Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies

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In this article I offer a principled strategy for the courts to identify and to handle the uses of culture as a defense in a criminal proceeding. I begin by discussing the relationship between culture and behavior illuminated by sociologists of culture. I then explain the three categories into which cultural defenses fall—cultural reason, cultural requirement, and cultural tolerance—and the response of criminal courts in the United States to each. I argue that where culture offers an alternative explanation of the defendant’s intent, it is highly relevant to determinations of criminal liability. However, where a defendant uses culture only to explain why he wanted to harm the victim and asks that the court be tolerant of such behavior, considerations of culture should not be allowed. In reaching this conclusion, I draw on theories of multiculturalism to consider the benefits and burdens of maintaining the facade of a “cultureless” criminal law in an increasingly heterogeneous society.

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Culture is a way of life, a rich and timeworn grammar of human activity, a set of diverse and often conflicting narratives whereby communal (mis)understandings, roles, and responsibilities are negotiated.

(Honig 1999, 39)

Law, it has been said, is our national religion, lawyers the priesthood, and courtrooms the cathedral where our contemporary passion plays are enacted.

(Norgren and Nanda 1996, 265 and n. 1)

Law, in theory, knows no culture and recognizes no identity.

(Sarat and Kears 1999, 13)

Culture, like law, is constituted by, reflected in, and performed on a variety of stages in human life: in families and in employment settings, in public sectors and in private conversations, on personal levels and on institutional grounds. Both culture and law are celebrated and enacted in everyday events such as school holidays and wedding rituals and in extraordinary events such as public executions and presidential inaugurations. Because institutions like culture and law are ubiquitous, their presence—and their influence—are often taken for granted, normalized, or considered benign.

But in certain circumstances, these institutions lose their taken for granted quality and assume center stage, often in conflict with each other. Nowhere is this tension more profound than in the courtroom. When a criminal defendant relies on his culture to account for, to rationalize, or to exonerate his behavior—in other words, to mount a “cultural defense”—he places his culture under a microscope and often into direct conflict with the law. The law of the United States does not formally take culture into account, and in fact assumes cultural homogeneity in order to apply one standard of justice to all. But when this homogeneity assumption is challenged and culture is thrust into the foreground, legal actors are asked to reexamine law’s foundations in order to achieve substantive justice.

Although scholars have coined the phrase “cultural defense,” no such singular defense exists in United States jurisprudence. Rather, that phrase encompasses a variety of approaches under which a defendant invokes his cultural background to explain, to excuse, or to justify conduct that our legal system would otherwise label criminal.¹ “The theory underlying the defense

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¹. The earliest use of the term cultural defense in legal scholarship can be found in a student essay in the Harvard Law Review in 1986 (Note 1986). While no U.S. jurisdiction has recognized the use of a formal cultural defense, courts have long accepted evidence of cultural factors pursuant to the assertion of traditional criminal law defenses. See discussion in part 2.
is that the defendant, usually a recent immigrant to the United States, acted according to the dictates of his or her ‘culture,’ and therefore deserves leniency” or is not guilty of the crime alleged by the state (Volpp 1994, 57). In explaining his conduct on cultural grounds, a defendant hopes to receive some benefit from the court or from the prosecuting agency, including reduced punishment, reduced charges, or a dismissal of charges altogether.

While legal scholars have debated the doctrinal merits and burdens of the use of culture as a defense, I approach the topic sociologically and empirically in order to explain how culture has actually been incorporated by the criminal courts of the United States and to offer a framework for the handling of future cases. Drawing upon the literature of the sociology of culture, I first explore what we mean by culture and its ability to explain, affect, or control the behavior of its adherents. Culture can be viewed alternatively as a soft or hard determinant of behavior (or as something in between), and these theories of culture establish a foundation from which we can assess how culture has been, or should be, appropriated by criminal defendants to bolster their claims of innocence or mitigation.

From my examination of the relevant U.S. case law, I argue in part 2 that defendants use culture in one of three primary ways: to provide a non-criminal motivation for what otherwise appears to be criminal behavior (cultural reason), to offer a culturally based explanation of tolerance for behavior that clearly violates the U.S. criminal law (cultural tolerance), or to explain certain cultural requirements that mandated criminal behavior in the circumstances at issue (cultural requirement). To illustrate the cultural arguments at stake, I provide examples of actual criminal cases in which one or another of these cultural claims was made, and I ground the discussion of the cases’ outcomes in the cultural theories described at the outset of the essay and in the relevant U.S. legal doctrines.

In part 3, I situate this examination of cultural defense strategies within a larger discussion of multiculturalism and the relationship of the criminal law to the multiculturalist agenda. Leaving behind the purely descriptive explanation of the strategies themselves, in this final portion of the paper I take a normative stance concerning how U.S. courts should treat cultural claims raised by criminal defendants. I contend that, while the cultural reason and cultural requirement strategies appropriately fit within (or appropriately challenge) American criminal law by invoking alternative theories about the actor’s intent, the cultural tolerance strategy concedes an intent to harm the victim and thereby improperly seeks to increase our nation’s tolerance for intentional violence against vulnerable populations. For this reason, I argue that courts should be receptive to claims of cultural reason and cultural requirement but should reject claims of cultural tolerance. I also suggest, from a practical standpoint, that when culture is raised in a criminal case it be done so directly, through the formal introduction of testi-
mony that can be subject to cross-examination and rebuttal. I advocate a form of notice pleading when a defendant wishes to rely on a cultural strategy, so that the prosecution and the court will have the opportunity to investigate fully the merits of the cultural claim at issue. These direct approaches will reduce the odds that courts will rely on stereotypes or incorrect information when assessing the relevance of culture to the defendant's behavior and, in so doing, will further the interests of both justice and multiculturalism.

