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VARIOUS KINDS OF CULTURAL DEFENCE IN THE CRIMINAL LAW

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The article suggests a way to overcome the reluctance to grant a defence for culturally motivated non-compliance with the criminal law by recognising various kinds of cultural defences. Cultural defence as an *excuse* enables courts to both declare the expectation that the minority will adjust their practices to criminal law prohibitions by perceiving the culturally motivated non-compliance as wrong, and nonetheless excuse the defendant on the ground that the cultural motivation negates her culpability. Cultural defence as a *justification* conveys a respect for cultural autonomy by permitting the defendant to adhere to cultural practices despite its infringement of the criminal law prohibition. Classifying the cultural motivation as an *offence modifier* implies that the reasons for criminalisation do not apply to the cultural practice. The variety of cultural defences would have to be subject to a normative constraint for cases in which the cultural practice infringes upon the polity's fundamental values.

I. Introduction

Multicultural societies are typically willing to grant a certain amount of cultural autonomy to minorities. The limits of such autonomy are often dictated by criminal law. Given the expectation that minorities will adjust their practices to the values protected by criminal law, courts are reluctant to grant a defence for culturally motivated non-compliance with criminal law prohibitions.

This article claims that a multicultural society ought, in appropriate cases, to grant a defence for culturally motivated non-compliance with criminal law prohibitions. In order to overcome the reluctance to grant such a defence, various kinds of cultural defences, rather than one unified defence, should be granted. The difference between the various kinds of cultural defences should be based on the theoretical distinction between different types of criminal law defences: excuses, justifications and offence modifiers. Each kind of defence will convey a different message with regard to the status of the cultural practice. The variety of cultural defences would have to be subject to a normative constraint for cases in which the culturally motivated practice infringes upon the polity's fundamental values.

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Although the main purpose of the article is to lay out the basis for a variety of cultural defences, analysing culturally motivated non-compliance in light of the distinction between criminal law defences will enable us to gain additional insights on criminal law defences more generally.

The article proceeds as follows. Part II exposes the reluctance to grant a cultural defence and offers a way to overcome this reluctance by granting various kinds of cultural defences rather than one unified defence. Part III focuses on the cultural defence as an excuse and points out the need to adjust the traditional conditions of excuse to culturally motivated non-compliance. Part IV discusses whether cultural defence as a justification should, in appropriate cases, be granted. It refers to the unique nature of the justification in cases of culturally motivated non-compliance, and to the need to develop a new cultural defence as justification. Part V shows that there may be cases in which the cultural motivation for non-compliance functions as an offence modifier that cancels the criminal law duty. The Concluding Remarks emphasise both the different message conveyed by granting each kind of cultural defence with regard to the status of the cultural practice and the insights on criminal law defences in general that can be gained by analysing culturally motivated non-compliance in light of the distinction between criminal law defences.

Before proceeding, a clarification is needed. Cultural practices might, at times, be based on religious beliefs. The importance of religious freedom has long been recognised in international and constitutional documents.[1] In recent decades there is a global tendency to safeguard cultural diversity by various international conventions, such as the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005),[2] and the Convention on the Safeguarding of Intangible Cultural Heritage (2003).[3] Even if there is a difference between the scope of protection accorded to religious practices on the one hand and cultural practices on the other, a sharp distinction between religious and cultural motivation for non-compliance is often impossible to draw. A practice based on religious belief might be adopted by non-believers as a way to express their sense of belonging to the same cultural group. Non-therapeutic male circumcision is an example. The vast majority of Jewish parents, including those who do not follow religious commands, have their male babies circumcised as a way to express their identification with the Jewish tradition. For the sake of clarity, I focus on cultural defences whether or not they engage religious beliefs.

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1 See Universal Declaration of Human Rights (8 December 1948), G A Res 217A (III), art 18; International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171, art 18(1); Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 UNTS 221, art 9(1). At the national level, see, *eg*, US Constitution, Amend 1; Canadian Charter of Rights and Freedoms 1982 (c 11) (Can) s 2(a); Human Rights Act 1998 (c 42) (UK) art 9(1); Basic Law for the Federal Republic of Germany, art 4.

2 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (20 October 2005), 2440 UNTS 311.

3 *Convention on the Safeguarding of Intangible Cultural Heritage* (17 October 2003), 2368 UNTS 1 [CSICH].

II. The Reluctance to Grant Cultural Defence and the Way to Overcome It

Various legal systems are reluctant to grant a defence to culturally motivated non-compliance with criminal law prohibitions.[4] The expectation is that minorities will adjust their practices to the values protected by the criminal law, whose protection is required to ensure co-existence by guaranteeing individuals' rights and other public interests. The example that is usually brought to support the reluctance to grant a cultural defence is that of honour killing.[5] Liberal democracies are not willing to legitimise a cultural practice which infringes upon the right to life of vulnerable members of the cultural community (typically women, as either wives or daughters) and sustains patriarchal practices; on the contrary, the criminal law should condemn such a practice.

When the cultural practice which infringes upon criminal law prohibitions is exercised by the majority, as in the case of non-therapeutic male circumcision motivated by Jewish tradition in Israel, the practice is often not perceived as one that infringes upon the criminal law, and therefore courts do not feel the need to turn to the cultural defence in such cases.[6]

However, culturally motivated non-compliance is not totally ignored. The criminal law is not always enforced against a culturally motivated non-compliance. Thus, for example, for many years the offence of polygamous marriage had not been enforced against the Bedouins in Israel.[7] Various techniques of non-enforcement enabled the polity, on the formal level, to declare that criminal law prohibitions apply to minorities' cultural practices, and yet to avoid compelling members of the minority to give up their cultural practice.

