Multicultural Feminism: Assessing Systemic Fault in a Provocative Context

Camille Nelson, American University Washington College of Law

Available at: https://works.bepress.com/camille-nelson/19/
MULTICULTURAL FEMINISM: ASSESSING SYSTEMIC FAULT IN A PROVOCATIVE CONTEXT

Camille A. Nelson*

© 2005

I. INTRODUCTION ........................................ 263
II. JIAN WAN CHEN ...................................... 268
III. HUONG “ROSIE” NGUYEN ........................... 274
IV. LATI SOUVANNAVONG ................................ 278
V. CONCLUSION ........................................... 279

I. INTRODUCTION

Strictly speaking, the cultural defense is really no defense at all. Instead, it is the moniker attached by defense attorneys to their advocacy which seeks to personalize the accused in one of two ways: First by injecting a reasonable doubt into the mens rea intent requirement — this would result in acquittal, or second, by contextualizing an affirmative defense, like provocation, by the provision of cultural information about the accused — this would result in mitigated sentencing. Central to

* Associate Professor, Saint Louis University, School of Law; LL.B. University of Ottawa, Canada, LL.M Columbia Law School. The author wishes to thank Professor Cynthia Lee for her gracious offer to be a part of the Culture and Crime Symposium and this symposium edition. A special thank you to my research assistants, Mr. Eric Michael Tuncil and Ms. Elizabeth Semotan for their thorough and diligent research assistance throughout. Thanks also to the ABA Commission on Racial and Ethnic Diversity in the Profession, the ABA Multicultural Women Attorneys Network, the ABA Criminal Justice Section, the ABA Section of Individual Rights and Responsibilities for sponsoring this symposium and to the University of Florida Levin College of Law for hosting the event. Thank you to Professors Lenese Herbert, Mario Barnes, and Angela I. Onwuachi-Willig. The stated agenda of this symposium edition was to systematically delve into the issues addressed in chapter four of Lee’s seminal book, Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom. This chapter is entitled “Culture and Crime.” It provides a thorough exploration of the use and misuse of culture in the American criminal courtroom. By detailing several important criminal law cases in which the culture of the defendant was explored, Lee engages methodically with the discourse and commentary around the advocacy which has come to be known as the “cultural defense.”
defense attorneys' uses of the cultural defense is the criminal defendant's perceived "foreignness." This much has been recognized by scholars who have been engaged with the cultural defense.¹

This ascribed "otherness" is a central pivot around which the so-called cultural defense, and the controversy surrounding its use, revolves. Ascribed otherness entails a certain judicial anthropology,² as defense attorney advocacy is informed by a study of human cultural variation which is from a Western normative cultural position. Adopting the role of neutral observer, the courts explore the foreign culture of the accused in the hopes of gaining an understanding of the criminal behavior in issue.

Essential to this inquiry, however, is the assumption of a normative starting point — white Anglo-American (cultural) norms are the unspoken starting point from which the cultural variations of the accused diverge and are assessed. This cultural anthropology is investigated by the courts as a way to critically enhance the judicial decision-making process. In assessing the criminal culpability of the accused as "other," the essential normative project³ of Anglo-Americanism is not only racialized, but "culturalized" as well. While in some cases, American courts prefer to proceed in a colorblind manner, as if race and culture are irrelevant, in the instance of the cultural defense, these identity constructs are explicitly foregrounded. This racial project might be otherwise innocuous, but for the fact that it "create[s] or reproduce[s] structures of domination based on essentialist categories of race."⁴ Specifically, as Professor Leti Volpp has opined:

[B]ehavior that we might find troubling is more often causally attributed to a group-defined culture when the actor is perceived to "have" culture. Because we tend to perceive white Americans as

---


² Indeed, the courts frequently hear expert testimony from anthropologists who “study” foreign cultures. See CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION IN THE CRIMINAL COURTROOM 97 (2003) (giving the persuasive testimony of Burton Pastemak, an American anthropologist who studied Chinese culture, in the case of Dong Lu Chen).

³ Sheila A. Bedi, The Constructed Identities of Asian and African Americans: A Story of Two Races and the Criminal Justice System, 19 HARV. BLACKLETTER L.J. 181, 182 (2003) (“[T]he criminal justice system has replaced slavery, Jim Crow and exclusionary immigration policy as the racist racial project that shapes race in America”).

⁴ Id. at 181 (quoting MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 71 (1994)).
“people without culture,” when white people engage in certain practices we do not associate their beliefs with a racialized conception of culture, but rather construct other non-cultural explanations. . . .

The ascribed (cultural and racial) otherness of the criminal defendant is, however, but the first variable in the defense attorney’s use of the cultural defense. The second pivot around which the defense turns is the combination of the race, culture and gender of the victim. Many cases in which the use of the cultural defense has been successful involve femicide or gendercide of Asian women. This Essay will explore the “othering” of the victim which forms the subtext to successful utilization of the cultural defense. Devaluation in life and death results from the construction of the victim at the intersection of race, class, culture, and gender. This identity intersection leads to a terrible fate for such victims of male violence — a deadly outcome for which concern has properly been noted by many feminists.

