it may provide a kind of stamp of approval for acts of domestic violence that may be sanctioned by certain cultures. At least one commentator argues that"cultural defense" may worsen the state of the victims that the defense is supposed to protect.[58] However, one problem with this argument is that the recognition of the defendant's cultural background does not only relate to violence in the family; rather, it relates to a variety of crimes. Moreover, even if "cultural defense" does give a stamp of approval to

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55. *See* Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?* 99 Dick. L. Rev. 141, 160 (1994); Fishcer, *supra* note 54, at 688.

56. *See* Samuels, *supra* note 47; Fischer, *supra* note 54, at 689.

57. *See* Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 Stan. L. Rev. 1311, 1312 (1991); Alice A. Galin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. Rev. 723, 723-24 (1994); Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 Colum. J.L. & Soc. Probs. 597, 598 (1991); Todd Taylor, *The Cultural Defense and Its Irrelevancy in Child Protection Law*, 17 B.C. Third World L.J. 331 (1997); Fischer, *supra* note 54, at 690.

58. Goldstein, *supra* note 55, at 164.

crimes of violence within the family, its application can be limited in those cases, especially in cases of severe violence. Secondly, in several verdicts, the defendants who pleaded "cultural defense" were actually women,[59] so that even if it is accepted that the defense acts against the good of women victims, in other cases it benefits them, when they are the accused.

The Need for Deterrence: It is claimed that recognition of the cultural background of a defendant belonging to a minority culture will undermine deterrence of others, who will not be deterred from performing the same or similar acts.[60] Similarly, it may affect the defendant's deterrence; if the defendant receives the message that the criminal act is "accepted" she may be encouraged to reoffend. This claim can be attacked by arguing that recidivism would be encouraged in *any* case where a defendant is acquitted due to circumstances of restricted criminal liability; "cultural defense" does not pose any unique risk.

The need for deterrence is one consideration among a range of different considerations that must be weighed. Firstly, the particular community to which the defendant belongs can be deterred by guidance and education—not necessarily by punishment of the defendant. Secondly, there is only a slight probability that the defendant who committed an act as the result of a cultural dictate will again perform the same act after she was once pardoned.[61]

Undermining the Doctrine of Equality: Critics argue that "cultural defense" undermines the doctrine of equality.[62] Difficulties with the definition make the defense problematic because some cultural groups are allowed the defense, while other are not.[63] The difficulty in creating these definitions means that adoption of "cultural defense" will undermine equality more than it will promote it because the basic principle of the doctrine stipulates that all men are equal before the law.[64] This reasoning can be disputed, because the doctrine

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59. Fischer, *supra* note 54, at 690-91.

60. Sacks, *supra* note 22, at 541.

61. For a comprehensive discussion on the validity of the deterrence rationale in punishment in cases of "cultural defense", *see* Guy Ben-David, *Cultural Background as a Mitigating Factor in Sentencing in the Federal Law of the United States,* 47 Crim. L. Bull., no. 4, 543, 548 (2011).

62. Sacks, *supra* note 22, at 542-45.

63. Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 Harv. Women's L.J. 57, 62 (1994).

64. Sacks, *supra* note 22, at 542. Also, see the discussion in Chapter I, section (2)

of equality will in this case prevent acting justly with the defendant. Moreover, equality is not blind; the fact that everyone is subject to the same laws is correct and desirable. However, the law cannot close its eyes and ignore minority cultures: the cultural values and norms to which members of each culture are committed are of importance. Blind application of the doctrine of equality may erode important principles of the criminal law, such as individual justice and the principle of culpability.

The Application of "Cultural Defense" Would Create Different Standards for Different Groups.[65] Critics argue that the defense would allow each sub-culture in a society to decide which standards it would obey and which it would ignore, and it would therefore undermine social order and even lead to anarchy. However, this assertion may be too far-reaching. It would be correct if the cultural restriction led to a sweeping unconditional pardon for all minority members. It is clear however, that there are conditions for the application of any criminal defense, so that any injury to particular public values or important public interests will not be excused. Moreover, the defense does not create new standards for behavior because these standards exist in any case by virtue of the cultural difference. The defense simply puts the criminal act in context based on the cultural difference. Furthermore, the conditions required for application of the defense in a given case may be tailored to prevent any harm to the public order or anarchy.

Summary: Recognition of "cultural defense" as an independent defense involves many disputes and difficulties concerning definition, application, and legal and moral principles. Some of these difficulties can be overcome while others can be refuted. Beyond the difficulties in practical application that I have discussed, there is an additional disadvantage in accepting such a model: the risk of sliding into erosion and harm to the principles of criminal law.