PART 1: THE RELATIONSHIP BETWEEN CULTURE AND BEHAVIOR

In order to craft an effective cultural defense to a criminal charge, the defendant must first identify how his culture plausibly excuses or explains his conduct. He must, at the outset, determine what he means by culture. I prefer the definition used by Robert LeVine (1984, 67): Culture is "a shared organization of ideas that includes the intellectual, moral, and aesthetic standards prevalent in a community and the meanings of communicative actions." LeVine's definition is particularly useful here because it includes the notion of community "standards," by which we typically assess what behavior is criminal and what behavior is lawful, and "communications," by which we understand other people's thoughts and actions and to which we, in turn, provide culturally appropriate responses. Moreover, it emphasizes that these standards and meanings are "shared," passed to new community members through socialization processes and eventually internalized by all who choose to remain in the community. Those standards and meanings form the framework that the community member will use to evaluate future experiences and communications. "Cultural models thus derive from, as

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2. Among legal scholars, only Nilda Rimonte has explicitly set forth the definition of culture that informed her discussion of the cultural defense. She writes: "I use the term to refer specifically to the body of beliefs, ideas, and ideals held by an ethnic group about the nature of women and men and about their roles and relationships. I also use 'culture' to describe the mechanisms, both actual and symbolic, that an ethnic group invents and imposes on its members in order to ensure cohesion and conformity with the group's ideas and beliefs" (1991, 1315). While I do not limit my discussion of culture to these ideas and practices governing relationships between men and women, I will incorporate Rimonte's notion of cultural mechanisms that promote conformity.

3. Lucian Pye instructs that culture's durability stems from its residence "in the personality of everyone who has been socialized to it. People cling to their cultural ways not because of some vague feeling for their historical legacies and traditions, but because their culture is part and parcel of their personalities" (1985, 20).

4. Roy D'Andrade refers to a framework of "constitutive rules" that "create a variety of types of people, occasions, and objects, which are linked to norms concerning the rights of certain types of people over certain kinds of objects on certain occasions. These norms are major determinants of a person's actions and reactions, directly affecting the flow of things on which social life depends" (1984, 111).

According to anthropologist Michelle Rosaldo, we must "understand how human beings
they describe, the world in which we live, and at the same time provide a basis for the organization of activities, responses, perceptions, and experiences by the conscious self" (Rosaldo 1984, 140). Building on these premises, a person who wants to explain his behavior as culturally grounded must then ask: Did my culture, this assemblage of shared meanings and standards to which I have become "enculturated" (Renteln 1993, 445), determine or influence my behavior?

Scholars in sociology and anthropology have long debated whether or not and how culture affects or determines our behavior patterns. Sherry Ortner (1990, 84) has described a continuum of positions on this question, ranging from "soft/external" to "hard/internal" explanations of culture. Because I find her continuum model persuasive, I will adopt it for my own discussion of cultural defense theory. Before I begin, I must emphasize that my goal is neither to prove nor to disprove the value of any particular theory overall. Rather, I seek to evaluate the usefulness of each theory to a cultural defendant who strives to convince a jury (and a community) of her innocence.

According to Ortner, at one end of the spectrum are the "soft/external" theorists such as Richard Fox (1985) and Eric Wolf (1982), who assert that culture has very little to do with behavior at the time of the behavior's occurrence. An actor (or an anthropologist) may only call upon culture afterward, "to describe what has happened, for example, or to legitimate what has happened" (Ortner 1990, 85). The soft/external theorists claim that we appropriate culture after the fact to give a particular meaning to an actor's behavior. Steve Deane (1994), in his study of Hindu society, identified such "soft" uses of culture in Hindu society. He found that Hindu men used their culture's framework to justify behavior they performed for noncultural reasons. They did this "culture work" to "avoid the discredit of appearing to lack what [Hindu culture] defined as normal human attributes" (1994, 276, 285). For example, when Ramesh Mishra wanted to marry a woman he loved but to whom his parents objected, he emphasized her social ties, rather than his love for her:

understand themselves and . . . see their actions and behaviors as in some ways the creations of those understandings. Ultimately, the trend suggests, we must appreciate the ways in which such understandings grow, not from an 'inner' essence relatively independent of the social world, but from experience in a world of meanings, images, and social bonds, in which all persons are inevitably involved" (1984, 138–39).

5. Alison Renteln defines enculturation as "the profound manner in which a person's culture shapes his worldview. . . . Enculturation shapes the way individuals perceive reality, and thus guides their actions" (1993, 445). Melford Spiro (1984, 326) distinguishes between learning a culture and becoming enculturated; for example, one may study Buddhism but will not become a Buddhist unless he internalizes Buddhist doctrines as personal beliefs.
Ramesh focuses not on the personal characteristics of the woman he had chosen to be his bride, nor on his own personal, individual happiness that he hopes to gain by marrying her, but instead on the family of the woman he had chosen to marry. Appeals to his own happiness or appeals which focus on the beloved’s personal characteristics, while making sense in the American framework which sees action as chosen by the individual in accord with his or her own interests and desires, would make little sense according to the Hindu framework which sees action instead as determined by the individual’s social ties. Although Ramesh himself emphasizes individual volition, he is nonetheless constrained to use strategies of action that explain his unconventional acts in a way that makes sense according to the collectivist framework for understanding action. (1994, 277)

Ramesh must invent a cultural reason for marriage—identical caste backgrounds—and mask his true objective—to marry for love—in order to gain the approval and respect of his family. He consciously appropriates his culture to legitimate what he knows would be regarded as illegitimate action.  

