

'Can culture excuse crime?'

Evaluating the inability thesis

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Abstract

The inability thesis holds that one's culture determines behavior and can make one unable to comply with the law and therefore less deserving of punishment. Opponents of the thesis reject the view that humans are made physically unable to act certain ways by their cultural upbringing. The article seeks to help evaluate the inability thesis by pointing to a literature in cultural psychology and anthropology presenting empirical evidence of the influence of culture on behavior, and offering conceptual analysis of the concept of determinism and its connection to moral culpability. Without conceding that culture never determines behavior, the author argues that opponents of the inability thesis err in drawing a moral implication from this premise. What matters in formulating moral judgments about punishment are not the possibility but the reasonability of complying with the law. Cultural influences may make an action reasonable that without similar cultural influences would be unreasonable.

Key Words

culture • excuse • free will vs determinism • responsibility

In the late 1990s a family of Iraqi refugees moved to Lincoln, Nebraska. The father feared his two daughters, aged 13 and 14, would be corrupted, so he arranged for their marriage to two 'good Muslims', aged 28 and 34. The men consummated the marriage and were charged with sexual assault of a minor. They argued they were following Iraqi custom as sanctioned by their faith and did not know they acted illegally. The deputy county attorney replied, 'You live in our state, you live by our laws' (Talbot, 1997). The two newly wed men faced sentences on sexual assault charges of up to 50 years in prison. They received 4–6 years and were eligible for parole after 2 years. Charges against the father were dropped but he was banned from seeing his daughters, who have been relocated outside of Lincoln (Agence Presse France, 24 September 1997).

In the mid-1980s Fumiko Kimura, a Japanese mother living in California, attempted

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oya-ko shinju, or parent-child suicide, to rid herself of shame on learning that her husband had supported a mistress. While she herself did not die, her two children drowned in the attempt. The Japanese community had petitioned to apply Japanese law, arguing a defense of cultural difference. The mother, it was argued, should be tried not by the standards and law of the United States, but by the standards she was raised to live by. If the point of punishment is to mete out just deserts, the argument went, there would be no point punishing her with the full force of the law. She was not acting with malice, or even acting badly. Rather, she was behaving properly according to the standards of her own culture. Representatives of the Japanese community sought involuntary manslaughter charges and probation. Ms Kimura, originally facing the death penalty, eventually pleaded no contest to voluntary manslaughter, which can bring a maximum of 13 years in prison, but she was sentenced only to 1 year in jail, 5 years probation and ordered to undergo psychiatric treatment.¹

In each of these cases individuals living in the United States experienced a conflict between the perceived demands of their culture and the demands of the state. In the first case, the defendants claimed not that they could not comply with the law, but that they did not know they violated the law. The second case is different. The defendant could not claim that she did not know it is illegal to kill one's children. But the court recognized, if only implicitly given that the case did not go to trial and was disposed of through a court sanctioned plea agreement, that Ms Kimura was not as culpable as would be a woman who simply killed her children without the intention and motivation that Ms Kimura had in committing *oya-ko shinju*. Given her cultural upbringing, she could not reasonably be expected to comply with the law.

Most commentators oppose a cultural defense (Lyman, 1986; Sams, 1986; Choi, 1990; Gallin, 1994; Coleman, 1996; Sacks, 1996; Taylor, 1998; but see Renteln, 1993) and no court has established a formal cultural defense. Yet the Kimura case is not the only one in which courts have taken seriously the idea that people should not be held fully responsible for violating laws that clash with their culture.²

The question of whether courts should grant a cultural excuse is enormously complex, but one that courts face with increasing frequency. It involves consideration of among other things the moral purposes of punishment, the relevance of moral considerations in the administering of a criminal justice system, concepts such as equality before the law, culture and its boundaries, the legal concept of defense as distinguished from justification and practical matters of implementation, such as discerning legitimate and feigned claims that culture motivated one's actions. For example, if we allowed a cultural excuse we would need to ensure that it was not abused by gang members, contract killers or other members of 'domestic cultures' who might claim that they violated the law because of a cultural belief. The issue also raises deep questions of political theory: should a liberal state inquire into the legitimacy of cultural practices, or into the validity of the beliefs upon which these practices may be premised? How should a liberal state weigh the values of toleration and cultural diversity against the interest in protecting innocent victims? The issue considered at its most general level also draws us into a longstanding and divisive debate about cultural relativism. Some would argue that applying the standards implicit in US law on those from other cultures is 'ethnocentric', is misguidedly to impose our own understandings and values on others, either by misinterpreting what those with different cultures say or do by filtering our observations of