According to this model, it is sufficient to grant an exemption to the defendant from criminal liability if a cultural act is the result of a particular practice. This defense does not relate to a specific case, defendant, or specific circumstances. According to the model in question it is the *culture* that receives the stamp of "approval" of criminal law; the law actually exempts the culture more than it exempts the defendant standing trial. This point of view overlooks the grounds for recognizing such a defense—the essence of the "cultural defense"

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of this article.

65. Connell & Valladares, *supra* note 27, at 7.41-7.43.

centers around the cultural *practice* rather than the perpetrator.

From all of the above, I conclude that the defendant's cultural background should be recognized with the help of existing criminal law tools and doctrines, and does not require or justify the creation of a separate cultural defense. Such a creation which would be a radical model that is not generally known to be applied in any legal system—for good reason. Therefore, I am inclined to reject said model, and think that it is incorrect and undesirable.

2. The "Integrated Model" Integration of Cultural Arguments Within the Existing Criminal Defenses

Another way to recognize the defendant's culture in a criminal procedure is by integrating cultural arguments within the existing criminal defenses.[66] I have dubbed this model as the "integrated model."[67]In this discussion, I relate the advantages and disadvantages of this model, comparing it to other models mentioned in this article.

a. The Rationale for the "Integrated Model."

According to the above-mentioned model, a defendant who committed a criminal act under the influence of a particular culture is "protected" by a defense against criminal liability, if the necessary conditions for the defense are met. Recognizing the defendant's culture at this stage involves an understanding of the case and its circumstances in the view of those who belong to that culture. This cultural information is essential, without which it would be impossible to attain suitable and just results. One example demonstrating the need for this model is as follows: as a Buddhist is praying to the statue of Buddha in a particular temple, an unidentified individual jumps into this sacred sanctuary with a hammer in his hand and marches towards the statue in order to smash it. In the split second when the hammer is raised above the statue of Buddha, the Buddhist, who worships the religious icon, pushes the would-be vandel aside and injures him. If the

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66. For a comprehensive discussion on the following model, *see* Guy Ben-David, *The Integration of Cultural Arguments in Criminal Defenses*, 7 Netanya Acad. Coll. L. Rev. 201 (2010) (In Hebrew).

67. This name fittingly reflects the model's nature, integrating cultural arguments within the foundations of the formal defenses determined by the Penal Law. In contrast to the model of "complete cultural defense" that positions cultural background as a new and independent defense, the defendant can employ the "integrated model" to present cultural arguments integrated and intertwined within the components of existing defenses.

Buddhist is tried for the attack, he should be able to argue "self-defense" which will "provide a defense for the use of force to protect persons or property from unlawful aggression."[68]

Without the presentation of the defendant's cultural background, the court will be unable to assign the appropriate extent of culpability because it will not be able to understand the motive for the act. In the given case, the court should be aware of the defendant's cultural background in order to understand the link between the Buddhist defendant and the statue. If the court does not comprehend the "cultural motive,"the statue of Buddha will perhaps be considered simply as a statue like any other, or even like any other property generally. This will in turn influence the assessment of the defendant's act and its proportions. In this case, the court is exposed to the defendant's cultural background as part of an existing "self-defense" and will eventually decide whether or not to to apply self-defense to the defendant's case. The court's exposure to the defendant's cultural background, when relevant, is necessary because it helps the court to understand and evaluate the true meaning of the defendant's acts and whether any real alternatives were available to the defendant. Acceptance of a cultural argument is subject to the rules of evidence and the court weighs this argument according to its impressions of the truth and authenticity of this evidence. First, the court must "raise the cultural curtain" in order to expose the cultural argument with all its meanings. In order to do so, the court has to examine whether the necessary conditions for the defense exist from the subjective viewpoint of the defendant on trial. At the second stage, the court must assess the authenticity of the cultural argument, under the assumption that it is relevant and subject to the rules of of evidence. The court can decide not to attribute any weight to this argument because it did not consider the argument authentic, because the argument was not properly established, or because the argument was refuted by other evidence.

b. The Advantages of the "Integrated Model."

Firstly, this model does not involve the creation of a new independent defense or the use of new tools in the criminal arena, and

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68. *See*, *e.g.*, Model Penal Code §3.06 (2010) (stating the basic rule governing justification for the use of force to protect property); *see also* Robinson, *supra* note 13, at 435-50; Joshua Dressler, Understanding Criminal Law, 259-76 (5th ed. 2009).

it is applicable without the need for any special resources.