At the other end of the spectrum lies the hard/external position, which holds that “cultural schemas may become deeply embedded in actors’ identities as a result of actors’ growing up within a particular cultural milieu, and as a result of practices (social, ritual, etc.) that repeatedly nourish the schema and its place within the self” (Ortner 1990, 86). In short, culture constrains actions by programming actors, eliminating their sense of agency or responsibility for their actions. One of the early proponents of this type of cultural determinism was Levi-Strauss, who aimed to show “how myths operate in men’s minds without their being aware of the fact...[to] proceed as if the thinking process were taking place in the myths, in their reflection upon themselves, and their interrelation” (1969, 12). Moving beyond this cognitive emphasis, Geertz has asked us to consider culture not as something contained inside the minds of individual people, but rather as a system of symbols through which members of a society communicate their worldview, moral standards, and the like (1973). Finally, Bourdieu’s “habitus” seems to capture the deterministic quality of this position; he emphasizes that, be-

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6. In another study of community and marriage, Jane Collier explored the marriage relationships and obligations among small-town Spaniards in the 1960s and 1980s. Collier concluded that women in the 1960s were free to think independent thoughts but had to conform their behavior and speech to the norms of the community: “[T]hey can freely report on the roof talking about their sacrifices were actually occasions when a woman invoked her ‘obligations’ to justify doing what she wanted. Women commonly excused themselves for not staying longer or for refusing to comply with someone’s request by referring to their obligations” (1997, 144).

7. Spiro asserts that culturally constituted beliefs neither guide nor instigate actions automatically. The actor must give the belief “emotional and motivational, as well as cognitive, salience” before he can claim that the belief significantly affects how he lives (1984, 328).
cause each of us inhabits a position in social space, we are consequently bound up with the systems of dispositions characteristic of different classes and class fractions (1984, 6).

Fox disparages this external position as cultural tyranny, warning that “culturology” approaches lead to racism and orientalism by “stereotyping and homogenizing ‘explanations’ of the human condition in different societies” (1985, xiii). Fox fears that when we explain behavior as determined exclusively by culture, we doom certain societies to be merely “carriers of communal traditions,” incapable of change or growth (1985, xv). Moreover, because this perspective feeds our own prejudices and preconceptions about why such societies are “backward,” we continue to regard them as backward and to ignore any changes or advances they might make.

Ortner herself offers a different approach to analyzing the relationship between culture and behavior, stemming from her frustration with the inadequacies of the extreme positions. “Everyone seems to agree in opposing a . . . view in which action is seen as sheer enactment or execution of rules and norms. Moreover, everyone seems also to agree that a kind of romantic or heroic ‘voluntarism,’ emphasizing the freedom and relatively unrestricted inventiveness of actors, will not do either” (1984, 150). Building on the practice theories of sociologists, such as Swidler (1986), who assert that one’s culture offers a particular tool kit of strategies to use in a particular circumstance, Ortner contends that if we unwittingly find ourselves acting in accordance with a cultural schema, we may adopt the schema as a guide to future action (1990, 88–90). She defines a schema as a “preorganized scheme of action” that governs the enactment of culturally typical relations and situations (1990, 60). Although we begin by acting as individuals with individual motivations, once we recognize that our actions seem to fit within a pre-organized cultural schema, we are likely to choose to follow the schema:

With that shift in perception [to a recognizable mode], the cultural schema is appropriated, and further moves . . . appear as the next rational step. In effect, the cultural schema has been moved by an actor from an external to an internal position, from an abstract model of deeds done by ancient heroes and ritual participants to a personal program for understanding what is happening to one right now, and for acting upon it. (1990, 89)

8. The tool kit analogy has elements of both agency and determinism. A person is free to choose among the options in her tool kit, but the contents of a given person’s tool kit depend on her culture and status. Hence, her choices (responses, behaviors, preferences) are limited by her culture and status (Swidler 1986).
While he is acting in accordance with a cultural schema, the path dictated by the schema becomes intuitive for the actor; it "has for the actor a certain naturalness, and realism, and hence coerciveness" (1990, 90). Because the actor internalizes the schema and then patterns his actions on the schema's directions, the schema—not the actor—structures the events that then unfold.

However, Ortner notes that this shift in perception from external to internal is not irreversible; the schema need not remain indefinitely at the controls. "[A] cultural frame that has been taken into the self can be taken out again—when others fail to react in expected ways, for example, or when circumstances change, or simply when a person matures" (1990, 89). Hence, not all actors will adopt or use the schema at a given time, and one actor's failure to "play along" may convince the other actor to abandon the schema.

In sum, the theories on the continuum described by Ortner distinguish themselves by the degree of agency they ascribe to an actor in a cultural situation or, conversely, by the degree of control they ascribe to the cultural schema in governing an actor's behavior. The soft/external theory posited by Fox and Derne stands in sharp contrast to the hard/internal view suggested by Bourdieu and Geertz, while Ortner's "moderate schema" approach lies somewhere in between these two poles. I now explain how these theories are expressed in the strategies used by cultural defendants.

The U.S. criminal justice system is premised on the notions of free will and individual responsibility for one's actions. Indeed, the law justifies punishing behavior with criminal sanctions because it is presumed that the actor knew what she was doing at the time of his action, and is therefore responsible for the consequences of her choices. But this paradigm may mask the role culture plays in shaping one's choices, as the hard/internal view and Ortner's moderate schema theory suggest. It is up to the defendant to bring to the court's attention this conflict between culture and jurisprudential theories, to demonstrate that culture influenced or determined her behavior and should therefore relieve her (in whole or in part) of criminal responsibility. But as the cases below demonstrate, not all invocations of culture will successfully convey this message or convince the court that jurisprudential traditions should be re-assessed in light of culture.