In posing the question of whether feminists and multiculturalists are “on a collision course,” Professor Holly Maguigan recognizes the somewhat ironic debate in which some liberals and feminists are bogged

5. Volpp, Blaming Culture, supra note 1, at 89.
6. These terms seek to capture the disparate statistics for woman-killing. See generally LEE, supra note 2, at 17-45.

Almost 30 percent of all female homicide victims were killed by husbands, former husbands, boyfriends, or former boyfriends, while less than 6 percent of all male homicide victims were killed by wives, former wives, girlfriends, or former girlfriends. In 1996, approximately 2,000 intimate partner homicides were committed. Of these 2,000 homicides, three out of every four victims were women.

Id. at 26 (citations omitted).
In my view, however, space can be carved out for a critically informed middle ground — a multicultural feminist articulation can be made. Such an articulation does not adopt a dichotomous A versus B framework — matters of multiculturalism, gender, class, and race are seldom black and white. Instead, in their educative capacities, attorneys and judges should encourage a healthy and inclusive, yet critical, discourse, thereby transforming multicultural feminism into womanism. As Professor Lisa Crooms remarked, the term “‘womanism’ [has been used] to convey a liberatory project in which feminists of color are [simultaneously] ‘concerned with struggles against sexism and racism . . . as part of [their] community’s efforts to achieve equity and liberation.’”

Such a discourse should attempt to reveal the contemporaneous role of race, gender, class and culture as intricately intertwined with, and constitutive of, systems of racialized patriarchy.

Accordingly, this Essay will revisit the cases of violence against women discussed in Lee’s chapter, *Culture and Crime*. This Essay will reveal that central to the success of these cultural defense cases is the veiled act of “ascribing otherness,” the mapping of foreignness onto the body of one not consulted in the process of identification — in these cases the silent body of the deceased women. The cases reveal a “cultural and racial nexus” that the Court assumes in its role as judicial anthropologist. That the victim died violently is one horror; that the American criminal justice system further violates the deceased by ascribing otherness so as to justify acquittal or mitigated sentencing is another. A further violation occurs when the criminal justice system denies or ignores the voices of women’s groups attempting to provide countercultural narratives.

In attempting to achieve an equality-enhancing use of the cultural defense, the criminal justice system should consider the voice of multicultural feminists. Such a perspective does not reflexively reject the

---

9. See id. at 46-47 (“In apparent tension with a multiculturalist reform agenda is the feminist goal of vigilant protection of a value only recently and tentatively recognized by this criminal justice system: the right of women to be free from physical violence at the hands of men”).
11. See LEE, supra note 2, at 96-124.
12. Id.
appropriateness of the cultural defense at times, nor does it deny the disparate utilization of the defense in a misogynistic manner. Instead, multicultural feminists should attempt to bridge the void between normative cultural preferences for assimilated Anglo-Americanism and patriarchy by querying whether the criminal justice system or courts' use of culture can ever be advantageous to marginalized women and their families. Indeed, perhaps an intersectional redefinition of culture is in order — a definition which inverts racialized patriarchy to assert color-conscious pro-woman equality.  

appropriate cultural advocacy from women's groups and also for parameters around affirmative defenses that would serve the ends of equality enhancement).

14. I prefer the language of color-consciousness to that of colorblindness. In my mind, colorblindness is a legal fiction, akin to the legal fiction of the corporation. Conceptually, it is conceivable to imagine a nonliving entity capable of action through those who conceive and constitute it. Like a corporation, however, the doctrine of colorblindness prevents accountability in the name of autonomy, efficiency, and supposed neutrality. People do matter. Color does matter. It is an unfortunate reality that race, despite being a social construct, is salient in our society. It would be a fiction to claim that we, in America, do not notice and are blind to race. See Angela Harris, Foreword, The Unbearable Lightness of Identity, 2 AFR.-AM. L. & POL’Y REP. 207, 214-17 (1996).

15. Asserting a pro-woman, or womanist, stance is not mutually exclusive of equality. Instead, it offers a more rich and textured appreciation of all women—seeking an inclusive and diverse feminism. In 2000, womanist was defined as: "Having or expressing a belief in or respect for women and their talents and abilities beyond the boundaries of race and class: 'Womanist... tradition assumes, because of our experiences during slavery, that black women already are capable' (Alice Walker). — n. One whose beliefs or actions are informed by womanist ideals. —wom’anoism." THE AMERICAN HERITAGE DICTIONARY (4th ed. 2000), available at http://www.bartleby.com/61/37/W0203750.html (last visited June 12, 2006).