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4 For the various approaches with regard to cultural defence in the criminal, see Spencer Sherman, "Legal Clash of Cultures"(1985) Nat'l LJ 1; Note, "The Cultural Defense in the Criminal Law" (1986) 99 Harv L Rev 1293; Alison Dundes Renteln, *The Cultural Defence* (Oxford: Oxford University Press, 2005); Mitra Sharafi, "Justice in Many Rooms since Galanter: De-romanticizing Legal Pluralism through the Cultural Defence" (2006) 71 Law & Contemp Probs 139; Julia P Sams, "The Availability of the Cultural Defense as an Excuse for Criminal Behavior" (1986) 16 Ga J Intl & Comp L 335; Caroline Choi, "Application of a Cultural Defense in Criminal Proceedings" (1990) 8(1) UCLA Pac Basin LJ 80; Tamar Tomer-Fishman, "'Cultural Defense', 'Cultural Offense', or No Culture At All?: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and of the Factors Affecting Them" (2010) 100(2) J Crim L & Criminology at 475, 476.

5 John Alan Cohan, "Honour Killings and the Cultural Defence" (2010) 40 Cal W Int' LJ 177 at 191–201; Sylvia Maier, "Honor Killings and the Cultural Defense in Germany", in Marie Claire Foblets & Alison Dundes Renteln, eds. *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Oxford: Hart Publishing, 2009) at 240–242.

6 See *State of Israel v Jane Doe* (2018) Cr C (Beer Sheva) 45487-03-16 in which the district court ruled that male circumcision does not cause "grievous bodily harm" despite the definition of "grievous bodily harm" which includes "any harm which amounts to … permanent disfigurement … to an external … organ". See Israeli Penal Law 1977, s 34X.

7 See Rawia Aburabia, "Trapped Between National Boundaries and Patriarchal Structures: Palestinian Bedouin Women and Polygamous Marriage in Israel" (2017) 48(3) Journal of Comparative Family Studies 339 at 343–345. The policy of non-enforcement was changed following the "Final Report of the Inter-ministerial Committee for Dealing with the Negative Implication of Polygamy" (2018) <www.gov.il/BlobFolder/generalpage/polygamy_final_report/he/polygamy_final_report.pdf>.

The argument of this article is that a multicultural society ought to take a stand explicitly, through its criminal law, on the dilemmas involved in a culturally motivated non-compliance with the criminal law. To overcome the reluctance to grant a cultural defence, various kinds of cultural defences, rather than one unified defence, ought to be granted. The difference between the various kinds of cultural defences should be based on the theoretical distinction between criminal law defences: excuses, justifications and offence modifiers.[8] According to that distinction, both excuses and justifications relate to cases in which the value protected by the prohibition of the offence has been infringed. Excuses imply that the infringement of the protected value is wrong, but due to a lack of culpability the actor cannot fairly be blamed for committing that wrong. Justifications, on the other hand, provide overriding reasons that justify, or at least permit, the infringement of the protected value. By contrast, offence modifiers cancel the criminal law duty; although formally the conduct falls within the definition of the offence, the protected value has not been infringed and actions done in circumstances that create offence modifiers fall outside the scope of the criminal law prohibition.

The variety of cultural defences should apply to both minority and majority cultural practices, and would have to be subject to normative constraint in cases like honour killing in which the culturally motivated practice infringes upon the polity's fundamental values.

The question whether to grant a cultural defence, and which kind of a defence – excuse, justification or offence modifier – depends on the extent of tolerance that the polity is willing to show towards the cultural practice, on the one hand, and on the culpability of those who out of cultural motivation did not comply with the criminal law, on the other. In some cases, the cultural defence will be based on existing defences; in other cases, new defences will have to be developed within wider existing categories of excuses, justifications or offence modifiers.

III. Cultural Defence as an Excuse

Excuses, which negate culpability for wrongdoing,[9] seem to be the natural defence for culturally motivated non-compliance. Granting an excuse enables the courts

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[8] For the distinction between justifications and excuses in general, see Albin Eser, "Justification and Excuse: A Key Issue in the Concept of Crime" in Albin Eser & George Fletcher eds. *Justification and Excuse: Comparative Perspectives* (New York: Transnational Juris Publications, 1987) 19; George Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978) at 515–580 [Fletcher, *Rethinking Criminal Law*]; John Cyril Smith, *Justification and Excuse in the Criminal Law* (London: Stevens, 1989); Andrew Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford: Oxford University Press, 2021) at 400–494; Michell Berman, "Justification and Excuse, Law and Morality" (2003) 53 Duke LJ 1; Dan Kahan & Heidi Hurd, "Justification and Excuse, Wrongdoing and Culpability" (1999) 74 Notre Dame L Rev 1551; Joshua Dressler, "Justifications and Excuses: A Brief Review of the Concepts and the Literature" (1987) 33 Wayne L Rev 1155. See also *infra* notes 9 (excuses), 25–27 (justifications). For the nature of offence modifier, see Simester, *ibid* at 33–36.

[9] For the various approaches with regard to the nature of excuses, see Simester, *supra* note 8 at 469–494; Victor Tadros, "The Characters of Excuse" (2001) 21(3) Oxford JLS 4495; Peter Westen, "An Attitudinal Theory of Excuse" (2005) 25 Law & Phil 289; Michael Moore, "Choice, Character, and

to express the expectation that the minority will adjust their practices to criminal law prohibitions by perceiving the culturally motivated non-compliance with the criminal law as wrong, and nonetheless to excuse the defendant on the ground that the cultural motivation negates her culpability. However, the cultural defence as an excuse might have its own characteristics, which require that we adjust the traditional conditions of excuses to culturally motivated non-compliance. To show this, let me discuss a 1963 Israeli case – *Grama* – as an example.[10]

Grama, a Yemenite Jew, who lived in an isolated village in the north of Israel, believed, like other members of his community, in the magical powers of one member of the community. The magician used to blackmail Grama. When Grama could no longer satisfy the magician's demands, the magician threatened that he would cast a deadly spell on Grama's family. In order to protect himself and his family against such a spell, Grama killed the magician. Grama, who was charged with manslaughter, based his defence on insanity. The court rejected his defence on the ground that Grama's irrational belief in the power of casting a spell was not rooted in mental illness. Grama was convicted with manslaughter and was sentenced to seven years imprisonment.