PART 2: THE CULTURAL DEFENSE STRATEGIES

In the introductory portion of this essay, I set forth my system for classifying cultural defense strategies. In dividing cultural defenses into three categories—cultural reason, cultural tolerance, and cultural requirement—I am drawing not only on the legal arguments contained therein but also on the particular theory or theories of culture-behavior relations that I believe are implicated in the chosen strategy. I will begin by providing a brief back-
ground on the elements of a criminal prosecution, and then posit the various defense theories against this background.

In order to convict a defendant of a crime, the state must establish two principal elements, known in the criminal law as actus reus and mens rea. A defendant cannot be found guilty unless he both committed the criminal act (actus reus) and possessed the criminal intent (mens rea) specified in the criminal statute. Generally, the state need not prove that the defendant intended to violate the law, only that she intended the actions that produced a law violation. From that doctrine we have derived the oft-repeated (but legally correct) cliché that “ignorance of the law is no excuse.”

Nonetheless, certain criminal statutes require the state to prove that the defendant had a specified state of mind at the time of his actions—a desire that his acts achieve a specified purpose—without which he cannot be considered guilty of the crime. California Jury Instructions—Criminal (CALJIC 3.31) denote these as “specific intent crimes,” a label I will adopt for this discussion. For example, an adult who intentionally rubs the bare chest of an unrelated young girl might be molesting her according to the California Penal Code (section 288(a)). However, in order to convict him of molestation, the state must prove that this adult touched her while intending to arouse either himself or the young girl. If the defendant credibly contends that he was rubbing cold medicine onto her chest and thereby provides the jury with an alternative and plausible explanation for his behavior, the jury should find him not guilty of child molestation.

Although the law treats act and intent as distinct elements of a crime, often we presume intent from the behavior itself, based on our cultural traditions, understandings, and taboos. The legal doctrine of circumstantial evidence confirms and validates this tendency: it allows a jury to draw reasonable inferences from the evidence, inferences that stem from common sense and everyday experiences (CALJIC 2.02). In the above example, evidence of the defendant’s intentionally rubbing the bare chest of an unrelated young girl would be sufficient, in and of itself, to convince most of us that the defendant intended to arouse himself by his actions. Common sense (i.e., our cultural tradition) dictates that adults do not, and should not, have this type of contact with unrelated children. Hence, unless and until the defendant provides a reasonable alternative explanation for his behavior, most of us would likely find him guilty of child molestation. Culture might offer the defendant the alternative explanation he needs.

But mounting such a defense based on culture is not easy; it incorporates both evidentiary hurdles and culture theory issues. One commentator

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9. See, e.g., People v. McLaughlin (1952); California Jury Instructions—Criminal no. 4.36 (West 1996 and 2001 amendments).
10. While his “general intent” is to touch, his “specific intent” must be to arouse (California Jury Instructions—Criminal no. 10.41).
has described the burden as follows: "A cultural defense will negate or mitigate criminal responsibility where the acts are committed under a reasonable, good faith belief in their propriety, based upon the actor's cultural heritage or tradition" (Goldstein 1994, 143, emphasis added). Looking more carefully at the twin requirements of honesty and reasonableness, a defendant must convince a jury that she honestly acted for this cultural reason at the time of the act; she must not be perceived as taking advantage of her cultural background to generate a convenient, after-the-fact explanation of otherwise criminal behavior. According to the spectrum described by Sherry Ortner, she must establish the hard/internal position for her cultural reliance by demonstrating that culture actually dictated, rather than merely explained after the fact, her behavior.

Second, she must show that her reliance on culture (rather than on American legal standards) was reasonable. The reasonableness inquiry goes to the actor's (in)ability or (un)willingness to disregard cultural prescriptions—to resist cultural schemas—in response to the victim's behavior or mainstream societal pressures. Hence, the reasonableness prong most directly implicates Ortner's theory of the power of a cultural schema to override individual agency in certain situations: if the jury believes that the defendant was able to operate outside of the schema but simply chose not to do so, it will likely find her reliance on culture unreasonable.

Commentators suggest that determinations of reasonableness (or ability to resist a given cultural schema) may address, among other issues: degree of assimilation, the defendant's length of time in residence, education, and employment in the United States (Arkin 1995; Sacks 1996, 538; Note 1986, 1310; Renteln 1993 and 1994; Goldstein 1994, 160); identification, the existence of cultural attributes that give an ethnic group an identity that sets it apart from other groups (Note 1986, 1308-9); and self-containment, the extent to which an ethnic community is physically segregated from other communities (Note 1986, 1309). Finally, a defendant must show that her behavior was consistent with existing and current cultural beliefs and practices; she cannot invent new cultural practices or draw upon cultural practices that have previously become extinct.12

Although other scholars have evaluated the defense uses of culture

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11. In United States v. Yu (1992), the court of appeals held that the defendant's culture did not entitle him to a sentence reduction for bribery of a public official, where the defendant had spent 12 years in the United States, was a naturalized citizen, had received a college education in the United States, and was a certified tax preparer. In United States v. Ojo (1997), the court found evidence of the defendant's Nigerian culture irrelevant because the defendant had lived in the United States for almost three years and had been in the United States military for almost two years at the time of his offense.

12. In one of the cases discussed extensively below, New York v. Chen, the defense expert claimed that murder was currently accepted practice in China as punishment for marital infidelity. After the judge accepted this argument, women's groups and Asian American groups angrily complained that the defense had relied upon outdated notions of Chinese culture (Sacks 1996, 540; Jetter 1989).
exclusively in terms of their relationship to specific U.S. legal doctrines (i.e., Chiu 1994; Renteln 1993, 1994; Gallin 1994; Maguigan 1995), I have developed an alternative approach based on cultural strategy. From my survey of the legal commentary and case law in this field,\textsuperscript{13} considered in light of the sociological and anthropological literature concerning culture’s ability to affect behavior, I have identified three principal strategies that cultural defendants employ: cultural reason, cultural tolerance, and cultural requirement. In the discussion that follows, I provide examples of cases to illustrate each strategy, and I examine the relationship between each strategy, the established case law, and the theories of culture introduced above.