Womanism brings a racialized and often class-located experience to the gendered experience suggested by feminism. It also reflects a link with history that includes African cultural heritage, enslavement, women's culture, and a kinship with other women, especially women of color. As Walker also told the Times, "Feminism (all colors) definitely teaches women they are capable, one reason for its universal appeal. In addition to this, womanist (i.e. black feminist) tradition assumes, because of our experiences during slavery, that black women are capable." Her original definition made clear that a womanist included any, "feminist of color... Also: A woman who loves other women, sexually and/or non-sexually. Appreciates and prefers women's culture, women's emotional flexibility (values tears as natural counterbalance of laughter), and women's strength. Sometimes loves individual men, sexually and/or non-sexually. Committed to survival and wholeness of entire people, male and female. Not a separatist, except periodically, for health. Traditionally universalist... Loves music. Loves dance. Loves the moon. Loves the Spirit. Loves love and food and roundness. Loves struggle. Loves the Folk. Loves herself. Regardless."
II. JIAN WAN CHEN

The deceased Jian Wan Chen was married to Dong Lu Chen when she was killed by him. She was the mother of three children who worked in a New York City garment factory. Dong Lu became suspicious that Jian Wan was having an affair after she refused to have sex with him. Weeks later upon being asked by Dong Lu, Jian Wan confessed to infidelity. Again weeks passed. Finally, upon being denied sex by Jian Wan again, Dong Lu became enraged, held his wife down and demanded to know how long the infidelity had been going on. Upon hearing the response from his wife of three months, Dong Lu got a hammer and killed his wife by striking her in the head eight times.16

In finding the defendant, Dong Lu Chen, guilty of second-degree murder, Brooklyn Supreme Court Justice Pincus sentenced him to five years of probation.17 Justice Pincus was persuaded by the expertise of Burton Pasternak, an American anthropologist and student of Chinese culture who testified on behalf of the defense.18 Pasternak’s testimony explained that, in Chinese culture, a wife’s adultery is dishonorable for the husband because it indicates his lack of control over his wife. First, the defense claimed that any similarly-situated, reasonable Chinese man would also have become violently enraged upon learning of his wife’s adultery.19 Second, defense attorneys addressed the American location of the crime — claiming that if the crime had taken place in China, family involvement would have prevented Jian Wan’s escalation of the battery to murder.20 In even allowing the expert testimony, the Court operates under the assumption that Chen is “unknowable” because of his “foreign” culture. While the defense’s assertion is slightly less relevant to my central point, it highlights the expert’s construction, and the court’s acceptance of the domestic, yet unassimilatable “other” — the stereotypical Asian person

16. See *Lee*, supra note 2, at 96 (my paraphrasing of Lee’s description of the murder of Jian Wan Chen).
17. *Id.* at 97.
18. *Id.*
19. *Id.* at 96.
20. *Id.* at 97.
as perpetually foreign and existing solely within the confines of his or her culture, no matter his or her location, citizenship status, or domicile.\textsuperscript{21}

By accepting the anthropological testimony that it would not be unusual for a normal Chinese man in that situation to kill his wife,\textsuperscript{22} the law was used to construct Chinese culture. Justice Pincus' comments that Dong Lu "was the product of his culture. . . . The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor,"\textsuperscript{23} revealing the legal construction of an alien and fragile culture prone to fracture, which in turn shaped interfamilial relationships. Interestingly, this "other" culture is deemed so foreign as to necessitate anthropological study, expert translation, and legal (re)definition.

Furthermore, the culture is legally pathologized as definitionally dysfunctional.\textsuperscript{24} It is something to be compensated for. Legal compensation is divvied up by way of mitigated sentencing or outright acquittal. In essence, the court or criminal justice system makes allowances to accommodate those who it deems culturally dysfunctional. The liberal's dilemma\textsuperscript{25} here involves the court's or criminal justice

\textsuperscript{21} See Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."); see also JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 367-412 (2000); Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 CAL. L. REV. 1241, 1258-65, 1308-12 (1993); Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law, 76 OR. L. REV. 261, 294-99, 301-02, 307-08 (1997).

\textsuperscript{22} LEE, supra note 2, at 97 ("Chen's behavior 'would not be unusual at all for [a] Chinese in that situation, for a normal Chinese in that situation . . . If it [sic] was a normal person, it's not the United States, they would react very violently. . . . I've witnessed such situations myself . . . I think that one could expect a Chinese [man] to react in a much more volatile, violent way to those circumstances than someone from our own society,'" (quoting American anthropologist, Burton Pasternak)).