Secondly, the framework of defenses against criminal liability is employed after the defendant has complied with the statutory conditions for the application of the defense. Thus, the defendant would be entitled to a defense because circumstances exist that create the exception and not by virtue of his membership in any particular minority culture. Thirdly, the message delivered by acquitting the defendant according to the "integrated" model differs from the message that might be understood under the "complete cultural defense" model. The foundation for acquittal according to the "complete cultural defense" model is the defendant's culture. This is in contrast to acquittal under the "integrated" model, which relies on compliance with an existing criminal defense. If it is decided that the defendant acted under the circumstances of an accepted defense, the defendant's acquittal will convey the message that the act committed is forbidden but in the unique situation that the defendant encountered, the acts are exempted by law. The fact that a particular defendant was acquitted does not suggest that there will be an acquittal in a similar case where another defendant committed the same crime.

A fourth advantage lies in the very fact that this is a moderate model. The intergrated model represents the middle path: the recognition of the defendant's cultural background to the extent that it is possible to exempt the defendant from criminal liability. On the one hand, it does not ignore the defendant's cultural background, where this is a relevant datum for judging the criminal act. On the other hand, it does not recognize the defendant's culture as the basis for an independent defense.

The "punishment" model recognizes a defendant's cultural background, but only at the stage of sentencing. Under the "punishment model," a court treats the defendant's background like any other datum that may mitigate punishment after a conviction. The defendant's diminished culpability is expressed in a lighter sentence. However, sometimes the defendant has only a very low level of culpability such that it would be unjust to convict the defendant at all, even if the punishment is mitigated. Therefore, one of the advantages of the integrated model is that it allows the court to weigh the defendant's cultural background even before sentencing.

A fifth advantage for the "integrated" model is that it does not recognize harmful practices, just because the defendant acted under cultural dictates. The model does not accept cultural values and norms

that contradict the values and norms of the majority culture. Under the "integrated model," a defendant who acted according to a particular cultural stipulation will not be exempt from criminal liability. In other words, any breach of norms, values and principles protected by criminal law will not be exempt unless the case falls under a generally applicable statutory defense. Furthermore, evidence of the minority culture influence on the defendant will only be allowed where the act was committed in circumstances that the law had from the outset decided it would exempt defendants in general. Thus, this model does not allow any injury to the rights and liberties of others on account of the principles, values, and morality of that minority culture. According to said model, there is no justification to recognize the practice of honor killing within the family as a defense against criminal responsibility in murder cases or any other 'harmful' practices which were not committed under conditions that permit an existing statutory defense.

A sixth advantage of this model stems from the "*de minimis*" defense, which allows an exception for trivial offenses.[69] In such circumstances, a court, considering the background of the cultural minority defendant, may exempt that defendant from liability for a relatively minor infraction. In cases such a *Karger*—where the cultural practice does not cause harm, infringe any human right, or injure the public interest—a court may dismiss the defendant's acts as *de minimus*. The "*de minimis*" defense can actually constitute an independent cultural defense, but only in cases which do not provoke cultural or moral antagonism as in the case of *Kargar*.[67] A further example relates to possession of a small amount of drugs, in cases where the defendant's culture permits the use of the drug to heal certain illnesses. If the defendant can prove that they held the drug solely for medical purposes, in accordance with their cultural beliefs, then the case should be dismissed as *de minimus*. It is true that in such cases, the prohibited cultural practice would receive a seal of approval.

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69. *See* Model Penal Code § 2.12 note (2010): "Section 2.12 authorizes the court to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law. It directs the court to dismiss a prosecution if one of the three conditions exists: (1) the defendant's conduct was within a customary license or tolerance; or (2) the defendant's conduct neither caused nor threatened the harm sought to be prevented by the law defining the offense, or did so only to a trivial degree; or (3) the defendant's conduct presents such other extenuations that it cannot reasonably be regarded as within the legislative prohibition."

[67] 679 A.2d 81 (Me. 1996).

However, this decision would only occur after a court has considered and balanced the entirety of the rights, principles, values, and interests involved. Thus, the "*de minimis*" defense, like the discretion of the prosecution not to try a case in the absence of public interest, both constitute appropriate filters to provide a defense against criminal liability.

c. The Disadvantages of Recognizing the Defendant's Culture Within the "Integrated Model."

One disadvantage is that the model enables the judges to apply broad discretion in order to dismiss cultural arguments; an independent defense would require a court to devote independent discussion to such arguments. For instance, while one judge would agree to recognize a particular act as falling within the boundaries of the "*de minimis*" defense, another judge with a different opinion might think otherwise.