The First Strategy: Cultural Reason

A defendant who is charged with a specific intent crime may rely on her culture to provide a plausible explanation—a cultural reason—for her conduct that can refute the inference most of us would draw based on our American\textsuperscript{14} cultural traditions. Cultural reasons advanced by the defendant must, of course, stem from the hard/internal view of culture’s influence on behavior: if the defendant intends to harm the victim at the time she harms him, but later cites a neutral cultural practice to explain her conduct, she cannot claim honestly that culture guided her actions.\textsuperscript{15} The key is the confluence of act and intent: hence, even Ortner’s moderate schema theory will excuse criminal behavior if the actor can establish that the schema had “taken over” her individual will at the time of the act, even if it was later discarded in favor of another script or practice. If we accept (as valid and true) that the defendant’s proffered noncriminal cultural reason was op-

\textsuperscript{13} I use the term survey here loosely, to connote a widespread examination of available case law. When I conducted this research in 1998, I ran multiple searches using the LEXIS state courts databases and read case reports for all cases cited or described in the secondary literature, such as law reviews and newspaper articles. This method of studying cases was not meant to be empirically rigorous (in the traditional sense of a scientific survey); it was used to provide an overview or broad sample of the types of cases in which culture was raised by the defendant. The cases cited herein include those most frequently cited or discussed in the secondary literature, as well as several more obscure cases. I do not quantify the percentages of cases that fall into each category or make claims about the frequency with which any of these strategies are used.

\textsuperscript{14} I refer to American culture and traditions throughout the article—even though one cannot genuinely identify any unitary culture of the United States—because the existence of a common culture is a premise of the criminal law. Criminal charges are brought by the “People of the State” against the accused, and the state itself is the technical “victim” of any crime (irrespective of any person or corporate victim directly harmed by the criminal behavior). As will be discussed in part 3 of this essay, the myth of a unitary American culture has been challenged by the proponents of multiculturalism and is often indicted in the calls for recognition of criminal defendants’ cultural background as relevant evidence.

\textsuperscript{15} I am assuming that defendants would testify honestly about the influence of their culture on their behavior. In the event that honesty does not serve the defendant’s best interests, I suppose my comments will assist a defendant in presenting the cultural defense that stands the best chance of succeeding.
erating at the time of the act, we must conclude that she did not possess the mental state required to make her behavior criminal.

The clearest examples of the cultural reason defense arise in cases of child abuse in immigrant families. Although engaging in behavior that U.S. law typically deems abusive, many immigrant parents actually intend to provide their children with medical assistance or to demonstrate affection in accordance with their cultural traditions. For example, for Vietnamese parents, the folk remedy cao gio, or coining (massaging the back and shoulders with a serrated coin which has been slicked with oil), serves to rid the body of "bad winds," which produce headaches, fevers, and chills (Oliver 1988; Renteln 1994, 39). Likewise, many Mexicans, Africans, and Eastern Europeans practice "cupping," heating a cup and then placing it over an affected body part in order to draw out the infection (Renteln 1994, 39). Both of these practices can wound the child, leaving scars, which often prompts social workers or educators to report the injuries and prosecutors to file abuse charges. The immigrant-defendant must establish her intention to heal, rather than to harm, the child in order to absolve herself of criminal responsibility for the injury.

Other cases involve suspected molestation of a child by a well-meaning adult. A South American woman in Georgia faced prosecution for stroking the genitals of her little boy, until she convincingly explained that her culture prescribed such behavior as a way to put healthy young boys to sleep (LaCayo 1993). Jack Jones, an Alaskan Inupiat, was charged with child molestation for swatting at the crotch area and pulling down the pants of his grandson. In acquitting the defendant of all charges, the judge cited the testimony of two anthropologists who had explained that such behavior had no erotic content; it was designed to teach boys to respond quickly to adversity (Maguigan 1995, 84). Farah Brelvi (1997) describes the humiliation suffered by an Albanian man living in Texas who fondled his 4-year-old daughter under her dress at a school event. He argues that parent-child sex is unimaginable in Albania and that parent fondling of children is accepted as affectionate (not sexual) behavior. After a protracted struggle, the court declared his behavior a manifestation of affection, devoid of any sexual undertones and unintended to produce arousal. A similar finding was made by the Supreme Court of Maine in People v. Kargar (1996), after an Afghan father who admitted kissing the penis of his infant son in accordance with cultural practices of affection was prosecuted for gross sexual assault. Although the Maine statute did not include any specific intent requirement, the Maine Supreme Court found that, because the kissing was a nonsexual, acceptable practice in the Afghan community, the behavior amounted to a de minimus infraction of the criminal code and the case should have been dismissed (see Wanderer and Connors 1999 for additional details).