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them through our own categories of understanding, or by judging them by the 'western' standards implicit in our law. An adequate account of how courts should respond to cases of culture clash would address these issues. My objective here is to focus on one specific issue that is part of the mix of these considerations. It concerns an argument that some theorists have made concerning the role that culture plays in human behavior. One claim that advocates of a cultural defense make is that Ms Kimura, while not justified, should not be held fully accountable because she could not comply with the law given her beliefs. Given her upbringing, Ms Kimura could not have acted otherwise. Since punishment expresses blame, and one cannot fully blame someone who had no choice, the full measure of punishment would be inappropriate. Can one's culture make a person unable to comply with the law, or at least make compliance difficult, so that it would be unreasonable to punish this person to the same degree that we would punish someone whose culture posed no similar obstacles to compliance?

The view that one's culture can determine one's behavior so as to make one unable to comply with the law has been called the 'inability thesis'. My purpose is to help evaluate the inability thesis by pointing to a literature in cultural psychology and anthropology presenting empirical evidence of the influence of culture on behavior, and offering conceptual analysis of the concept of determinism and its connection to moral culpability.

The most explicit statement against the inability thesis is that of Michelle Moody-Adams. Moody-Adams argues that cultural upbringing does not exempt an individual from responsibility. She considers the example of Greek slave owners. Some philosophers have argued that we cannot blame ancient Greek slave owners on the ground that because of 'cultural limitations' they were unable to see that slavery was wrong (Slote, 1982). Rather than excusing these slave owners, Moody-Adams charges them with affected ignorance. Some Greeks, she argues, apparently did challenge slavery, for Aristotle refers to unnamed opponents of slavery in his *Politics*, and so those who accepted and practiced slavery made a choice for which they can be held responsible (Moody-Adams, 1994: 296). Moody-Adams suggests that slave owners should be condemned even in a society where everyone accepted slavery because even in that society it is surely possible to challenge slavery:

merely in virtue of learning a language, every human being has the capacity to imagine (to conceive) that her social world might be organized on quite different principles . . . one has the capacity to question existing social practices merely by virtue of learning to form the negation of any statement. (1994: 296 fn. 14)

In her view, all human beings, regardless of their cultural upbringing, have the capacity to see that certain acts are wrong, and should be held accountable if they commit these wrongs. We cannot say that culture forced the Greek slave owner to enslave, the Nazi to exterminate Jews or Ms Kimura to kill her two children. Their cultural upbringing does not excuse them from moral responsibility, because one can always step outside one's own culture to see whether its practices are truly right or wrong.³ For Moody-Adams,

any talk about culture is talk about a useful theoretical abstraction that outlives its usefulness when we attempt to think of cultures as 'forces' or 'causes' that make things happen. A culture

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. . . cannot be an 'agent' of anything. Moreover, there is no brute fact about persons that can plausibly be held to constitute 'having a culture'. (1994: 304)

A primary reason Moody-Adams is unwilling to see culture as causing and thereby excusing action is that 'cultural conventions are modified, reshaped, and sometimes radically revised in individual action'. 'I submit', she writes, 'that it is more plausible to claim that each individual possesses her own version of a given culture' than to attribute behavior to culture per se (1994: 307). To grant Ms Kimura a cultural excuse by concluding that she had no choice but to kill her son and daughter would be, for Moody-Adams, one more example of how cultural relativism is 'impoverished', and views people as 'less than fully human'. 'The misguided relativist', she writes,

assumes that a readiness to engage in moral criticism of other cultures reveals disrespect for those cultures, or even masks a malevolent readiness to dominate and destroy the cultures that we criticize. On this view, when the practices of different cultures clash, we are allowed only to gaze in amazement – or possibly in horror – at the result. (1994: 306–8)

The argument that culture cannot determine behavior because one can always break from one's culture is distinct from another position one might take, that as agents with free will we can resist any antecedent causes, that our actions are not determined by either culture or any other factors. There may be compelling moral reasons to resist the view that human actions are determined by antecedent causes over which we have no control, and to postulate that humans have free will and should be held morally accountable for their actions. But Moody-Adams does not base her rejection of the inability thesis on the premise that the free will–determinism debate has been won by free willists. The free will position can be true, and arguably must be true to some degree if punishment is to be morally justified, yet culture can be one of the external constraints, like the laws of physics or the proverbial brick wall, that even free willists must acknowledge (Williams, 1997). Moody-Adams rests her position specifically on claims, presumably empirically verifiable, about what actions or moral judgments are possible for people with a certain cultural upbringing. She denies that culture is a brick wall.