To summarize, the "integrated model" is a moderate model that considers the defendant's cultural background to allow the defendant to explain her actions in the context of the specific circumstances within which she acted—but only when the acts are linked with the defendant's cultural background and are committed under conditions that meet an existing defense. This is a moderate model because it only considers the defendant's cultural background if the case falls within a situation in which the legislator would anyway exempt the defendant from criminal liability. This model is not fraught with the practical difficulties of creating a new criminal defense, and does not engender legal, moral, or ethical antagonism as would the "complete cultural defense" model.

Within the framework of the next model, I discuss the defendant's cultural background as an issue to be considered for mitigation of punishment.

3. "The Punishment Model" - Recognition of the Defendant's Cultural Background as a Mitigating Factor in Sentencing

Punishment is an essential concept in criminal law. The punishment model recognizes the defendant's culture as a mitigating factor in sentencing.[70] *Prima facie*, the punishment model of "cultural

70. For a comprehensive discussion on the punishment model, *see* Ben-David, *supra* note 61.

defense" appears to strike the correct balance between different interests. The model does not exempt the defendant from criminal liability, but it recognizes the cultural argument to the extent that it is genuine and relevant. The model then translates this recognition into mitigation of the type or extent of punishment.

According to the "punishment model," the defendant's cultural background is recognized in order to mitigate a punishment irrespective of the framework of criminal liability. Factually, the defendant has already been convicted of the crimes attributed to him; this is so regardless of whether he defended himself by means of cultural arguments and those arguments were rejected, or whether such arguments were not voiced at the trial stage. In the punishment model, the defendant may present evidence to be considered in determining his punishment, and to establish the authenticity of the "cultural motive" by virtue of which the crime was committed. The goal at this stage of the criminal procedure is to prove to the court that the defendant's extent of culpability was diminished as a result of the cultural background to which the defendant belongs, thus entitling the defendant to a mitigation of punishment.

a. The Advantages of Recognizing the Defendant's Cultural Background at the Sentencing Stage.

The message delivered by recognizing the defendant's culture according to the punishment model is that the criminal act was forbidden, and that any defendant who breaches the law is liable for sanctions without distinction and without any connection to the culture to which they belong. The message is sharp and clear: a defendant who belongs to a specific minority culture and commits a criminal act in the context of his culture cannot be exempt from criminal liability (under the assumption that he did not commit the act in circumstances recognized under an existing formal defense). The message transmitted to the public at large—and specifically to the defendant's cultural community— is that everyone is equal before the law and there is no pardon for a defendant who violates the law, even if they acted in accordance with norms, values, or dictates of their cultural community.

Recognition of the defendant's cultural background as a new complete defense or by integrating cultural arguments into existing formal defenses leads to a dichotomy, expressed by the alternatives of conviction or acquittal. Contrastingly, considering culture at the sentencing stage enables the judge to assign the appropriate type and

extent of punishment for the defendant, in accordance with the extent of her culpability. Further, culture is only considered insofar as the enculturation process influenced the defendant's behavior, values, and personality. Thus, considering the defendant's culture at this stage enables the court to choose a solution along a continuum of increasing severity, allowing the court discretion for a broad array of actions.[71] When determining punishment, the judge is entitled to weigh different rationales for punishment (such as retribution, rehabilitation, incapacitation and deterrence) while considering their validity for the specific case. In this way, the judge is faithful to competing interests such as the extent of harm to the victim, the promotion of cultural pluralism in criminal law, and allowing the expression of "the right to culture."

It is also possible to argue that recognition of the defendant's culture at the sentencing stage does not necessitate legislation or any additional resources in order to apply said model. Additionally, this model may make it unnecessary to raise cultural arguments at earlier stages of the criminal procedure, thus streamlining the trial and preventing any unecessary complication and lengthening of the process.

b. Critique of Considering Culture at the Sentencing Stage.

First, the critique that is voiced against recognizing cultural background at any stage of the criminal procedure is equally valid at the sentencing stage. This critique is that by recognizing cultural background in the criminal process, it disseminates a public message that members of minority cultures are entitled to "privileged consideration" and in fact are not subject to the same standards as the rest of society's citizens.[72]

Secondly, the defendant's request that the court consider her culture may be viewed as an unjustifiable request to excuse her violent act merely because it is accepted in her cultural community.[73] In doing

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71. Gabriel Halevi, *The Impact of Defense Arguments Based on the Cultural Difference of the Accused in the Criminal Law of Immigrant Countries and Societies*, 51 J. Migration & Refugee 13 (2009).