While some child abuse cases hinge on a finding of physical abuse,
parents who fail to provide care for their children in accordance with an American concept of reasonableness may run afoul of various states’ child neglect laws. For example, when Chong Sun France left her baby in a dresser drawer while she went to work for several hours, the baby died from asphyxiation (North Carolina v. France 1989). France was sentenced to 20 years in prison for second-degree murder and felonship child abuse; however, she was released on parole in 1992 after a massive campaign organized by Korean women explained France’s actions in light of Korean child-care culture. In 1996, a Danish woman left her 14-month-old baby parked in a stroller outside the window of a Manhattan restaurant where she dined. She was charged with child endangerment and jailed, but charges were dropped when she explained that leaving children unattended outside cafes was common in her native Denmark (Brelvi 1997). These two women successfully argued that culture determined, not merely explained, their conceptions of good motherhood and of the risks posed by leaving children unattended. By drawing on this hard/soft view of culture, by demonstrating that their ways of thinking about child care were constrained by their native traditions and practices, these defendants established that they could not have foreseen that harm might befall an unattended infant. While this lack of foresight may be difficult to accept, if one accepts the claim as true (as the court and the parole board did), these defendants cannot be considered to have criminally (intentionally) harmed their children.

The cultural reason defense has also proven valuable to immigrants who use cultural practices to ward off witchcraft or possession. In 1997, two Korean missionaries were prosecuted for performing an exorcism that resulted in the death of the possessed. “Their religious zeal led them to repeatedly crush [the victim’s] abdomen and chest with their hands and feet”; they claimed that they were motivated by their desire to save her from the demons (O’Neill 1997). Accepting this explanation, the judge found the two missionaries guilty of involuntary manslaughter, rather than murder, for their role in the demon-cleansing ritual. A Jamaican defendant was charged with third-degree murder for killing his wife in Commonwealth v. Reid (1983): he testified that he believed his wife was a witch and would kill him with witchcraft. After an anthropologist testified that belief in witchcraft was rational in Jamaica, the judge reduced the charges to manslaughter (Maguigan 1995, 75). A 1968 Native American defendant was not so suc-

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16. A petition sent to the governor of North Carolina explained that “Korean people often leave the children alone when we go out to work because in Korea neighbors and friends look after each other’s children” (Volpp 1994).
17. This is an unreported case described in Maguigan’s article (Maguigan 1995).
18. In Alameda County, California, an Ethiopian man who shot a woman he believed was exercising witchcraft over his mind used expert testimony to establish that the Ethiopians commonly believe in a witch’s ability to inflict pain (Goldstein 1994, 155, n. 145; Oliver 1988). The jury convicted him of assault with a firearm instead of attempted murder.
cessful: Charles Mull sought to introduce evidence that he killed the decedent in order to escape the witchcraft powers she was exercising over him. His attorney argued that the defendant “was seeking to destroy the influence or power [the victim had] over his mind, which is a different matter from having an intent to commit an assault” (Mull v. U.S. 1968). However, because the defendant failed to testify that this was his actual intent in killing her, the trial judge refused to allow an expert to testify to these spiritual beliefs among Native Americans.\textsuperscript{19}

A derivative of the pure cultural reason defense is the “mistake of fact based on cultural interpretation” defense: a defendant claims that, by honestly following the shared “meaning system” (D’Andrade 1984) established in his culture, he interpreted a certain communication in a culturally specific way.\textsuperscript{20} Although his cultural interpretation might have been factually wrong, it led to his culturally appropriate response. This type of case most clearly invokes Ortner’s moderate schema theory, because a defendant is likely to advance this argument when the parties dispute whether the defendant honestly and reasonably (mis)interpreted the victim’s response to the defendant’s actions, such as in sexual assault cases.\textsuperscript{21} Recall that under Ortner’s formulation, the schema’s power can fade or disappear once it becomes obvious that other participants aren’t “playing along”; hence, after a victim refuses to play her part in the predetermined drama, the defendant’s continued reliance on the cultural schema becomes questionable. Actions that result once the victim has made her position known may, therefore, count as criminal.

In Wisconsin v. Curbello-Rodriguez (1984), the defendant (on trial for gang rape) claimed that, due to his Cuban heritage, he interpreted the 16-year-old victim’s friendliness and marijuana smoking as a sign that she would consent to intercourse. The court found him disingenuous and unreasonable in this assertion; it sentenced him to 80 years in prison. In Illinois v. Farrokhli (1980), an Iranian man who had been living in the United States for several years contended that, due to both his language difficulties and his culture’s interpretation of the 19-year-old victim’s smiling countenance, he could not detect that she was severely mentally retarded and incapable of consenting to intercourse. The court was unimpressed; it convicted the defendant of

\textsuperscript{19} According to the criminal law, while the expert might establish the reasonableness of the defendant’s beliefs, only the defendant can testify to the honesty of his beliefs as the source of his actions.

\textsuperscript{20} For an example of the mistake of fact doctrine in U.S. law, see California Jury Instructions—Criminal no. 4.35. According to California law governing general intent crimes, the mistake must be reasonable; for specific intent crimes, there is no reasonableness requirement.

\textsuperscript{21} Sometimes this misinterpretation leads to crimes other than rape. In People v. Poddar (1974), a Hindu defendant born into the untouchable caste came to study at the University of California at Berkeley. While there he met Tanya Tarnoff, a non-Hindu student. In accordance with his upbringing, he interpreted their single kiss as a sign of a serious relationship; she did not, and told him so. When he confronted her about seeing other men, he killed her.
rape and sentenced him to six years in prison. In People v. Rhines (1982), a black defendant charged with rape of a black woman claimed that, because black people speak to each other very loudly, he neither thought that she was intimidated by his loud voice nor interpreted the woman's shouts as indicators of lack of consent. In rejecting this argument, the court held:

Defendant's proffered testimony of a black psychologist concerning "the characteristics of black people to speak very loudly to each other" and the purpose for which he sought to use it . . . we consider to be an inexcusable slur on all females of the black race. Indeed, race has no bearing on the reaction or response of a female in the circumstances here, and we deplore the indignity of defendant's effort to excuse his own conduct by demeaning females of the black race. (People v. Rhines 1982, 484)