\textsuperscript{24} The defense attorneys used cultural anthropology to support a plea of not guilty by reason of temporary insanity. See also Cynthia Lee, Race and the Victim: An Examination of Capital Sentencing and Guilt, Attribution Studies, 73 CHI.-KENT L. REV. 533 (1998).

system’s appropriate construction of the reasonable person and how much, if at all, to subjectivize this objective standard. If the court or criminal justice system constructs the reasonable person in the abstract, it will bear no relation to the accused and will likely be imagined as a white man, as it was traditionally stipulated.26 On the other hand, if the objective person is hyper-contextualized and uncritically subjectivized, the test may tend towards excessive sentence mitigation and ultimately morph into a subjective standard by another name. This reasonable person test is the centerpiece of numerous criminal law defense tests,27 including provocation.

While the defense in Chen centered on a plea of temporary insanity, the substance of the argument was actually reasonable provocation — the “cracking factor.”28 As James Sing has noted,

Although neither the defense nor the court made any mention of the provocation doctrine, this crucial element of intra-cultural sameness [that Chen acted in the way other reasonable men in China would have acted] reveals that the court in essence ruled that Dong Lu Chen was provoked into killing his wife and that the crime was therefore excusable.29


27. The test is also central to self-defense, duress, and necessity.

28. See supra text accompanying note 23.

Specifically, the Chen court adopts a normative perspective by drawing an essential distinction between American and Chinese culture. Justice Pincus must accept on some level that, in China, the justice system or government condones the fact that men aggrieved by the marital infidelity of their wives resort to fatal violence. This racialized cultural essentialism is disturbing, especially since it depends largely on the expertise of the American cultural anthropologist — the quintessential outside observer ascribing as he describes.

Equally disturbing, however, is the subtext. The Court’s implication of community cultural knowledge captures the deceased and renders her complicit in her own death. Jian Wan is tainted by the essentialized cultural knowledge which is imputed to her. This is Sing’s theory of cultural sameness turned on its head. The victim is expected to know that her affront to her husband’s honor will result in fatal violence. In essence, the court expects that the deceased woman had notice of the rules of her own culture — an externally defined, legally constructed definition which fixes culture and ignores integration and assimilation. Jian Wan is retrospectively deemed to know the cultural rules, as defined and ascribed by the American anthropologist, by which she must govern herself in relation to her husband in particular, and American society in general. She is ultimately devalued as a victim of homicidal rage by virtue of being constructed as a culturally captive woman, irrespective of any existing American laws which she might otherwise have hoped would protect her. The confluence of her culture, race, gender and class conspire to make her murder excusable, understandable and perhaps justifiable — after all, the court accepts the testimony of the cultural anthropologist that Jian Wan had “stained” Dong Lu with her adulterous behavior, thereby dishonoring him.\textsuperscript{30} The verb selected by the court implies agency and active participation on the part of Jian Wan in disparaging her husband — it implies her intentionality.

It is doubtful that Chen would have received only probation had he murdered someone the Court saw as an outsider to his culture. Had the victim of his fatal domestic violence been a white woman she would not have been confined by the legally defined anthropological recognition of an honor killing, a justifiable or excusable instance of homicidal rage stemming from illicit female (mis)behavior. Instead, Chen would have faced harsher sentencing, even the death sentence, in keeping with the

\textsuperscript{30} LEE, supra note 2, at 97 (quoting Volpp, (Mis)Identifying Culture, supra note 1, at 69).
statistics for persons of color who murder white people.\textsuperscript{31} As Halliburton stated, while "[t]he crime is the same, the level of justice imposed depends on the color of one’s skin,"\textsuperscript{32} including that of the victim.

Mitigation through use of the cultural defense requires a nexus between the culture of the perpetrator and the victim. An Anglo-American victim would not have been ascribed and bound by a legally defined culture. A cultural and (e)raced Americanism is the normative yardstick and is, thus, legally invisible. Rather, even though Americans are not homogenous, "[j]udges assume that Americans have a shared understanding of what reasonable people think and do."\textsuperscript{33} Accordingly, the theory would hold that an Anglo-American woman would not have expected, or been deemed to know, that her Chinese husband would react with fatal violence to her marital infidelity — with anger yes, but not murder.\textsuperscript{34} She would not be tainted with agency in the orchestration of her own demise. Chen, a Chinese man, would be disparately punished for taking the life of a white woman. This hypothesis is supportable empirically.\textsuperscript{35}

\begin{flushright}
\end{flushright}

In order to appreciate the breadth of the disproportionate problem, we must take a close look at current death row population studies to confront the reality that the use of the death penalty as a special punishment for people of color is not just an anomalous problem of a few rogue states, but is a replacement strategy for the official, overt forms of discrimination that were defeated in the civil rights era.