72. *See* Kelly Diffily, Comment, *Protecting the Federal Sentencing Guidelines: A Look at Congress' Prohibition of Cultural Differences in Federal Sentencing Determinations in the Wake of the 2003 Protect Act*, 78 Temp. L. Rev. 283 ,255 (2005).

73. *Id*.

so, the court disregards the liberties and rights of the victims, especially women and children, who commonly migrate to the country in order to enjoy those rights and liberties which could not be enjoyed by them in their countries of origin. Further, mitigation of punishment may perpetuate the message that the victims of the crime have no suitable representation in court, thus strengthening their sense of victimization.

Another argument revolves around the fact that the request for consideration of cultural background as part of sentencing determination has often been raised by women defendants. The argument is that if women ask the court to consider their cultural background when they are accused of committing particular crimes, then a man belonging to the same culture can similarly claim that his culture allows him to engage in violent domestic behavior.[74]

Several arguments can be presented to counter these critiques. First, even if the cultural argument is recognized at the sentencing stage, the court must still balance the cultural claim against other important interests, including the victims' interest not to be harmed. Further, it may be argued that the punishment model does not engage in impermissible discrimination, but rather promotes a permissible distinction. This is because the distinction is based on differing relevant characteristics (for the determination of punishment) between defendants belonging to the majority culture and defendants belonging to minority cultures. Insofar as the extent of culpability is a substantive—but not an exclusive—factor in determining punishment, then considering the defendant's cultural background to the extent it influenced the defendant's culpability, is not impermissibly discriminatory.

Thus, in contrast to the recognition of a defendant's culture as an independent new defense (the "complete cultural defense model") or the integration of a defendant's cultural background as part of the components of an existing defense (the "integrated model"), recognition of cultural arguments at the sentencing stage has an important and principled advantage. While the two previously mentioned models are instrumental in determining a choice between acquittal and conviction, at the sentencing stage the judge has the discretion to impose a particular punishment from a graded continuum of punishments. This means the judge can impose the punishment that

74. *Id.*

is most fitting for the specific case. The appropriate punishment is the result of weighing the entirety of the data and interests involved in the case, while adapting the punishment to the specific defendant on trial.

The advantage of the consideration of culture at the sentencing stage is due to the flexibility of the punishment, which reflects the flexibility of a legal system committed to ensuring individual consideration and personal justice towards a particular defendant. This flexibility enables the court to assign greater weight to the cultural background in one case and lesser weight to this factor in another case, and in both cases the results will be seen as appropriate and just. Any cultural practice or criminal act peformed should be distinguished according to the court's discretion. while considering the message that will be conveyed as a result of the type and extent of the punishment imposed. Mitigation of punishment where the defendant possesses drugs under cultural belief that the drug has medical powers, does not justify mitigation of punishment for a defendant belonging to the same culture who advocates female circumcision. The court's discretion depends, as always, on the severity of the offense, its unique circumstances, the defendant's motive, and other relevant factors which allow the court to distinguish between cases. The range of discretion open to the court allows it to accept some practices and to give them significant expression by substantially mitigating the extent of punishment, while it also allows the court to reject a cultural argument or give it little weight in other cases.

So that the court can assign the correct weight to cultural background and the extent of its influence on the defendant's behavior, evidence of this background should be presented to the court. One way to do this is to allow the defendant to introduce authoritative witnesses regarding the cultural practices, who can clarify the defendant's culture. Another method would be to ask the probation service to prepare a report including consideration of the defendant's cultural background. It is also possible to anchor the method for presentation of such evidence in the law, such as a sentencing guideline that would mandate consideration of the defendant's cultural background, if relevant, when determining the verdict.

4. The "Disregarding Model" – Lack of Consideration of the Defendant's Cultural Background in a Criminal Procedure

Several scholars oppose cultural defenses in regardless of form.[75] I will call this approach the "disregarding model." Within the description of the complete cultural defense model," I noted several arguments against the application of a cultural defense. These arguments constitute the foundation and justification for the "disregarding model". The consequence of adopting the "disregarding model" is that no evidence regarding the defendant's cultural background is admissible during the criminal procedure because this is considered irrelevant to the determination of culpability or punishment.