Could Grama have claimed putative self-defence,[11] on the basis of his belief that the threat to cast a death spell endangered the life of his family members?

Grama's belief was grounded in the cultural belief in magical powers shared by the members of his community. A belief in magical powers falls under "knowledge and practices concerning nature and the universe", which is included in the "intangible cultural" that the Convention on the Safeguarding of Intangible Cultural Heritage aims to safeguard and to ensure is respected.[12] However, a lethal response to specific magical power, like that of casting a death spell, raises the question as to how the legal system should treat such response. For the purposes of this article let us assume that objectively casting a death spell does not endanger life and therefore killing a magician who threatened to cast a death spell, as in Grama's case, is wrong. The question then becomes whether Grama's mistaken belief, that the threat to cast such a spell endangered the life of his family members, negates his culpability for committing that wrong?

Excuse" in *Placing Blame: A Theory of the Criminal Law* (Oxford: Oxford University Press, 2010) at 548; Richard Brandt, "A Motivational Theory of Excuses" in J Pennock & J Chapman eds. *Nomos: Criminal Justice* Vol 165 (New York: New York University, 1985); Claire Finkelstein, "Excuses and Dispositions in Criminal Law" (2002) Buff Crim L Rev 6.

10 *Grama v The Attorney General* (1963) Cr Ap 181/62, 17 PD 925.

11 There are incompatible approaches among scholars with regard to the classification of putative self-defence as either excuse or justification. For classifying putative self-defence as an excuse (the approach adopted in this article), see Simester, *supra* note 8 at 480–494; John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 1996) at 118–122; Fletcher, *Rethinking Criminal Law*, *supra* note 8 at 695–698; Kahan & Hurd, *supra* note 8 at 1563–1565. For classifying putative self-defence as a justification, see Kent Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84 Colum L Rev 1897 at 1907–1909; Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) at 280–290; Joshua Dressler, "New Thoughts about the Concept of Justification in Criminal Law: A Critique of Fletcher's Thinking and Rethinking" (1984/1985) 32 UCLA L Rev 61 at 92–95 [Dressler, "New Thoughts"].

12 CSICH, art 2, s 2(d).

Putative self-defence is usually granted when the mistake that there is an imminent danger to life relates to factual circumstances rooted in reality; as in a case when the defendant mistakenly believed that the victim who approached her was holding a gun and was about to kill her. In cases like Grama's, on the other hand, the "mistaken" belief stems from a culturally distinctive perception of reality, a perception not shared by the majority of society who treated it as superstition. Should putative self-defence be extended to include such a mistaken perception of reality?

In various legal systems, putative self-defence is subject to a standard of reasonableness.[13] On the face of it, such a standard, which requires us to evaluate the mistaken belief that there was an imminent danger to life according to an ordinary person's beliefs, does not enable the extension of putative self-defence to cases like Grama's. According to the majority's views, Grama did not share the ordinary person's perception of reality.

Moreover, the rationale for holding the mistake in cases of putative self-defence to a standard of reasonableness is that:

> A defendant who relies upon a supervening defence chooses to commit a *pro tanto* offence … [He] recognizes that he is inflicting harm, and so is on notice that his action requires justification … Effectively … [he] is asserting a liberty, in the circumstances, to inflict harm *deliberately*: it does not seem too much to ask for *reasonable ascertainment of those circumstances.*[14]
> [emphasis added]

Such a rationale is not applicable to cases like Grama's. When the mistaken belief is the kind of Grama's perceptual error, there is nothing that the defendant could be expected to do to ascertain whether there is indeed a danger. An essential characteristic of this kind of belief is that no rational explanation could convince those who believe in the power of a death spell that no real danger is involved in casting such a spell.

We can, however, adjust cases like Grama's to putative self-defence, by understanding the standard of reasonableness as no more than an application of the more general evaluative requirement of excuses: whether it would be "fair" to expect that the defendant avoids committing the wrong.[15] I believe that Grama could not

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[13] This was the traditional view of the common law, see, *eg*, *Palmer v R* (1971) 55 Cr App R 223. However, the ruling of the Privy Council in *Beckford v R* [1988] 1 AC 130 changed this view by holding that putative self-defence will be granted when the defendant's mistake was honest even when it was unreasonable. For the historical development in this regard, see Simester, *supra* note 8 at 480–494. According to the American Law Institute, Model Penal Code, in cases when an honest mistake with regard to the element of self-defence was due to either recklessness or unreasonableness, the defendant will be held liable "for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability" (s 3.09(2)). However, various States in the US do not follow the Model Penal Code in this regard and require a reasonable mistake as a condition for putative self-defence, see, *eg*, New York Penal Law § 35.15; *State v Williams*, 774 A 2d 457 (NJ Supreme Court, 2001).

[14] Simester, *supra* note 8 at 491. In the same spirit, see Stratenwerth Günther, "The Problem of Mistake in Self-Defense" (1986) BYUL Rev 733; George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998) at 162–163.