\begin{flushright}
\textsuperscript{32} \textit{Id.} at 49.
\end{flushright}

\begin{flushright}
\textsuperscript{33} \textit{Id.} at 50.
\end{flushright}

\begin{flushright}
\textsuperscript{34} \textit{Id.}, supra note 2, at 100.
\end{flushright}

\begin{flushright}
\textsuperscript{35} Such theoretical slight of hand is, of course, at odds with the fact of femicide. See \textit{Id.}, supra note 2, at 17-45. Nonetheless, the nexus between the race of the victim and the defendant is relevant in predicting the Court’s harshness or lenience of the defendant’s punishment.
\end{flushright}

\begin{flushright}
\textsuperscript{36} Writing about analogous devaluation of black life, Halliburton explains:
\end{flushright}

The fact that approximately 50 percent of murder defendants and victims are black may suggest that murder is largely a crime committed against same-race victims. But, if we then look at the effect of the race of the victim, we begin to realize that a black life simply is worth less than a white life. Although about 50 percent of all homicide victims are black, only 13.77 percent of individuals of any race executed killed black victims, whereas 80.29 percent of those executed killed white victims. Further, even though black defendants accused of killing a white victim represent 8.1 percent of the homicides from year to year, black defendants convicted of killing a white victim made up 21 percent of those executed. In contrast, white defendants accused of killing a black victim represent 3.2 percent of the homicides.
Eighty-two percent of the people currently on death row were convicted of killing white victims, even though nationally only fifty percent of murder victims are white. Further, hate crimes committed against Asian Americans have doubled over the last twelve years, and incarceration rates for Asian American’s have quadrupled in the past ten years.\textsuperscript{36}

Indeed, Maguigan has determined that “[d]efendants who are not from the dominant culture are convicted more frequently and sentenced more severely than dominant-culture defendants.”\textsuperscript{37} In the face of these statistics, but for the race and culture of the victim, it is hard to explain Chen’s light sentence for murdering Jian Wan. Had his wife been white, Chen would likely have been sentenced to a prolonged period of incarceration in keeping with the increasing rates of incarcerations for Asian Americans. The white victim’s Anglo-American, yet invisible, culture would have resulted in a heightened “property” interest, even in her death — she would have been “worth” more than Jian Wan.\textsuperscript{38}

The role of race, class, culture, and gender are revealed as intersecting variables in the mitigated sentencing of Dong Lu Chen. The racialized cultural synergy and symmetry between the perpetrator and the victim is a necessary element in the success of the cultural defense. Problematically, cultural spectators in the form of cultural anthropologists externally define the culture of the victim and the perpetrator. Although, the discipline of anthropology is not intrinsically corrupt, anthropologists must take care to consider internal cultural voices from the disaffected group. Moreover, attorneys, judges, and jurors must be cautious to ensure as much diligence is exercised in legally ascribing and defining any culture — multiculturalism must be organic and inclusive, and must avoid the touristic gaze.

In weighing the testimony of Burton Pasternak, Justice Pincus should have balanced it against testimony from Chinese women’s groups as interveners for the silenced voice of Jian Wan.\textsuperscript{39} The Court might have

\textsuperscript{36} Bedi, \textit{supra} note 3, at 184.
\textsuperscript{37} Maguigan, \textit{supra} note 8, at 97, \textit{cited with approval in} LEE, \textit{supra} note 2, at 101.
\textsuperscript{38} See Cheryl I. Harris, \textit{Whiteness as Property}, 106 HARV. L. REV. 1709 (1993) (discussing the salience of white skin in elevating value in the legal system and how white skin privilege has quantifiable significance at law).
\textsuperscript{39} Volpp asks:
been able to bring a more nuanced view of Chinese culture — one that might concede any patriarchy while simultaneously recognizing the dynamic transformation of Chinese culture. Indeed, such multicultural women’s voices might challenge the very relevance of culture to the criminal proceedings. The inclusion of a multicultural womanist perspective would highlight the marginalized socioeconomic status of both Jian Wan and Dong Lu as recent immigrants, a garment factory worker and dishwasher respectively. It would recognize their likely linguistic and racial marginalization in their adopted homeland and the stresses of such displacement. Finally, a multicultural womanist perspective would acknowledge the gendered violence and sexism pervading the life, and ultimately the death, of Jian Wan. Only against this critically informed foundation could Justice Pincus have determined an appropriate sentence. Multicultural womanism would help the court avoid cultural capture through static, external, and one-dimensional determinations.

III. HUONG “ROSIE” NGUYEN

Chanh Van Duong was waiting outside a divorce courtroom in Colorado with a loaded gun. Upon seeing his estranged wife Huong with Robert Jencks, the man Chanh suspected was her lover, he shot Jencks in the wrist and then fatally shot his wife Huong. But where was Jian Wan Chen in this story? The defense strategy rendered her invisible. She was most notably present in the testimony as a dead body and as a reputed “adulteress,” bringing a “stain” upon her husband. Jian Wan Chen did not exist as a multi-faceted person but was instead flattened into the description “adulteress.”

Volpp, (Mis)Identifying Culture, supra note 1, at 76, cited with approval in LEE, supra note 2, at 103-04.