One way to establish Moody-Adams's view that culture cannot determine behavior might be to point to individual differences among members of a culture. Just as not all people with a rotten social background become criminals, and not all those who are delusional attempt to take the life of the President, not all Japanese mothers commit *boshi-shinju* (mother–child suicide) and so how can it be that Ms Kimura had to? Though in the 1990s there were nearly 22,000 annual suicides in Japan, the percentage of suicides per population in Japan is not unusually high, and *shinju* may account for fewer than 2 percent of these (Takahashi and Berger, 1996). Most Japanese, even those who are despondent enough to take their own lives, do not commit *shinju*, and clearly one can be a Japanese mother and not kill one's children.

One problem with this argument is that it mistakes the relevant comparison set in drawing conclusions about the extent to which Kimura's behavior is influenced by her culture. We should look not at the number of Japanese mothers with small children, but at the number of these mothers who experience so much shame that they feel they must take their lives. We would also need to single out from among those in this category only those who could not rely on friends, family or other intervening

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influences. In the same way, to dismiss John Hinckley's defense to shooting President Reagan on the ground that there are other insane people who do not shoot at national leaders is to ignore how a trait may cause an effect only when coinciding with a number of other circumstances that may be quite rare. That these circumstances are rare, and that this trait when found in others not facing the same circumstances never produces the same effect, does not diminish the causal efficacy of the trait.

Moody-Adams assumes that culture can never determine an individual's actions or ability to make moral judgments (Moody-Adams, 1994: 294). Some recent research in cultural and social psychology, however, indicates that there is a connection between one's culture and how one perceives, thinks and attributes causality, including moral causality.⁴ Being brought up in a culture can make certain behavior impossible. For example, at some point before one reaches a year of age in Japan, infants become incapable of distinguishing the /l/ and /r/ phonemes, whereas children growing up in the United States retain this ability (Werker and Tees, 1984). Language can cause a particular cognitive structure by casting attention to certain things and not others. For example, there are an estimated 7.5 million color solids that humans can distinguish, and all human beings with normal vision should be able to make the same set of discriminations. However, different cultures have different color names, and hence different ways of coding colors. Experimental evidence has shown that the ability to code or categorize colors is correlated with ability to recognize colors. An English speaker responds differently than a Zuni when shown the colors for orange and yellow. The Zuni language uses a single word for both. Zunis confuse the two colors, not because they have different perceptual equipment, but because they have different languages (Brown and Lenneberg, 1954). While there may be no connection between cultural determinants of this sort and moral behavior, some recent studies point to other behavioral characteristics that may vary with culture, such as causation attribution, which do bear on one's ability to judge the morality of an action or to act morally. One study comparing Hindu Indians and Americans asked both groups to explain an acquaintance's behavior that had a good outcome, and the behavior of another that had a bad outcome. Americans were more inclined to explain the behavior by appealing to personality traits, whereas Hindu Indians were more likely to explain the behavior in terms of social roles or context. In other studies, Americans were found to prefer dispositional explanations of behavior, whereas Chinese preferred contextual explanations (Choi et al., 1999; Nisbett, 2003).

It may be that such differences are not 'hard-wired' in the way that ability to distinguish phonemes apparently is, so that association with new cultures could lead to acquisition of new ways of recognition or attributing causation. For example, a Zuni who learned English would come to recognize clearly the distinction between orange and yellow. But this does not matter in deciding one's culpability, for the inability thesis is plausible as the basis for a cultural excuse on a theory of determinism, not a theory of necessity.