[15] Such an evaluative standard of excuses reflects the prevailing view in Germany. See Eser, *supra* note 8 at 40–44; Miriam Gur-Arye, "Criminal Law Defences Divides" (2021) 23(1) JRSTU 167 at 176–178.

fairly have been expected to refrain from killing the magician. Grama's previous behavior in satisfying the magician's demands attests that he, like other members of his community, sincerely believed in the magician's power and acted on that belief. Even if his belief was considered irrational, and therefore thought to be unreasonable, as a member of an isolated community he had no way to know that such a belief was regarded by the rest of society as superstition. Grama's perception of the threat posed to his family did not leave him an alternative way to avoid the danger to life. He had no way to know when the spell would be cast; even if there had been an opportunity to call the police, and even if the police had arrested the magician, the prison walls could not have stopped him from casting the death spell. Therefore, Grama, who could not fairly be expected to refrain from killing the magician, should not be blamed for killing him.

More generally, excuses are subject to a normative constraint. Such a constraint is usually implemented by the standard of reasonableness, which requires normative evaluation. Giving up the standard of reasonableness, as in cases of putative self-defence based on a mistaken perception of reality, does not mean that the cultural defence as an excuse should not be subject to a normative constraint. Such a constraint should be included in the evaluation of the "fair" expectations, and it is especially important for culturally motivated practices that infringe upon the polity's fundamental values. Honour killing, mentioned earlier,[16] could serve as an example. Honour killing ought not to be excused, even if the defendant, who was culturally obliged to protect his family honour, believed that he had no choice but to kill the woman whose action exhibited disrespect for the honour code of their family. Taking the lives of women, who are vulnerable members of the defendant's cultural community, ought not to be tolerated and the defendant should be expected to adjust his behaviour to the polity's values, as is reflected in the criminal law prohibitions protecting human life.[17]

IV. Cultural Defence as a Justification

Granting a justification for culturally motivated non-compliance seems more challenging. Justifications provide overriding reasons that "justify" the infringement of the protected value.[18] In cases of cultural motivation for non-compliance, the cultural motivation in itself does not justify infringing the protected value; the "justification" can only be grounded in cultural autonomy, the respect of which implies that a polity *permits* a believer to choose between following his religious belief or cultural tradition and infringing upon the criminal law duty, on the one hand, and

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[16] See *supra* note 5 and its accompanying main text.

[17] Such a constraint was in fact adopted by the Israeli legal system. The Israeli courts refused to acknowledge "provocation" as a mitigating circumstance for honour killing, and defendants who had killed a woman in order to protect the family's honour were convicted with murder. See, for example, *Abu Khdeir v State of Israel* (2016) Criminal Appeal 4226/11, paragraphs 66–71; *Azberga v State of Israel* (2010) Criminal Appeal 10358/08 at [8]. Following the reform with regard to homicide offences in Israel [Israeli Penal Law, (Amendment 137) 2017], honour killing is perceived an aggravated form of murder (s 301A(5)).

[18] For the various approaches with regard to the nature of justification, see *infra* notes 25–27.

complying with the criminal law duty and acting against her belief/tradition, on the other. Therefore, a unique kind of justification for culturally motivated non-compliance has to be developed. To show this, let me discuss the example of cultural motivation for non-compliance with paternalistic legal duties.

While discussing the right to conscientious objection, Joseph Raz states that:

> The claim [to recognise a right to conscientious objection] is strongest with respect to paternalistic laws, i.e. those whose justification is predominantly in terms of the interests of the persons bound by them (each person's duty being in his own best interests). It is hard to imagine a situation in which coercing the conscience of a normal adult by law in his own interest could be justified. If the ideals of autonomy and pluralism are not enough to enable a person to pursue his moral convictions at his own expense then they count for very little indeed.[19]

In some cases, the right to conscientious objection might stem from religious beliefs and be identified with religiously motivated non-compliance with criminal law duties: as in the case of Sikhs who refuse to comply with the duty to wear a crash-helmet while riding a motorcycle due to their religious obligation to cover their hair in public places by wearing turbans (and no further head coverings may be placed over turbans).[20] Coercing Sikhs to wear crash-helmets rather than turbans while riding motorcycles seems to Raz "a pathetic example of bureaucratic insensitivity".[21] Raz's view in this regard is consistent with legal systems, such as the English system, that exempt Sikh motorcyclists from the duty to wear a crash-helmet, due to the importance those systems attach to religious freedom.[22] However, other legal systems, such as the German system, refuse to exempt Sikhs from the duty to wear crash-helmets while riding motorcycles, on the ground that the duty does not prevent Sikhs from practising their religion since they have a choice to avoid riding motorcycles.[23]

On the controversy over the question of whether believers should be coerced to comply with paternalistic duties in violation of their religious beliefs, I tend to side with Raz. Promoting cultural diversity requires according significant weight to cultural autonomy, which, in appropriate cases, implies permitting a believer to infringe upon a paternalistic duty in order to follow her religious beliefs. However,

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[19] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) at 230.

[20] Dirk H R Spennemann, "Turbans vs Helmets: The Conflict between the Mandatory Wearing of Protective Head-Gear and the Freedom of Religious Expression" (2021) 17(3) Sikh Formations 207 at 214–215.

[21] Raz, *supra* note 19.

[22] Motor-Cycle Crash Helmets (Religious Exemption) Act 1976. For an exemption granted by additional jurisdictions, see the survey in Spennemann, *supra* note 20 at 221–225.

[23] See the ruling of the German Federal Administrative Court in Leipzig: BVerwG, Judgment of 4 July 2019, 3 C 24.17 (For the official English translation, see <https://www.bverwg.de/en/040719U3C24.17.0>). The German court additionally based its ruling on the interest to protect other drivers from being traumatised if they cause heavy injury to someone driving without a helmet ([20]–[21]). For additional legal systems that refuse to grant exemption to the Sikhs in this context, see Spennemann, *supra* note 20; Esmaeilikia *et al*, "Bicycle Helmets and Risky Behaviour: A Systematic Review" (2019) 60 Transportation Research 299.

unlike those legal systems that explicitly exempt Sikhs from the obligation to wear a crash helmet, I believe that a special kind of criminal law defence of justification should be granted, rather than an exemption, in cases in which non-compliance with paternalistic duties is religiously motivated.