40. Womanism has also been referred to as part of the larger identity of “women of color” which was created by women of differing racial or ethnic identities to combat racism and is joined by other subsets of that terminology such as “essentialism,” “multiple jeopardy,” “centerwoman,” “transgender,” and “intersectionality” all developing distinct vocabularies and meanings to express their specific concerns. Alison M. Jaggar, Sexual Equality as Parity of Effective Voice, 9 J. CONTEMP. LEGAL ISSUES 179, 190 (1998).

Duong’s attorneys argued against first-degree murder, despite the fact that their client brought a loaded pistol to court. Instead, they claimed that Duong had reacted as any reasonable similarly situated Vietnamese man would have in such circumstances; the stigma of divorce in Vietnam carries much dishonor. This provocation articulation revolved around James Sing’s theory of cultural sameness and my extrapolation of this theory to cultural nexus.

By returning a verdict of manslaughter, the jury essentially accepted the defense argument that “the average or ordinary Vietnamese man would have been similarly provoked because divorce in Vietnam is a serious taboo” — cultural sameness in the first degree. The extrapolation to cultural nexus, however, relates to the identity of the victim as culturally racialized. Knowledge of an externally defined, judicially accepted culture is imputed to Huong. She is captured by her culture, which the court pathologizes as unknowable and dysfunctional, to her detriment.

The hypothesis of cultural nexus would hold that when the race of the perpetrator and the victim is the same in femicide cases, one can predict sentence leniency due to the cultural-captivity of the female victim — captivity even to the dominant (yet invisible) white culture. Specifically, when the murderer is a white male and the victim is a white female, one can expect sentence mitigation grounded in unstated dominant cultural norms of patriarchy. When the murderer is a white male and the victim is a woman of color, one can predict sentence leniency due to racialized patriarchy. When the murderer is a man of color and the victim is a woman of color, racialized patriarchy devalues the female victim by ascribing cultural otherness so dysfunctional as to merit legal compensation through sentence mitigation, per the Chen and Duong cases. Where, however, the murderer is a man of color and the victim is a white woman, the inverse is true. Here, the expectation is that racialized patriarchy results in the Court’s imposition of longer sentences or even the death sentence. A comparable statistic reveals that the “[c]hance of receiving [a] death sentence for people convicted of killing whites compared to people convicted of killing Blacks [is]: 11:1.” The American racial hierarchy
likely results in a similarly disconcerting disparity for the murder of Asian women by white men, as opposed to the murder of white women.

This theory of racial devaluation is supported by the juxtaposition of the cases raised in chapter four of Murder and the Reasonable Man. Although the court gave Duong what, to my mind, was a short sixteen-year sentence for what was arguably a premeditated and deliberated murder, having brought the gun to court expecting to encounter his wife, his manslaughter sentence still exceeds the sentence the court gave to Texan Jimmy Watkins for murder:

In December 1997, Jimmy Watkins, a supervisor of a waste disposal company and his wife Nancy began having marital difficulty. Nancy, who worked at a Wal-Mart store, began seeing one of her co-workers, Keith Fontenot. In December of 1998, Nancy kicked Jimmy out of the family home after he sexually assaulted one of her relatives. Nancy’s boyfriend moved into the house the same day. Shortly thereafter Jimmy commenced repeatedly calling Nancy’s cell phone. Jimmy called Nancy from his cell phone whilst he was just outside the family home. He asked her where she was in the house. Nancy responded that she was in the kitchen at which point Jimmy kicked in the kitchen door and shot her in the head with a 9 millimeter handgun as their 10 year old son looked on. Jimmy then shot Keith twice. He pulled the trigger a third time but the gun failed to fire. Jimmy fled thinking he was out of bullets. While driving, he realized the gun had merely jammed so he fixed the gun and returned to his former home. Upon re-entering the kitchen, Jimmy Watkins shot his wife five more times while she was on the phone with 911 dispatchers.

Charged with murder, Watkins claimed that he was reasonably provoked. Watkins argued that he was distraught and snapped after finding out that Keith, his wife’s boyfriend, had moved into the family home. However, by the time of Watkins’s trial, Texas law no longer

46. LEE, supra note 2, at 96-124.
47. Id. at 42.
48. See id. (my paraphrasing of Lee’s description of the murder of Nancy Watkins); see also Gabrielle Christ, Wife Killer’s Witnesses Charged With Perjury, FORT WORTH STAR-TELEGRAM, June 28, 2000, at 1; Michael Weissenstein, Man, 33, Accused in Killing of His Wife, FORT WORTH STAR-TELEGRAM, Dec. 23, 1998, at 1;
49. LEE, supra note 2, at 42-43.
50. LEE, supra note 2, at 43.
recognized provocation as a mitigatory defense for murder. Nonetheless, the jury, in finding Watkins guilty of murder, recommended a sentence of probation because he killed Nancy in the heat of passion. Accordingly, the judge sentenced Watkins to ten years probation (having to serve four months of them in custody) and required Watkins to pay a $10,000 fine.