The distinction between determinism and necessity was famously articulated by J.S. Mill in the 19th century. Determinism holds, rightly for Mill, that human actions have antecedent causes. But this does not entail that there is a necessity to our actions. Necessity implies that causes are not controllable – it implies 'fatalism'. But, Mill argued, 'the causes . . . on which action depends, are never uncontrollable' (Mill, 1893: 583). Mill

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was a determinist, convinced that every action has an antecedent cause, and that the consciousness that we have a choice to do this or that is illusory (Mill, 1979). Yet he also defended free will in the sense that he felt that humans can control the character that becomes the antecedent cause of their actions. While Mill's view that humans can freely shape their own character is controversial (Owen, 1949 [1817]), his conceptual distinction between determinism and necessity is not. This means that even if Moody-Adams is correct that humans can break from their culture, at any given point in time it may not be possible for them to act otherwise (though I shall shortly argue that what really matters is not that it may not be possible, but that it may not be reasonable for them to act otherwise). In deciding one's culpability for the purpose of punishment, what matters is not the sort of person one could have been had circumstances been otherwise, but the sort of person one was when violating the law.

In light of this distinction between determinism and necessity, we must reject another argument advanced by Moody-Adams. She argues that cultures cannot be causal agents because cultural practices are modified and reshaped. How can one say that the Greek slave owner could not have challenged slavery, given that practices such as slavery are reformed? The argument that cultures change, that they are not natural but constructed, has been used by some theorists to argue against the preservation of minority cultures and in defense of a cosmopolitan alternative (Waldron, 1992). Moody-Adams takes this point further when she implies that there is no such thing as having a culture, for each individual possesses their own version of a culture.

A fundamental problem with this argument is that it fails to distinguish determinism from necessity. That causal factors are not permanent does not mean they lack efficacy when they are in force. But the argument also is premised on a characterization of culture that unduly discounts the extent to which culture is found and not simply invented by each individual to suit their own needs. It is important to acknowledge that many of the things identified as part of a culture are not essential to maintain one's cultural identity. Within a culture there may be a disagreement as to whether something is a part of the culture, or whether it is required or optional, or a matter of taste. Such contested practices may not be a sufficient basis for a cultural excuse, as I shall discuss later. But to assert that no features of a culture are causal agents is to ignore the socialization processes involving education, habituation and coercion, through which an individual's identity is formed. The anthropological literature provides an abundance of examples. Ritualized homosexuality in Melanesia initiates men into a hierarchical structure in which men have authority over women and the elder have authority over the younger, a structure that affects a person's relation with others in the society for their entire lives (Herdt, 1982; Elliston, 1995). Male and female circumcision, while it exists in a number of forms, in many cases contributes to the cultural creation of sexual and gender identity (Schweder, 2000; Ahmadu, 2001; Thomas, 2001). The wearing of a veil in Muslim societies is one instance of a general assumption of gender roles that shapes the life course of individuals in these societies (Fernea, 1990; Menon, 2000). The learning of a language and authoritative texts, both oral and written, allows the transmission of information about what is legitimate and proper in a culture (Fleischacker, 1994). The most central of these texts, those that truly are cultural objects, will not typically be interpreted very differently – one might think of the significance of the cherry blossom or of *shinju* in Japanese society. Such cultural objects shape an

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individual's understandings of one's obligations and place in the world. Certainly it is possible for some individuals to resist certain features of a culture. And to say that a culture consists in the transmission of authoritative texts and practices is not to deny that often there are disputes about which texts and practices are authoritative, or what they mean; or that they evolve. Often these are contested by groups within the culture (Ewing, 2000), whereas Moody-Adams implies that these meanings and understandings are a matter of individual choice. But to infer from these contestations of aspects of culture that there is no cultural force that shapes the individual is just as wrong as to view culture as an unchanging hegemonic monolith. To put this point another way, some anthropologists train nurses and doctors to understand the cultural differences of their patients, as this can often make the difference between successful and unsuccessful treatment (Galanti, 1997). Whether these differences are either necessary or desirable does not diminish the need for health care providers to recognize them in order to effectively treat patients.