THIRD CHAPTER: THE PROPOSED SOLUTION – THE "RELATIVE NORMATIVE MODEL"

Each of the four models described in this paper presents a different way to relate to the defendant's cultural background, and each model has its advantages and disadvantages. I am led to the conclusion, therefore, that the solution does not lie in the strict application of one particular model, but rather in the creation of a "mixed" model that constitutes a synthesis of the following three models: the "integrated model," the "punishment model," and the "disregarding model." I dub this model as the "relative normative model," because it involves the varying application of each of the above-mentioned three models, while the basic assumption is established on a foundation of normative assumptions. Because this is a relative normative model, any society and any legal system can adapt this model to its system, drawing their own normative boundaries for the application of the model.

1. The Rationale for the Creation of the "Relative Normative Model"

The suggested model asserts that there is not, and it is not proper that there should be, a single inflexible model or rule concerning the recognition of a defendant's cultural background by a legal system during a criminal procedure. To prove the validity of this argument I

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75. Elizabeth Martin, Note, *All Men Are (or Should Be) Created Equal: An Argument Against the Use of the Cultural Defense in a Post-*Booker *World*, 15 Wm. & Mary Bill Rts. J. 1305 (2007);. Lyman, *supra* note 53, at 108-09; Sams, *supra* note 53, at 337; Fischer, *supra* note 54, at 688; Sacks, *supra* note 22, at 550; Goldstein, *supra* note 55, at 147-48; Spatz, *supra* note 57, at 626.

shall ground it on two radical events: The first is an act of murder committed against a background of transgression of the family honor code,[76] and the second is a cultural practice such as the one previously described in the *Kargar* case.

Our moral intuition calls for the censure and denunciation of murder in any form, even when a murder is committed in observance of family honor codes common in some cultures. However, considering the defendant's cultural background in *Kargar*, the conduct in that case—although generally undesirable—seems forgiveable. The source of the different ethical, moral, and legal considerations lies in the distinction between the two acts—a severe homicidal act to uphold the value of honor, causing the death of the victim, as opposed to an act of "little significance" termed as a sexual assault in legal language. The distinction between these two contrasting cases speaks to many more such cases on both sides, yet it also speaks to the existence of many cases that exist in the middle of these two extremes. The need to draw such a distinction between different cases and defendants necessitates the adoption of a flexible model by the courts. A method that can be applied to appropriately reflect the proper balance between the rights, principles, and interests involved in the unique circumstances of each case.

2. Outlining the Court's Discretion in Applying the "Relative Normative Model"

The question for discussion is which of the three models should the court apply in the case brought before it? To answer this question, I draw distinctions among the "integrated model," the "punishment model," and the "disregarding model." The first two models are "positive" models because they both allow for recognition of the defendant's cultural background. While the "integrated model" allows consideration of this data when criminal liability is determined, the "punishment model" allows this at a later stage: during sentencing. In contrast, the "disregarding model" is a "negative" model that does not allow any consideration of the defendant's cultural background at any stage of the criminal procedure. In the following discussion I shall

76. For a comprehensive discussions on Honor Killing, *see* Wendy M. Gonzalez, *Karo Kari: Honor Killing*, 9 Buff. Women's L.J. 22 (2000/2001); Rachel A. Ruane, Comment, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 Emory Int'l L. Rev. 1523 (2000); John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 Cal. W. Int'l L.J. 177 (2010).

indicate the stages where the application of the "relative normative model" is desirable.

a. The Mode of Application for the "Relative Normative Model."

At the first stage a court should ask whether, in the defendant's view, the defendant's acts were committed under the conditions of an existing defense against criminal liability. If it was, then the case should be treated according to the "integrated model." The defendant should be allowed to present her cultural background, so that the court can examine the authenticity of this argument on the basis of evidence that can reinforce and affirm the argument. The defendant's arguments must comply with some or all of the statutory conditions for the application of the defense, while the court examines the act and its circumstances from the viewpoint of the member of the minority group. If the court is convinced that the defendant did indeed act under the conditions of the defense, then the defendant will be exempt from criminal liability. If the defendant does not argue that their act was conducted under the conditions of a particular defense, then the criminal act committed by the defendant must be examined according to several parameters detailed below. If a positive answer is given to one or more of these parameters, then the "disregarding model" should be applied.

At the second stage, if a defendant has not argued that the act was committed under the conditions of a particular defense, it is necessary to ask whether the crime is a homicide. If so, the case should be channeled to the "disregarding model." Recognition of the defendant's cultural background will not apply in cases of homicide. This rule reinforces the principle of the sanctity of human life found in many legal system. Because homicide cases such as "honor killings" or cases of "infanticide" cannot be considered for mitigation of culpability or punishment, the rule sends a clear message that no cultural value, however important, can outweigh the sanctity of human life.