Exemptions cancel the criminal law duty, and imply that the reasons for criminalisation do not apply to cases which are exempted.[24] The legal duty to wear a crash-helmet while riding a motorcycle aims at protecting the motorcyclist from risking his life and bodily integrity in a traffic accident. Such risks exist whenever motorcyclists do not wear a crash-helmet. A Sikh motorcyclist who out of religious reasons refuses to comply with the duty to wear crash-helmet risks his life and bodily integrity. Therefore, the paternalistic reasons for criminalising the failure to wear crash-helmet are not cancelled, and the Sikh motorcyclist infringes upon the value protected by the duty to wear a crash-helmet. Those reasons are in conflict with the religious reasons that oblige the Sikhs to wear turbans. Respecting the Sikh motorcyclist's autonomy to choose between the turban required by his religious belief and the crash helmet required by law may require that, in appropriate circumstances, he should be permitted to infringe upon the value protected by the paternalistic duty. Could such a permission be a form of criminal law justification?

Scholars disagree over the question of whether criminal law justifications imply that the infringement upon the protected value was morally right,[25] was permissible,[26] or was non-criminal, regardless of whether it was morally justified or not.[27] Instead of taking a stand on the nature of justification in general, I suggest that the nature of a particular justification might vary according to the interests involved and the appropriate way to balance between them.

In some cases, the reasons for committing an action defeat those that militate against the action and the justification implies that the infringement upon the value protected by the criminal law prohibition was *morally right*. An example is self-defence, where the defendant's right to defend herself against the unlawful aggression overrides the aggressor's right to life; in such cases, killing an aggressor as the only way to save life imminently endangered is morally right.[28] In other cases,

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[24] Simester, *supra* note 8 at 33–36; Miriam Gur-Arye, "Justifying the Distinction between Justifications and Power" (2011) 5 Crim Law and Phil 293 at 297. See also the discussion of cultural motivation as an offence modifier at Part V below.

[25] George P Fletcher, "Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?" (1979) 26 UCLA L Rev 1355 at 1359–1360; Dan Kahan & Marta Nussbaum, "Two Conceptions of Emotion in Criminal Law" (1996) 96(2) Colum L Rev 269 at 318–319; Kahan & Hurd, *supra* note 8 at 1558.

[26] Greenawalt, *supra* note 11 at 1904–1905; Dressler, "New Thoughts", *supra* note 11 at 84–87; Antony R Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007) at 266–267.

[27] Berman, *supra* note 8 at 11–17; Douglas N Husak, "Partial Defenses" (1998) 11 (1) Can JL & Jur 167 at 170–172.

[28] Simester, *supra* note 8 at 441–454; George P Fletcher, "The Right to Life" (1980) 63 The Monist at 135–158; Sanford Kadish, "Respect for Life and Regards for Rights in The Criminal Law" (1976) 64(4) Cal L Rev at 871–901; Re'em Segev, "Fairness, Responsibility, and Self-Defence" (2005) 45 Santa Clara L Rev at 383–460. Some go further and argue that by virtue of the unlawful attack, the aggressors lose their right to life, see Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994); Fiona Leverick, *Killing in Self-Defence* (Oxford: Oxford University Press, 2006).

the justification should imply only that infringing upon the protected value is *permissible*. This latter category is where cases of culturally motivated non-compliance should fall. In such cases, the cultural motivation in itself does not justify the infringement of the protected value. Rather, the "justification" is grounded in cultural autonomy. Respecting cultural autonomy may imply permitting a believer to infringe upon a criminal law duty in order to follow her religious belief.

Legitimating a Sikh's refusal to wear a crash-helmet while riding a motorcycle via a unique criminal law defence of *justification*, rather than via an exemption from the duty, enables us to balance *all* the interests involved. Most paternalistic legal duties are buttressed by the public interest in avoiding the cost of looking after the injured victim: in this case, in avoiding "the cost of looking after injured motorcycle riders".[29] Such an interest in itself has only marginal weight among the reasons for criminalisation in general, and therefore ought not to be accorded significant weight among the reasons for criminalising the failure to wear a crash-helmet. It follows that the public interest in avoiding the cost of looking after the injured motorcyclist should not tilt the balance that permits the Sikhs to choose between following their religious beliefs and wearing turbans, on the one hand, and complying with the paternalistic duty and wearing crash-helmets, on the other.

Whether having a choice to avoid riding a motorcycle, which enables Sikhs to practice their religion without infringing upon the duty to wear a crash-helmet (as emphasised by the German court),[30] has an impact on the balance of the interests involved requires us to assess the burdens imposed by being unable to ride a motorcycle, as well as the public interests in enabling riding motorcycles. The burdens depend, among others, on the availability of alternative efficient modes of transportation, including during rush hours, and on whether it is so common to ride a motorcycle that being unable to ride one would exclude Sikhs from taking part in common activities. The public interest in enabling riding motorcycles depends *inter alia* on whether it can contribute to alleviating the problem of either traffic congestion or parking. The interest in encouraging bike-riding in order to reduce pollution, for example, adds additional weight for permitting the Sikhs to ride bikes with turbans rather than crash-helmets. Different jurisdictions might, and indeed do, give varying answers to those considerations.[31] However, the central point I would like to emphasise is that a justification-based approach allows for a balanced evaluation of all these considerations.