Some opponents of the inability thesis will not be convinced by the argument that while actions may not have causes that are necessary, they are still determined and therefore one cannot be held responsible for them. For they will want to resist the claim that culture even determines human behavior. They deny that at the time she acted Ms Kimura could not have done otherwise. It is not just that she could have chosen to reject certain features of Japanese culture or, in Mill's language, to change her character; but that the character she had at the time she acted did not make it impossible for her not to kill her children and attempt to take her own life. Moral responsibility, these opponents rightly claim, assumes that humans are agents with choice. The very possibility of moral discourse presupposes that human beings have the capacity to resist any constraining cultural or other influences. For example, if incest avoidance is instinctive to humans, the result of some biological mechanism and not a conscious and deliberate act of free will, then it would make no sense to say that people who avoid incest act well, and people who engage in incest act badly. One can act well or badly only when one has a choice of how to act. Moral judgments concerning incest would be inappropriate if it were not physically possible for one to commit incest. But the opponents of the inability thesis can point to how humans are adept at overcoming biological constraints, sometimes through inventions such as eyeglasses, hearing aids and braces, sometimes through perseverance. Incest does occur, despite some impressive evidence that a naturally selected mechanism discourages it.⁵ The many ways in which humans overcome constraints, be they biological or cultural, through acts of will, is evidence against the position that culture determines behavior, and is a reason to hold individuals morally accountable for their actions. This argument, which I earlier distinguished from that of Moody-Adams, is essentially that the inability thesis denies free will, humans have free will, and so the inability thesis must be wrong and people must be morally responsible despite the influence culture had in their deliberations.

A determinist could respond simply by denying that humans have free will. But this is problematic for if we deny free will, there are serious doubts about whether we can ever morally justify punishing anyone (Owen, 1949 [1817]; Williams, 1997). But one need not take this route in order to save the inability thesis in some form. For even if we concede that culture cannot make one physically unable to act certain ways, it would not follow that someone acting under the influence of culture is morally culpable. That

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it is physically possible for a person to act a certain way does not mean it is reasonable to expect them to act this way. The effort it takes to pursue morally worthwhile goals or comply with the law varies among individuals, and the difficulty in one's ability to comply with the law is morally relevant in determining one's punishment. Few cases of culture clash involve claims that one was unable to comply with the law. Ms Kimura really claims not that she was physically unable to refrain from wrongdoing, but rather, that she was acting reasonably given her circumstances, understanding and upbringing, and that compliance with the law, for her, would require overcoming constraints not faced by others. The degree of resistance she faced because of her cultural upbringing is relevant in morally assessing her actions.

Shinju has been beatified in Japan. It is associated with the cherry blossom, whose blossoms fall in one day, its ephemeral beauty remaining cherished in memory. One Japanese-American, writing in response to Kimura's attempt at *shinju*, links the valuing of a glorious memory of its beauty over the cherry blossom's short-lived existence to *shinju* and how the 'Japanese prefer to die rather than live in humiliation' (Hayashi, 1985). According to another account of *shinju*, the practice reflects a non-western conception of the boundaries of one's self. 'In the psychology of the mother who commits *boshi-shinju*, killing her own children is equivalent to actually killing herself, and this is interpreted as a kind of "extended suicide"' (Takahashi and Berger, 1996). In light of these understandings, and given the fact that in Japanese society children of a parent who has committed suicide suffer social stigma throughout their life, and as adults find it difficult to find a job or spouse (Dolan, 1985; Rae-Dupree and Jones, 1985), Ms Kimura could reasonably believe that she was acting in her and her children's best interests. In Japan, those who commit *oya-ko shinju* receive either a short prison term or probation (Comment, 1995); and when a Japanese newspaper first reported that a California prosecutor had charged Ms Kimura with first-degree murder, the response in Japan was shock (Takahashi and Berger, 1996).

It certainly was physically possible for Ms Kimura to refrain from attempting mother-child suicide. Had circumstances been different – had her family from Japan been nearby, had she friends who kept a close eye on her, had her husband never caused her to feel shame – and had she been a different person with a different upbringing, the case would never have arisen. But given the circumstances she faced and who she was at the time, it may be unreasonable to regard her actions in the same way that we would regard those of someone who kills her children simply because she regards them as an unwanted burden. What may be unreasonable for an American in a given situation may be reasonable for a Japanese or Tongan facing the same situation.

Opponents of the inability thesis reject the view that humans are made physically unable to act certain ways by their cultural upbringing. Without conceding this point, I have argued that they err in drawing a moral implication from this view. What matters in formulating moral judgments about punishment and responsibility is not the possibility but the reasonability of complying with the law. Cultural influences can make an action reasonable that without similar cultural influences would be unreasonable.