In fact, as part of this stage, any society is entitled to set a "red line" to determine in which criminal cases it will not recognize the defendant's culture, and to channel these cases to the "disregarding model." For example, a State legislature may determine that the "disregarding model" should also apply in cases involving certain severe crimes of violence. On the other hand, the same legislature may determine that only a homicide committed with the mental element of "intent" should be channeled to the "disregarding" model, while other

homicidal acts committed under "milder" mental states (such as recklessness) should be channeled to the "punishment" model.

These rules so far seem out of line with the first part of this article regarding the justification for recognizing a defendant's culture in a criminal trial. It was argued that when a defendant acted under a specific cultural dictate, it should be grounds for diminished responsibility. However, according to the proposed new model it is suggested that no such special consideration should be given in cases of homicide or a severe violent crime, even if the perpetrator acted according to a specific cultural dictate. The answer is that this is where expression is given to the necessary normative balance between "tolerable" cultural dictates—that are exempted criminal liability or mitigated in sentencing—versus "harmful" cultural dictates which cannot be tolerated in a democratic society.

At the third stage, if the defendant does not claim that the act was conducted under conditions of a particular defense and if the case is not one of homicide, then the case should be channeled to the "punishment model." Within the framework of the "punishment model" a court should examine the several following parameters that can assist it in correctly evaluating the defendant's culpability.

b. The Parameters that can Assist the Court in Evaluating the Defendant's Culpability.

The extent of the defendant's assimilation within the majority culture may assist in evaluating culpability. A cultural minority defendant's knowledge of majority culture may be assessed through the following non-exclusive factors: (1) the defendant's period of residence in the state (2) the language that she speaks (3) external signs, such as dress and behavior (4) the place where the defendant was educated (5) the defendant's occupation (6) whether the defendant was in contact with government bodies such as welfare, nursing, health authorities, etc. and (7) the defendant's natural environment.

A new immigrant who arrived in the host country and soon afterwards performed a cultural practice that constitutes a criminal act should be distinguished from a person who lived in the host country for many years prior to committing the crime. Similarly, with regard to the argument of "ignorance of the law," there is a difference between a new immigrant and someone who has lived in the country for many years. The fact that a new immigrant does not speak the local language hinders effective interaction with neighbors who do in fact speak the

local language. A person who does not speak the state's official language cannot be presumed to have assimilated within the majority culture. For example, people who live for many years in the Chinatown region of New York City live in a Chinese community, are surrounded by people speaking Chinese, and work in an area where almost everyone is Chinese; there is no need for these people to speak any other language, and so they do not. Such persons cannot be considered to have assimilated within the American majority culture. Thus, they will have diminished culpability when they perform crimes dictated by Chinese culture in comparison to people who are fully assimilated within the majority culture. Finally, the defendant's occupation, the place where she acquired her education, and her close environment can testify to the extent of her exposure to, and assimilation with, the majority culture.

Under an additional parameter, it is necessary to ask whether the criminal act that the defendant performed has an "additional cultural value." This parameter aims to measure how positive the act is in the eyes of the cultural community to which the defendant belongs. A good example of this is the case in which a defendant possessed drugs known to have special medical powers and held them with the intention of curing an illness or medical symptom.

Another parameter which may indicate the extent of the defendant's culpability is the extent the defendant's arguments are supported by expert evidence. The fact that the defendant's arguments are supported by expert witnesses (sociologists, anthropologists, etc.) grants those arguments a dimension of authenticity.

The court is also entitled to examine whether or not the victim belongs to the defendant's culture and whether the victim of the crime agreed to the performance of the crime. In some cases, the victim of the defendant's crime will belong to the same culture as the defendant. In such cases, if the victim being of the same culture of the defendant, willingly and freely consents to the performance of the crime, then the defendant's culpability is less than in another case where the victim did not consent to the performance of the crime.

Yet another parameter examines whether there was a process of conciliation-mediation-compensation between the victim of the crime and the defendant. An example is the "*soulha*" process accepted in traditional Arab cultures. In his article "*It is about time for a Soulha*," Israeli Justice Ron Shapira notes that the "*soulha*" is not just an agreement or mediation process between the person harmed by the

crime and the perpetrator.[76] The "*soulha*" is a traditional institution for the settlement of disputes in Arab society.[77] It constitutes an expression of the main phenomenon that characterizes the development of the legal system, including the Israeli legal system, that is, the evolution of alternative procedures for the settling of disputes outside the courts system (alternative dispute resolution).[78]