More specifically, the possibility of granting a justification for culturally motivated non-compliance with paternalistic duties allows us to give significant weight to "the ideals of autonomy and pluralism" emphasised by Raz.[32] At the same time, those ideals do not become trumps. The balance of the interests might change as the additional interests involved become weightier. Thus, for example, the balance of interests that permit Sikh motorcyclists not to wear crash-helmets might similarly permit the refusal to wear head protection at a workplace. Indeed, legal systems that exempt Sikh motorcyclists from the duty to wear helmets tend to extend the same

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[29] Raz, *supra* note 19 at 283 n 231.

[30] See *supra* note 23.

[31] See *supra* notes 22–23 and their accompanying main text.

[32] See *supra* note 19 and its accompanying main text.

exemption to wearing head protection in a workplace.[33] However, when particularly dangerous and hazardous tasks are involved, the balance of interests might militate against permitting them to perform such tasks without head protection.[34] In such cases, Sikhs will have to choose between either practising their religion by wearing a turban and giving up working in a workplace that involves hazardous tasks, or working in such places with head protection and abrogating their religious obligation to wear a turban.

In cases in which culturally motivated non-compliance with paternalistic duties is permissible, the "justification" that applies to such a permission has unique characteristics which are distinct from traditional justifications based on the balance of interests, such as self-defence and justifying necessity.[35] Traditionally, both self-defence and necessity are granted in cases of emergency. The requirement of emergency is a rule of law constraint, one that "explains why D [the defendant] is not usurping the proper role of the state".[36] This rule of law constraint does not apply to cases like that of a Sikh's refusal to wear a crash-helmet, which typically involves no form of emergency at all. On the contrary, the justification is based on the willingness of the state to prioritise the autonomy of the defendant over paternalistic considerations. Unlike both self-defence and necessity, which involve a conflict between the interests of the defendant and those of the victim, in cases of non-compliance with paternalistic legal duties out of cultural motivation, the predominant conflict is internal to the interests of the defendant himself. It follows that granting justification in cases of culturally motivated non-compliance requires developing a special kind of justifying cultural defence.

Although non-compliance with paternalistic duties, as discussed above, is the natural candidate for being permitted via a justifying cultural defence, such a defence can also be extended and applied, in appropriate circumstances, even to criminal law prohibitions whose aim is to protect others from being harmed. To clarify this point, take the case of infant male circumcision. Non-therapeutic male circumcision is at odds with the boy's right to bodily integrity. The parental decision to have their infant boy be circumcised, even though (due to his age) the boy is unable to legally consent to the procedure, infringes upon the boy's right to self-determination. Therefore, the practice of non-therapeutic male circumcision infringes upon values protected by the criminal law.[37] Nonetheless, religious

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[33] See, *eg*, in the UK, Employment Act 1989 (c 38) (UK), ss 11–12 [UK Employment Act], as amended by the Deregulation Act 2015 (c 20) (UK), s 6. For a thorough discussion and comparative survey, see Spennemann, *supra* note 20 at 214–225.

[34] See ss 6A–6B to the UK Employment Act.

[35] In various jurisdictions necessity as justification is explicitly based on the balance of interests, see, *eg*, German Penal Code, s 34; American Law Institute, Model Penal Code, s 3.02 "Choice of Evils". For the balance of interests as a general rationale of justifications, see Theodor Lenckner, "The Principle of Interest Balancing as a General Basis of Justification" in Eser & Fletcher, *supra* note 8 at 493–522.

[36] Simester, *supra* note 8 at 461.

[37] In 2012 a County Court in Cologne, Germany ruled that non-therapeutic male infant circumcision, motivated by Muslims' religious belief, is unlawful because it violates a boy's right to bodily integrity: Landgericht Köln, Judgment of May 7 (2012) No 151 Ns 169/11. The judgment stirred up a heated controversy, and in response the Bundestag enacted a law which provides a parent with a right to consent to a non-therapeutic male infant circumcision, provided that it is performed in accordance with valid medical standard: see art 1631 d of the German Civil Code enacted on 12 December 2012, and which came into force on 1 January 2013.

reasons shared by both Jews and Muslims might permit infringing the protected values.[38] According to the Jewish tradition, circumcision represents a covenant between man and God, and parents might feel that they ought not to deprive their infant boys of such a bond. For both Jews and Muslims, circumcision represents an initiation of the infant boy into the community of the faithful. Through circumcision, male children become fully fledged members of the community and receive all benefits that accompany that membership. Respecting the parents' autonomy to follow their cultural practice could warrant permitting non-therapeutic male circumcision despite its infringement upon the boy's bodily integrity.

It is important to note that granting *justification* for culturally motivated infant male circumcision implies that the criminal law acknowledges both that the boy's bodily integrity has been infringed and that the infringement is permitted due to the importance of cultural autonomy. Such an acknowledgment is important in legal systems, like the Israeli legal system, in which infant male circumcision reflects the majority's cultural practice, and therefore there is a tendency to ignore the fact that the circumcision infringes upon the boy's bodily integrity and needs to be justified by a criminal law justification.[39] Being aware that the circumcision infringes upon the boy's bodily integrity might lead to special conditions for permitting it, such as performing the circumcision by a fully qualified professional,[40] the need of both parents' consent,[41] and the like.