'Reasonable' here does not mean objectively justified. To explain this distinction, I now turn to the final argument against the inability thesis that I want to single out, and that seems to be the primary impetus for Moody-Adam's objection to the thesis: that the cost would be too great if we excuse some people because their cultural upbringing

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makes it difficult for them to act morally, rather than simply demand that everyone act morally. Excusing those for whom complying with morally justified laws would be difficult would, Moody-Adams believes, sanction their immoral conduct. In her view, the inability thesis sanctions the cultural relativist view that those in one society should not presume to challenge the moral standards or understandings of those from another society.

To say that Ms Kimura may have acted reasonably given her culturally shaped understandings and the situation she faced, is not to say that her actions were objectively justified, or that we must agree that what she did was good or that one ought to have the moral considerations that she did (Harman, 1975). Even a proponent of the view that there are universal human rights and one who considers as misguided the charge that criticism of practices that violate these rights is ethnocentric must reject the premise that excusing Kimura's behavior is to justify *oya-ko shinju*. The question of whether *oya-ko shinju* is good or bad, rational or irrational, is distinct from the question of how we should punish people who engage in it. One can criticize Ms Kimura and other Japanese for engaging in an irrational practice yet still make allowances at the sentencing stage because the sincerity of their beliefs and lack of malice in their actions indicate they lack the culpability of those for whom we reserve the punishment meted out for premeditated murder.

One way of making this point is to draw on the distinction in the criminal law between justifications and excuses. The law allows for a defense in situations where enforcing the law against the accused would result in an injustice because the accused was justified in violating the law (Arnold and Garland, 1974). Persons who act with justification, such as someone who in self-defense uses the force just necessary to repel an attacker, commit no wrong, and deserve no punishment, even though they violated the letter of the law. A cultural relativist may be inclined to argue that people in the United States have no basis for morally blaming and punishing Ms Kimura because according to her standards of right and wrong, she acted with justification. But even a cultural relativist must reject the argument that Ms Kimura was legally justified. To say she was is to assert not merely that *oya-ko shinju* is morally right to the Japanese, but that permitting it is morally superior to prohibiting it. To establish that I was justified in breaking a law, I must show not merely that I believed I acted to fulfill what I believed to be a purpose morally superior to the purpose realized by complying with the law, but that the purpose I believed I acted to fulfill was in fact morally superior. For example, I am justified if I steal bread because I believe doing so is necessary for my survival, perhaps even if my belief that I will starve to death without bread is not true, only in so far as a court can agree that there is in fact greater moral worth in my living than in protecting the property rights of the person whose bread I stole. A newly arrived immigrant who steals a car through some clever ploy because he correctly believes that in his native culture cleverness is the highest virtue and possessing private property is a sin, is legally justified only if he can show that the purpose for which he stole is morally superior to the purpose served by enforcing property rights in this country. This is not a position a cultural relativist can coherently defend. It cannot be defended merely by showing that people in some other country would regard the former purpose as morally superior. For US law to recognize Ms Kimura's actions as justified, the court with jurisdiction would have to declare that permitting *oya-ko shinju* is morally superior to protecting children's lives.

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But courts can take culture into account in sentencing Ms Kimura without justifying her actions, or regarding them as legitimate. The criminal justice system makes efforts to ensure that punishment is morally appropriate. One way this is done is by allowing for excuses. The criminal law distinguishes excusing conditions, to which defendants appeal who admit that their act was a wrong but claim an excuse, and justifying conditions, to which defendants appeal who deny that their act was a wrong because they were justified (Greenawalt, 1984). In granting excuses, the law acknowledges that some violators of a law are less morally culpable than others. This does not mean that society condones the actions. Excusing Ms Kimura does not imply that we do not think the moral beliefs underlying Ms Kimura's actions are false, or that we are committed to the view that all moral beliefs have equal truth value. Whether Ms Kimura's views about an after life, or her moral belief that death is in some cases superior to life, are true or false is beside the point in determining her culpability. Some beliefs are adaptive in certain environments. They may serve no purpose or even be maladaptive when the environment changes. Even cultural anthropologists who emphasize how beliefs that are rational in one context but irrational in another context concede that beliefs that lost their original grounding may still have a positive function for the person, and are often difficult to shed (Harris, 1989). While a liberal state affords protection against harmful consequences of false beliefs, it does not punish people for having false beliefs.⁶