The criminal mediation process is based on the amelioration of the relationship between the victim and the person who harmed them, where the substance of the mediation is to mend the relations between the victim and the perpetrator.[79] This theory, known as the "Theory of Ameliorative Justice," views the injury to the victim, and the victim's community, as the focus of the criminal incident. This contrasts with the traditional perception of criminal law that focuses on the injury to the law and the general interest of the public that stems from the criminal act.[80] Under Shapira's approach, several factors justify recognizing the practice of "soulha" when considering culpability. These include the development of criminal law, the wishes of the victim, the importance of compensating the victim, and the mediation process between the injured person and the offender.[81] I am convinced that "*soulha*" constitutes a relevant consideration when determining punishment, though it should be subordinate to the specific circumstances and other considerations for punishment.

A court may consider other aspects to bear on culpability. For example, consideration may be given to whether the cultural community will impose sanctions on the defendant and similarly, whether the defendant's cultural community will act to prevent the repetition of such cases. A court should consider additional questions to clarify the proper extent of consideration, if at all, of the defendant's cultural background. It is noted that this proposed list of parameters for consideration is an "open" list because there may be other useful parameters for evaluation of the defendant's extent of culpability. Some of these parameters can also be used or given extra weight to evaluate the defendant's culpability and the authenticity of her cultural

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76. Ron Shapira, *It is about Time for Soulha*, 48 Israeli Bar L. Rev. (Hapraklit) 433 (2006) (In Hebrew).

77. *Id*. at 435.

78. *Id*. at 441.

79. *Id*. at 443.

80. *Id*.

81. *Id*. at 458.

arguments within the "integrated" model.

SUMMARY

In the first chapter of this article I discussed the justifications for the recognition of a "cultural defense" doctrine in criminal procedure. The conclusion from this part of the article led me to discuss whether it is proper to recognize the defendant's cultural background during a criminal procedure and how t§his should be done. In response to this question I suggested four legal models, where each model described and reflected different consideration and levels of recognition for the defendant's cultural background during criminal procedure.

While the "complete cultural defense model" advocates the creation of a new cultural defense against criminal liability, the "integrated model" supports the integration of cultural arguments within existing defenses. The "punishment model" recognizes cultural arguments as a mitigating factor in sentencing. In contrast to these three models, the "disregarding model" reflects a different approach that views the defendant's culture as an irrelevant datum in criminal procedure, and does not give it any consideration. Each model involves advantages and disadvantages in comparison with the other models. The fact that each model may be suitable for particular cases and certain circumstances led me to conclude that the solution to the underlying issue of the thesis cannot be found in the strict application of one of these models for all cases of "cultural defense." Rather, the solution can perversely be found in the appropriate application of each of the suggested models. I therefore reject the preference of one model over other models, and propose that a synthesis of the several models be used. I dubbed this scheme the "relative normative model." According to this model, the advantages and disadvantages of each model are weighed and one of the models is chosen to be applied as is appropriate for a particular case brought before the court. Since a suitable solution for the thesis must be founded on normative consideration, I think it is appropriate that the "relative normative model" should not include the "complete cultural defense." It appears that the application of this model would undermine liberal norms, values and principles and lead to a slide down a sharp slope which might destabilize important liberal values in a society that advocates the protection of human rights. Nevertheless, it is quite conceivable that different legal systems will choose to adopt the "relative normative model" within which, when the crime was committed in the setting of

particular circumstances, it will be possible to channel the case brought before the court to a "complete cultural defense."

As noted, the "relative normative" model combines three models, each of which offers a different approach to the issue of recognition of a defendant's cultural background in the criminal procedure. Those approaches ranged from complete disregard for the defendant's culture, to considering culture as a mitigating factor in sentencing, and ending with the integration of cultural arguments within the framework of existing defenses. The difference between these approaches necessitates the determination of guidelines that would channel each particular case to one of the suggested models. The court should apply the "relative normative model" for any case in which the issue of "cultural defense" arises. One of the advantages of this model is its flexibility and ability to be adapted for any society, any legal system, or any time.

In order to facilitate the application of said model, several parameters were suggested in order to construct the court's discretion and to assist the court in finding the solution for the particular case. This is an open list of criteria, and the court is entitled to add additional criteria in order to draw a balance between them or to assign a special weight to some of them.

The discussion of "cultural defense" first arose in the United States for debate in literature and litigation during the 1980s. Since that time, the issue has been widely discussed. However, deciding on the legal regulation of this issue raises legal, moral, and pragmatic difficulties. This article has discussed some of the dilemmas that "cultural defense" involves and even suggested pragmatic solutions for these dilemmas.