As in cases of excuse-based cultural defence, the distinctive cultural defence as a justification should be subject to normative constraint. Such a constraint applies even when religious reasons motivate non-compliance with a legal duty that is in part paternalistic. To clarify this point, let me refer to the refusal of some of the ultra-Orthodox sects in Israel to comply with COVID-19 regulations.[42]

At various points, COVID-19 regulations, which forbade mass gatherings, mandated shutting down synagogues and *yeshivas* (seminars for learning Torah). Some of the ultra-Orthodox sects refused to comply with those regulations due to the importance attached by Jewish law to the performance of religious rituals in public and to studying Torah together. For them, giving up prayer in a *minyan* (a group of at least ten men) in synagogues, and studying Torah in *yeshivas*, was an unacceptable price to pay. Could such a refusal be permitted on the basis of the ultra-Orthodox

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[38] For a detailed description of such reasons, and the debate of whether they could permit performing non-therapeutic male circumcision, see Eldar Sarajlic, "Can Culture Justify Infant Circumcision?" (2014) 20 Res Publica 327; Merkel Reinhard and Holm Putzke, "After Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault?" (2013) 39 J Med Ethics 444; Joseph Mazor, "The Child's Interests and the Case for the Permissibility of Male Infant Circumcision" (2013) 39 J Med Ethics 39; Eliyahu Ungar-Sargon, "On the Impermissibility of Infant Male Circumcision: A Response to Mazor (2013)" (2015) 41(2) J Med Ethics 186.

[39] See *supra* note 6 and its accompanying main text.

[40] In Germany, infant male circumcision motivated by religious tradition has to be performed in accordance with valid medical standard (see *supra* note 37). In Israel, professional circumcisers, *mohalim*, are considered qualified professionals to perform circumcision.

[41] When there is no consensus among the parents, courts in Israel are authorised to decide whether the infant's best interest requires performing the circumcision. See *Jane Doe v The Supreme Rabbinical Court* 8533/13 (2014, High Court of Justice) (Israel).

[42] For a detailed description, see Miriam Gur-Arye & Sharon Shakargy, "Solidarity, Religious Freedom and COVID-19" [2021] 2 Netherland J Legal Philo 203 at 206–208.

belief in the importance of performing religious rituals in public and of studying Torah together? If those who preferred to continue praying in a *minyan* and studying Torah in *yeshivas* had been risking solely their own lives and health, the issue would have been no different, in principle, from that of the Sikh motorcyclists who choose to wear turbans rather than crash-helmets; in both cases, respecting cultural autonomy might have permitted non-compliance with paternalistic duties. However, COVID-19, like other pandemics, is highly infectious, and the regulations were aimed at restricting its spread. The ultra-Orthodox community in Israel is not isolated from the rest of the population, and therefore the ultra-Orthodox who refused to comply with the regulations put at risk the lives and health of others, and increased the risk that hospitals would exceed their capacity to provide treatment to all. When the life and health of the rest of the population is at stake, the non-compliance ought not to be permitted even when non-compliance is motivated by religious belief, and despite the importance of religious freedom.

The COVID-19 example helps to clarify the constraint on justifications more generally, according to which some reasons for justifying the infringement of the protected value ought to be excluded from consideration.[43] The religious reasons that motivated non-compliance with COVID-19 regulations are no different, in essence, from those that motivated Sikhs' non-compliance with the duty to wear crash-helmets. In both cases the issue is whether respecting religious autonomy warrants permitting non-compliance out of religious motivation. However, the same kind of reasons that are able to permit non-compliance with paternalistic duties, aimed predominantly at protecting the interests of those who are bound by them, are excluded from consideration when the non-compliance puts at risk the life and health of the wider population.

V. Cultural Motivation as an Offence Modifier

We have seen that culturally motivated non-compliance might function either as an excuse, which negates culpability for wrongdoing (as in the *Grama* case), or as a unique form of justification, which permits infringing upon the value protected by the prohibition of the offence (as in the crash-helmet and male circumcision cases). Could there be cases in which the cultural motivation for non-compliance has a stronger effect?

As already noted, there is a difference between criminal law justifications and offence modifiers. Offence modifiers cancel the criminal law duty; justifications provide overriding reasons that either justify or permit infringing upon the duty. Actions done in circumstances that create offence modifiers fall outside the scope of the criminal law prohibition.[44]

The case of Sikhs who are mandated to carry a Kirpan, a kind of a knife or a sword, on their body all the time could serves as an example of cases in which the cultural motivation functions as an offence modifier that cancels the criminal law duty. Literally, carrying a Kirpan falls within the offence which prohibits carrying

[43] In the same spirit, see Simester, *supra* note 8 at 448–451.

[44] Simester, *ibid* at 33–36.

a knife in a public place.[45] The prohibition protects public safety by preventing in advance the potential danger that might stem from using a knife as a weapon. For Sikhs, the Kirpan is not a weapon but rather a spiritual symbol of each Sikh's duty to fight for good over evil, and to support freedom from oppression.[46] Legally, recognising it as an article of faith functions as an offence modifier that cancels the duty to refrain from carrying a *knife* that might serve as a weapon in a public place.[47] On that view, carrying a Kirpan does not infringe upon the value protected by the offence of carrying a knife in a public places; rather, it falls outside the scope of the prohibition.

There are various legal systems in which Sikhs who carried a Kirpan in public places were not convicted with the offence of carrying a knife in a public place, although the legal basis for that varies. In England, the Criminal Justice Act 1988 grants a defence to those who carry a knife out of religious reasons;[48] both the Supreme Court of Canada[49] and the Ohio Court of Appeals in the US[50] held that the Kirpan is not a weapon, but rather an article of faith.[51] The distinction between offence modifier and criminal law justification, clarified above, could shed a light on the different effect those systems attach to the Sikhs' religious motivation for carrying a Kirpan. The rulings of both the Canadian Supreme Court and the Ohio Court of Appeals are consistent with perceiving the Sikhs' religious motivation for carrying the Kirpan as an offence modifier: being an article of faith rather than a weapon means that the reasons for criminalising the carrying of a weapon in a public place do not apply to carrying the Kirpan in a public place, and therefore carrying the Kirpan falls outside the scope of the prohibition. The defence granted in England for those who carry a knife out of religious reasons, on the other hand, has a narrower effect. The Kirpan is perceived as a knife and carrying it in a public place infringes upon the value protected by the offence. Respecting the Sikhs' religious autonomy permits the infringement and allows them to carry a Kirpan.