The view that acting reasonably according to one's culturally shaped understandings is a ground for excusing one's actions may be plausible in some circumstances but troubling in others. In many Arab countries an unchaste woman is sometimes said to be worse than a murderer. Girls are repeatedly warned that if they stray, they die. This threat is often carried out by the girl's brother or father even in cases where a girl loses her virginity by being raped. A Jordanian found guilty in an honor killing can be sentenced to as little as six months or less in prison. One Jordanian who killed his sister by bashing her over the head with a paving stone when he found her with a man, and who spent just four months in prison for this, said 'We do not consider this murder. It was like cutting off a finger.' An Egyptian father who stabbed his 25-year-old daughter to death and then chopped off her head because of her sexual promiscuity explained, 'Honor is more precious than my own flesh and blood.' He was released from prison after two months. If a girl is unchaste and her family fails to kill her, they are ostracized, her sisters deemed unmarriageable, her brothers taunted. The killings occur usually among the poorer and less educated, and are rare among the educated and upper classes (Jehl, 1999).

Should we say that an Arab who commits an honor killing acts reasonably according to the dictates of their culture? As with Ms Kimura, an Arab who kills for honor may be acting under very strong emotional stress and may be so overtaken with the cultural dictate as to be in effect unaware of the illegality of his action. We apparently face a dilemma: accept the view that culture excuses crime but be committed to what may be an unpalatable position of excusing those who murder innocent victims of rape; or reject entirely the view that culture excuses crime, in which case we would have no basis for reducing the punishment of Ms Kimura.

We might avoid the dilemma if we can distinguish the cases. One difference is that the practice of Arab honor killing can be interpreted as an instance of undeserved

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punishment and this might be seen to violate a universally valid principle of justice that punishment must be deserved. However, on the position I have taken, the injustice of the practice is in itself beside the point in deciding the culpability of those who engage in it. Killing innocent children as part of *oya-ko shinju* may be as unjustified to us as Arab honor killing. But the question of excuse concerns whether we can blame someone in light of the fact that they are acting reasonably from their cultural perspective and is distinct from the question of whether their cultural practices are justified.

One other difference may be in the accused's state of mind. Ms Kimura feels she acts in the best interests of herself and her children and this state of mind may differ from that of the person committing an honor killing if we understand honor killing as an act of vengeance or retributive punishment. This difference does bear on the issue of excuse, inasmuch as state of mind bears on culpability. The distinction is a fine one, and open to criticism: Ms Kimura might argue she is not harming her children and rather acts in their best interests, but conceivably the Arab could also claim he acts in the best interest of others, that retribution is a noble and beneficial aim. Even if the Arab's motives are purely self-interested, the criminal law does not excuse selfless acts while prohibiting only self-interested ones.

There is another sense in which the state of mind of the actors in each case may differ that might also justify different punishments. Arabs who commit honor killings may know that what they do is illegal and wrong, while Ms Kimura may not have known. For example, in 1985 in Visalia, California, a Yemeni immigrant girl, 16 years old, was shot to death. The lead suspect was her oldest brother, who is believed to have committed the murder in order to defend the family's honor because the girl had allegedly lost her virginity by being raped. The brother is believed to have fled to his native Yemen, and the act of flight indicates an awareness of the illegality of his action (King, 1985). But the premise of my argument concerning the role of culture is not that acting under cultural influences means one lacks knowledge of the law; even if one is aware of the law, cultural influences can still make compliance with the law more difficult and indicate a lack of malice that is relevant in determining culpability. On this argument, whether one had knowledge of the illegality of one's actions is not itself decisive in deciding one's culpability.

Perhaps the most promising way of distinguishing the two cases would be to point to the extent to which the legitimacy and reasonableness of the practice of honor killing is contested within the culture. The *New York Times* recently reported on a woman, unmarried and pregnant, who was stoned to death in Turkey. There was a dispute over whether she had consensual sex or was raped, but villagers and family members said they saw little difference. Article 462 of Turkey's criminal code had provided judges the discretion to reduce a murder defendant's potential sentence by more than 80 percent but recently the Turkish Parliament approved a sweeping human rights law that abolished this provision. Emin Sirin, a member of Parliament, said he 'hoped the legislation would quickly bring the medieval practice [of Arab honor killing] to an end.' However, the article notes, 'the distance between legislative pronouncements emanating from Ankara, Turkey's modern capital, and the sometimes grim, medieval realities of everyday life in other parts of the country' can be stark. The woman's family did not visit her as she lay semi-conscious for seven months before dying. However, women from Kemer, a women's association in Diyarbakir, visited her and brought medicine; when no one