By juxtaposing the Duong and Watkins cases one can identify the veiled racism and sexism of the legal system — the systemic fault lines. Despite killing his wife in public with a handgun he brought for that purpose, the court convicted Duong, a former Vietnamese military officer, of manslaughter instead of murder, and Duong received a mitigated sentence of sixteen years in prison. The court convicted Watkins, a white male, of murder, but sentenced Watkins to probation and four months in custody.

Although I take issue with the mitigatory outcome of the cultural defense in Duong, Doriane Coleman’s assertion that the court’s recognition of the cultural defense violates antidiscrimination principles by treating immigrant defendants more favorably is not borne out in this instance. Indeed, the cultural nexus between the white male perpetrator and female victim in Watkins carries even greater currency than in Duong. This juxtaposition of case law may reveal that the white male perpetrator is most favored by American courts. Either way, the ultimate losers are the women trapped by the legal construction of a confining culture and patriarchy. Clearly, it is not the cultural defense alone that leads to oppressive outcomes. Indeed, the crucial issue may be criminal courts that are systematically at fault for reproducing dominance and patriarchy. These courts are predisposed to accept excuse and justification narratives from men who kill their intimate partners in fits of homicidal rage.

Again, the relevance of multicultural feminism or womanism is apparent — the combination of sexism, rising to the level of misogyny, and racism legally devalues nonwhite and female life. As Patricia Hill Collins remarked, three tasks are served by the language of “womanism.” First, it “offers a vocabulary for addressing gender issues within . . . communities [of color] without violating norms of racial solidarity . . . .” Such internal discourse is important for any community, especially

---

51. Id. at 115.
52. Id. at 43.
53. Id.
54. Telephone Interview by Eric Michael Tuncil with Mealone McDonnald, Reporter, FORT-WORTH STAR-TELEGRAM (July 29, 2005).
55. See LEE, supra note 2, at 109 (citing Doriane Lambelet Coleman, Individualizing Justice Through Multiculturalism: The Liberal’s Dilemma, 96 COLUM. L. REV. 1093 (1996)).
56. Crooms, supra note 10, at 254 n.96.
communities marginalized along identity variables. Internal community
dialogue helps avoid externally imposed nomenclature that does not have
an organic resonance with community members. Touristic cultural
anthropology is mitigated if organic internally devised solutions have also
been conceived of and generated by those community members with the
greatest stake in the (legal) dialogue.

Second, womanism fosters "strong relationships between . . . women
and . . . men of color in the U.S. which is a very important issue for . . .
[many] women [of color] regardless of their political perspective."\(^{57}\) Women of color in the United States know their men are endangered,
whether lovers, sons, or friends — necessarily, we are inclined to be
protective. Finally, womanism "seemingly supplies a way for . . . women
[of color] to address gender oppression without attacking . . . men [of
color]."\(^{58}\) This is particularly important as undoubtedly Duong's
marginalization along the axis of race, class and culture might indeed be
relevant in a criminal law setting, as might any linguistic issues.\(^ {59}\) These
issues affect him and his community, which includes Vietnamese women
with whom he might interact. Of course, this should not excuse or justify
misogyny. It does, however, allow for the possibility of a more nuanced
assessment of his criminal culpability, one that takes into consideration the
voices of (dis)affected women.

IV. LATICOUVANNAVONG

After settling in upstate New York, May Aphaylath, a Laotian
immigrant married Laticouvannavong, also a Laotian immigrant.
Shortly after their wedding, the couple began to quarrel about Lati's
ex-boyfriend Nunh. Lati taunted May, using Nunh as an example of
what a good husband should be like. She told May she wished she
had married Nunh. Upon entering the kitchen one day, May became
enraged upon finding Lati on the phone talking to Nunh. Despite

\(^{57}\) Id.
\(^{58}\) Id.
\(^{59}\) This is especially important for those of us displaced either voluntarily or nonvoluntarily
from our respective homelands — this sense of alienation is particularly acute for refugees and
immigrants alike. See Robert S. Chang, Migrations, Citizens and Latinas/os: The Sojourner's Truth
and Other Stories, 55 FLA. L. REV. 479 (2003); Guadalupe T. Luna, LatCrit VI, America Latina and
the fact that Lati’s two sisters were in the house, May stabbed Lati sixteen times with a kitchen knife.\textsuperscript{60}

While the trial judge refused to hear expert testimony about Laotian culture and convicted Aphaylath of murder, the Court of Appeals of New York overturned the conviction.\textsuperscript{61} The highest court in New York thus stated that the trial judge had erred in refusing to allow the expert testimony that “in Laos the shame of having a wife receive calls from a single man is so great that a husband can be expected to lose his control.”\textsuperscript{62} This example of “cultural determinism” is troubling as, not only is it stereotypical, but it concretizes culture as static, non-dynamic, and unchanging.\textsuperscript{63}