It is interesting to note the different approaches, within the English legal system, to the Sikhs' religious motivations for non-compliance. Sikhs who out of religious reasons choose to wear a turban while riding a motorcycle are explicitly exempted from the duty to wear a helmet;[52] Sikhs who carry a Kirpan in a public place will have a criminal law defence upon proving that they carried the Kirpan for religious

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45 See, *eg*, Criminal Justice Act 1988 (c 33) (UK), s 139 [UK Criminal Justice Act].

46 Rishi S Bagga, "Living by the Sword: The Free Exercise of Religion and the Sikh Struggle for the Right to Carry a Kirpan" (2006) 2(3) The Modern American 32 at 32–34; Karamvir Dhaliwal, "The Balance of Safety and Religious Freedom: Allowing Sikhs the Right to Practice their Religion and Access Courthouses" (2020) 18 Seattle J Soc Just 305 at 308.

47 See in the same spirit: *State v Singh* 117 Ohio App 3d 381, 387 (Ohio Court of Appeals, 1996), in which the Ohio Court of Appeals held at 388 that "[t]o be a Sikh is to wear a Kirpan - it is that simple. It is a religious symbol, and in no way a weapon. As long as the Kirpan remains a symbol and is neither designed nor adapted for use as a weapon, laws such as R C 2923.12 [which make it unlawful to carry weapons] are wholly inapplicable" [*State v Singh*].

48 UK Criminal Justice Act, s 139(5)(b).

49 *Multani v Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256.

50 *State v Singh*, *supra* note 47.

51 For a comparative discussion see, Dhaliwal, *supra* note 46 at 317–322; Bagga, *supra* note 46 at 34–35.

52 *Supra* note 22 and its accompanying main text.

reasons.[53] The distinction between offence modifier and criminal law justification, as discussed in this article, supports the reverse conclusion. A Sikh motorcyclist who for religious reasons chooses to wear a turban rather than crash-helmet risks his life and bodily integrity. Therefore, the Sikh motorcyclist infringes upon the duty to wear a crash-helmet. However, respecting his autonomy permits him to follow his religious belief and to wear a turban despite the risk to his life. For a Sikh who out of religious reasons carries a Kirpan in public places, the Kirpan is not a weapon, but rather a faith symbol. The reasons for criminalising the carrying of a knife in public place do not apply, and the carrying of the Kirpan falls outside the scope of the criminal law.

VI. Concluding Remarks

In common law jurisdictions, the distinction between criminal law defences as justification versus excuse was considered for a long time as "one without difference".[54] In its report on Criminal Code for England and Wales, the Law Commission explicitly noted that: "There is a growing literature on the distinctions to be made between two classes of defence, but no rule that we propose requires express reference to any distinction between justification or excuse or the separate use of either of them."[55] No reference to the distinction between justification and excuse is to be found in the Law Commission's later report on Defences of General Application.[56]

By contrast, the importance of distinguishing between criminal law defences (mainly between justification and excuse) has now achieved broad consensus among scholars and more nuanced distinctions have been proposed.[57] The discussions focus mainly on traditional criminal law defences such as self-defence, necessity and duress.

Analysing the cultural defence in light of the distinction between criminal law defences provides additional support for distinguishing between excuse, justification and offence modifier. The distinction makes it easier to overcome courts' reluctance to grant a defence in cases of culturally motivated non-compliance with the criminal law, by recognising various kinds of cultural defences rather than one unified defence, each of which conveys a difference message with regard to the status of the cultural practice.

Granting cultural defence as an excuse enables the courts to both declare the expectation that the minority will adjust their practices to criminal law prohibitions by perceiving the culturally motivated non-compliance with the criminal law as wrong, and nonetheless excuse the defendant on the ground that the cultural motivation negates her culpability. Granting cultural defence as a justification conveys a stronger message: respect for cultural autonomy permits the defendant to adhere

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53 *Supra* note 45 and its accompanying main text.

54 Justin Miller, *Handbook of Criminal Law* (Minnesota: West Publishing Co, 1934) at 199.

55 Law Commission for England and Wales, *Criminal Law: Report on Defences of General Application* (No 83, 1977).

56 Law Commission for England and Wales, *Report on Codification of the Criminal Law* (No 143, 1985).

57 See the references at *supra* notes 8, 9 and 25–27.

to cultural practices despite its infringement of the criminal law prohibition. The strongest message is conveyed by classifying the cultural motivation as an offence modifier that cancels the criminal law duty: the reasons for criminalisation do not apply and the cultural practice falls outside the scope of the criminal law.

Analysing culturally motivated non-compliance in light of the distinction between criminal law defences provides additional insights into criminal law defences more generally.

First, the conclusion that both the cultural defence as an excuse and the cultural defence as a justification must be subject to normative constraints in cases in which the cultural practice infringes upon fundamental values, implies that *excuses*, and not only justifications, are subject to normative constraint. Such constraint is usually invoked by the standard of reasonableness, which involves normative evaluation. Reasonableness should be perceived as no more than an application of the more general normative constraint included in evaluating whether it would be "fair" to demand compliance.

Secondly, the nature of a *justification* might vary according to the interests involved and the appropriate way to balance between them. In some cases, the reasons for committing the action defeat those that militate against the action and the justification implies that the infringement upon the value protected by the criminal law prohibition was morally right. In other cases, the justification implies only that infringing upon the protected value is permissible, as in cases of cultural motivation for non-compliance. In such cases, the "justification" is grounded in cultural autonomy, respect for which implies that a polity permits the believer to choose between following her cultural belief and infringing upon the criminal law duty, on the one hand, and complying with the criminal law duty and acting against her belief, on the other.