Despite most defendants' inability to succeed with this defense, some Hmong defendants have capitalized on it, defending their tradition of "marriage by capture" in kidnapping and rape cases. The case of People v. Kong Moua is the most widely cited example of a successful marriage by capture defense (Evans-Pritchard and Renteln 1994; Oliver 1988; Gallin 1994, 723; Sherman 1989; Goldstein 1994, 148–50; Chiu 1994, 1107; Coleman 1996; Rimonte 1991; Magnarella 1991, 69–70). Defendant Moua, facing kidnapping and rape charges brought by the victim ("intended wife") Seng Xiong, offered his cultural tradition as an alternative explanation of his behavior. Under the "marriage by capture" tradition, a man (such as defendant Moua) abducts a woman who is not interested in him, without her consent, and in the face of her vigorous protests, as a signal that he wants to marry her. Indeed, if the woman does not protest convincingly, she is considered unchaste, and if the man gives up, he is seen as weak (Magnarella 1991, 70). After they have intercourse (during which she continues to protest), their parents work out the marriage arrangements. Pursuant to this tradition, the woman's protests are part of the ritual; by protesting, she is playing her part in the drama. If, however, the victim is not participating in the tradition to which the defendant subscribes, she regards herself as having been kidnapped and raped. Such was the case for Kong Moua and his victim Seng Xiong. In light of the evidence and Hmong culture, the defense contended, could Moua know whether Seng was truly resisting or merely "fabricating the ritual declarations" required by her tradition (Goldstein 1994, 150 n. 90)?

During pretrial negotiations, the defense presented the judge with a 22-page pamphlet about Hmong marriage rituals. According to Evans-Pritchard and Renteln (1994, 20), it contained a superficial description of a few types of marriage practices and cited only one reference. But the prosecution had no evidence to rebut the claims made in the brochure or to
challenge Moua’s asserted sincerity, and the cultural practice became the centerpiece of the judge’s decision in the case: He allowed Moua to plead guilty to one misdemeanor count of false imprisonment and sentenced him to 120 days in jail and a $1,000 fine.\textsuperscript{22}

The “culturally based interpretation of another person’s behavior” claim has also produced mixed results for persons who, when defending their reactions to police behavior, emphasize a history of police abuse directed toward their racial-ethnic group.\textsuperscript{23} In *New York v. Odinga* (1988), the defendant, a member of the Black Liberation Army, attempted to show that he “had a reasonable belief, based on his own experiences and knowledge of the relations between law enforcement agencies and black radical groups” (143 A.D.2d 1988, 203–4), that the police officers who chased him were attempting to kill him, which therefore entitled him to use deadly force to protect himself. The court excluded any such testimony based on its assessment of the police behavior; it concluded that no one, of any race or political group, reasonably could have perceived the police behavior as a threat to kill. In *Arizona v. Lamar* (1984), 15 black defendants unsuccessfully attempted to justify their violence against police officers by claiming that, based on their past history with local police, they believed the officers dispatched to break up a riot intended to harm the rioters.

A Native American defendant, Patrick Croy, did successfully advance this theory as a defense to charges that he intentionally murdered several officers in Yreka, California (*People v. Croy* 1985). An expert in Indian

\textsuperscript{22} Moua had faced eight to ten years in prison on the kidnapping and rape charges. Goldstein (1994, 151) reports that, according to the judge, the plea bargain gave him “leeway to get into all these cultural issues and to try to tailor a sentence that would fulfill both his needs and the Hmong needs.” A similar result occurred in a marriage by capture case/kidnapping and rape case in Minnesota: the prosecutor asked the 11 year-old victim’s family how they would resolve this situation “in the old country,” and then allowed the defendant to plead guilty to sexual intercourse with a child under 12, with a $1,000 fine and no jail time (Coleman 1996, 1105–6).

\textsuperscript{23} This argument is typically made in a case in which the defendant asserts self-defense against harm threatened by the police or another private citizen (see, e.g., *Ha v. Alaska*, 1995). It stems from the assertion that culture, enhanced by social experience, predetermined behavior patterns and responses. “[O]n the basis of their social experience, a group of actors may come to construct a conception of their social universe as hostile and threatening even though such a conception is not transmitted to them by intentional enculturation processes and may even be inconsistent with cultural propositions that convey the very opposite message” (*Sprio* 1984, 324). In *Ha v. Alaska*, for example, the court allowed evidence of the defendant’s culture to be admitted on the issue of self-defense, holding that “an understanding of [the defendant’s] Vietnamese culture was relevant to evaluating [the victim’s] motivation or readiness to kill [the defendant].” In other words, the cultural evidence was relevant to ascertaining the reasonableness of the defendant’s belief that he was in imminent danger (1995, 195).

I have included this category of cases in the discussion of the cultural reason strategy, rather than in the cultural tolerance strategy discussion, based on the specific type of claim raised therein. Defendants in these cases do not claim “my race or culture condones violence against authority,” but rather “my cultural heritage explains why I reasonably feared for my life.” Culture thus provides an alternative reason for the behavior itself (self-defense), not a plea for tolerance based on a different culture’s barometer of acceptable levels of violence.
history and contemporary affairs testified that the relationship between Indians and non-Indians in Croy's county, particularly the persecution suffered by Indians at the hand of government officials, could rationally have led Croy to believe the officers pursuing him intended to kill him (Volpp 1994, 58; Goldstein 1994, 153). Consider the following quote from Croy's defense attorney in support of his motion to introduce the expert testimony:

The jury must be apprised of the difference and complexities of the Indian experience—for this defendant's individual perspective has been shaped by his experience as an Indian within the collective and historical experiences of genocide, enslavement, disenfranchisement, and dispossession of civil, property, and religious rights at the hands of an invading white culture. . . . Every Indian is aware that at any time, the lurking, historical pattern of genocidal racism against Indian people can surface, whether in the form of white citizen violence or police aggression. (Goldstein 1994, 153)