Again cultural sameness partially dictates this ruling as the court legally constructs Laotian culture as misogynistic — a similarly situated Laotian man would have reacted with murderous rage as did May Aphaylath. The reasonable person is subjectivized in a manner that is the antithesis of equality enhancing — here, the reasonable man from Laos is imbued with murderous patriarchal rage, not even from adultery, but from his wife’s merely speaking to another man.\textsuperscript{64} A multicultural feminist or womanist stance would encourage the denial of the cultural defense in such an instance where its justice-driven potential morphs into an “equality injustice,” further subjugating women and sanctioning misogyny in the name of multiculturalism.\textsuperscript{65}

V. CONCLUSION

Returning to the purpose of this symposium edition, I have attempted to engage in the debate between feminists and multiculturalists about the cultural defense. Framing my analysis within chapter four, Culture and Crime, of Lee’s Murder and the Reasonable Person, I have attempted to carve out a space for a new, less polarizing debate about the utility and

\textsuperscript{60} See Lee, supra note 2, at 116 (my paraphrasing of Lee’s description of the murder of Lati Souvannavong); see also Robert Bellafiore, Court Overturns Laotian Refugee’s Murder Conviction, U.P.I., Nov. 13, 1986; Refugee to Get New Murder Trial, N.Y. Times, Nov. 16, 1986, at 54.

\textsuperscript{61} Lee, supra note 2, at 116-17.

\textsuperscript{62} Id. at 116.

\textsuperscript{63} Nelson, (En)Raged or (En)Gaged, supra note 13, at 1068.

\textsuperscript{64} See Lee, supra note 2, at 116 (stating “the Laotian husband who kills his wife for talking on the telephone with a single man acts reasonably or at least the way any ordinary Laotian husband would act”).

\textsuperscript{65} See Nelson, Breaking the Camel’s Back, supra note 13, at 146.
deficiencies of the cultural defense — I posit a multicultural feminist or womanist approach to these issues. It is my opinion that the issues are not either-or.

In some instances, a robust utilization and acceptance of the cultural defense may, indeed, be in order to ensure a just outcome. Care must always be taken, however, to avoid, or at least mitigate, touristic cultural anthropological deference to outsider “students” of “other” cultures. We must guard against ascribing otherness in this fashion, especially when our ascriptions are essentializing and inscribe dysfunction onto a culture without balanced input from the community under “study.” A more nuanced account of culture is appropriately used — such an approach seeks to incorporate organic, internal voices — voices of women and men capable of exploring and explaining their culture as dynamic.

Secondly, we must be clear that the misogynistic application of the cultural defense should not be condoned by the American legal system. Any application of the defense that results in the wholesale devaluation of the lives of women is to be rejected by the courts. Vigilance must be exercised to ensure that the application of the cultural defense does not perpetuate dominant stereotypical cultural values such as sexism or the subordination of women in the name of cultural pluralism. As the definition of culture is value-laden, it is imperative that women’s voices be heard and influence the analysis of their culture — such anthropological evidence must be solicited from multiple sources, especially from the affected community.

It is possible for courts to define the defense in a way in which culture is considered, when relevant, yet protect women’s interests in life and liberty. For instance, instead of convicting Chanh Duong of manslaughter and giving him a sixteen-year sentence, the court should have convicted Duong of first-degree murder and Duong might have avoided the death penalty by introducing any relevant cultural information. Alternatively, the court could have convicted Duong of second-degree murder, with significant incarceration and rehabilitative programming.

Accordingly, my answer to Maguigan’s question of “whether feminists and multiculturalist are on a collision course,” is no, not necessarily. One can be a feminist and a multiculturalist at the same time. Indeed, to ignore this possibility would be to ignore the reality of many women of color who simultaneously breathe life into both the feminist and multicultural possibilities. It is not contradictory to be a multicultural feminist or a

67. Id.
womanist — one can, and should, be simultaneously pro-woman, pro-
people of color, and pro-equality. There is consistency and logic in this
quest for justice. In the words of Alice Walker, "womanism" is "a black
feminist who continues the legacy of outrageous, audacious, courageous
[struggle] ... willful[,] responsible[,] in charge, [and] serious ... women
who are agents for social change for the wholeness and liberation of black
people, and by extension, the rest of humanity."68 I relish this definition of
womanism and hope that we, men and women of all races, can all rise to
this level of commitment with respect to the construction and application
of the criminal law.

68. Linda L. Ammons, Dealing with the Nastiness: Mixing Feminism and Criminal Law in
the Review of Cases of Battered Incarcerated Women — A Tenth-Year Reflection, 4 BUFF. CRIM.
L. REV. 891, 894 n.5 (2001); see THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN-AMERICAN