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from the family came for the corpse, the association saw to it that the woman had a coffin, and flouted Islamic tradition by carrying it into the cemetery themselves (Filkins, 2003). So Arab honor killings are contested within the society, as reflected both by new legislation, and the rebellion by the women's association. Moreover, Islamic philosophy and religion espouses respect for human life. Appealing to this principle, many Muslims condemn the practice of honor killing. It may be that awareness of this contestation would weaken the case for a cultural excuse. It may also be that certain practices are objected to so strongly within a society that an immigrant or other subject of that society's laws who has not yet assimilated is nevertheless made aware of this society's objections, and the view that the practice is unacceptable. This, too, could bear on the case for a cultural excuse, and may be the basis for a distinction between Arab honor killing and *oya-ko shinju*.

While I have not endorsed the view that having been brought up in a particular culture makes one physically unable to do certain things, I have argued that there are ways in which culture may determine one's actions, even if those actions are not necessary inasmuch as cultural influences could be otherwise or the actions have different consequences under different circumstances. In so far as culpability is relevant in deciding the level of punishment, which itself is a point of controversy I do not address here, then in determining whether or how to punish someone who violates the law for cultural reasons it is appropriate to consider the ways in which culture may constrain how we can reasonably expect a person to act. There are a number of questions that remain to be answered before we can conclude that the law should allow a cultural excuse. Some actions motivated by culture may not be truly required by the culture. Some cultural influences can be easily resisted and some may even be regarded as unworthy influences by some members of the culture. Those who argue for a cultural excuse will need to spell out which associations should legitimately be recognized as a culture and how we are to establish that a person truly was influenced by the culture. Even if the practical difficulties of implementing a workable cultural excuse could be overcome, it may be that the interest in deterring harmful conduct outweighs the interest in matching punishment with moral culpability. As I noted earlier, the issue of whether a cultural defense should be permitted involves a number of complex considerations. However, in allowing for excuses, the law allows us to take into account morally relevant differences. My purpose has been to argue, against opponents of the inability thesis who contend that culture is not a morally relevant difference, that culture may shape human behavior in ways that are relevant to the question of what punishment is deserved.

Notes

- 1 See *People v. Kimura*, A-091133, Superior Court of Los Angeles (reported in Galante, 1985; Sherman, 1985). Kimura's defense counsel cast the appeal in terms of temporary insanity, relying not on a free-standing cultural defense, but on existing American definitions of psychiatric defenses; but appeal *was* made to how 'the roots of her Japanese culture' directed Ms Kimura's behavior. See Maguigan (1995: 68).
- 2 See the case of Dong Lu Chen, as reported in Asseal (1989); *Ha v. Alaska*, 892 P. 2d 184 (1995), recognizing that 'an understanding of Vietnamese culture was relevant to evaluating [victim's] motivation or readiness to kill defendant' in assessing

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- self-defense claim; *Maine v. Kargar*, 679 A. 2d 81 (1996), allowing cultural evidence in applying a *de minimis* statute; and *People v. Helen Wu*, 235 Cal App. 3d 614 (1991), providing instructions for retrial that jury 'may consider evidence of defendant's cultural background in determining the existence or nonexistence of the relevant mental states'. In *Minnesota v. New Chue Her*, 510 NW 2d 218 (1994), the court allowed cultural evidence to bolster the prosecution's case.
- 3 Moody-Adams criticizes the Nazi Adolf Eichmann along the same lines that she criticizes Greek slave owners (Moody-Adams, 1994: 298–9).
 - 4 Recent studies on cultural differences in causal explanation attributions for moral behavior include Choi et al. (1999); see also Lebra (1983). Recent empirical studies claiming to establish cultural differences in thought and perception include Ji et al. (2000) and Roberson et al. (2000). For a recent summary, see Nisbett (2003).
 - 5 For an account that explains incest avoidance as the result of an involuntary mechanism that creates a strong resistance to sexual desires between two people who were in continual close contact when one of the two was between the ages of 2 and 6, see van den Berghe (1980).
 - 6 That courts do not inquire into the truth or verity of a defendant's religious doctrines or beliefs is central to First Amendment jurisprudence, see *US v. Ballard*, 322 US 78 (1944).

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