The expert's testimony corroborated Croy's explanation for why he shot the officers and contributed to his eventual acquittal.24

As we evaluate the legal basis for these cultural reason claims, it is clear that no uniquely cultural exception is at work. Defendants in these cases articulated a "lack of specific intent" defense for which culture provided the context and the credibility. Parents of sick children who applied coins and cups to their children's skin claimed they were motivated by an intent to heal, rather than to harm; they therefore could not be found guilty of child abuse, which requires a specific intent to harm. Likewise, parents who caressed their children in a culturally affectionate manner contended that they had no specific intent to arouse, and thus could not be guilty of child molestation. Hmong males who "captured" and had intercourse with their protesting brides claimed they were merely following a marriage tradition that includes ritual protests by the "bride"; hence, the specific intent requirements for kidnapping and rape could not be met. In all of these cases, the

24. Cultural evidence also helped Croy by providing an alternative explanation for some of the statements witnesses had heard him utter. A witness testified that she heard Croy say he was excited to be "shooting the sheriff." However, an expert in anthropological linguistics testified that shooting posfitch, the Indian term for going deer-hunting, could easily be misheard as "shooting the sheriff" (Volpp 1994, 58).

Native Americans have also used culturally based fear of authority to explain their failure to seek medical assistance. In Washington v. Williams (1971), a Native American couple thought their infant had a simple toothache. They gave him aspirin for two weeks, but he died from an infection and from malnutrition; they were prosecuted for negligent homicide. The defendants asserted that they (1) lacked the education to realize that their child was desperately ill (and thereby could not have formed even the lowest mental state required for any crime) and (2) feared that if they brought him to a doctor, the welfare authorities would take him away. The second belief was based on stories they had heard about welfare involvement with other Native American families. The court rejected both theories and found them guilty of negligent manslaughter.
legal doctrine of specific intent controlled the outcome; culture provided facts relevant to the defendant’s motivation and grounded the alternative, noncriminal explanation in something other than the defendant’s imagination.

The cultural reason strategy alternatively buttresses a traditional legal claim of self-defense, in which the reasonableness of the defendant’s behavior in response to an assailant is colored by cultural overtones. Culture is relevant to explain the defendant’s perception of the threat posed by the assailant. As evidenced in the Croy case, a defendant from a community with a long history of police brutality may assert that his perception of imminent danger from a police chase is reasonable and thus justifies use of force against the pursuing officers. However, the empirical evidence suggests that the use of culture in this context is rarely successful, perhaps due to courts’ unwillingness to render police officers vulnerable to attack by disadvantaged populations.

Generally speaking, the success or failure of a cultural reason defense seems to hinge on the amount of evidence produced by the defendant on the issue of the honesty and reasonableness of his cultural beliefs. The cases demonstrate that to establish reasonableness, an expert must testify to the existence and purpose of the cultural practice; that purpose must not include any intent to harm a “copractitioner” (such as the victim). Likewise, to prove honesty the successful cultural defendant must produce evidence that, at the time of his behavior, he was actually following his cultural practices; we should therefore believe that he acted without any intent to harm the victim. If the reason offered by the defendant appears too convenient—too easily fabricated to explain intentionally criminal conduct—it will not be perceived as the true motivation for his actions. Returning to Ortner’s formulation, then, if the use of culture appears soft rather than hard, the judge and jury will not believe culture determined the defendant’s behavior or shaped her intent at the time of the act. Moreover, fact finders are likely to question the reasonableness of the length of time culture remained at the controls when the victim’s behavior clearly contravened the cultural tradition relied upon by the defendant: if the state can establish that the defendant was unwilling, rather than unable, to resist the cultural schema once it became clear that the victim (or coparticipant) was not playing along, his use of the cultural reason strategy may backfire.

The Second Strategy: Cultural Tolerance

Under a cultural tolerance theory, the defendant admits that she committed the alleged acts with the harmful intent required to make her actions criminal in the United States. However, she contends that she should not be held criminally responsible in the United States because her native culture
tolerates or condones the injurious behavior as an acceptable response to the victim's behavior.

As the case descriptions below will demonstrate, cultural tolerance cases implicate culture theory in a more problematic way than their cultural reason counterparts. While cultural tolerance defendants claim that culture governed or ruled their actions (because one's notions of appropriate discipline or responses to disrespect are necessarily shaped by one's cultural background), courts almost always perceive these claims as after-the-fact explanations for violent behavior, finding an intent to harm that superseded cultural dictates. In other words, despite a defendant's efforts to invoke the hard/internal view of culture, cultural tolerance arguments almost inevitably become translated into soft/external justifications that fail to excuse or to justify the defendant's conduct.

Cultural tolerance cases typically concern charges of child or spousal abuse in which the perpetrator contends that he was disciplining the victim in accordance with his culture (Coleman 1996, 1108). Although spouse abuse has long been prevalent in the United States, it has been outlawed in most states in recent decades (see, e.g., the federal Violence against Women Act 1995; California Penal Code § 273.5; Gibbs 1993), and violence against women has received priority in international human rights conferences (see, e.g., Coleman 1996, 1151–52; Gallin 1994; Sacks 1996, 534). Hence, defendants asserting "cultural discipline" in spouse abuse cases often have a difficult time winning the support of the court and of the community.

In most cases, the defendant makes two assertions about the impact of his culture: first, he claims that infidelity or disrespect causes great shame in his culture; second, he claims that his culture allows him to react violently when shamed. For example, in People v. Aphasaylth, a Laotian man was convicted of killing his wife after she received phone calls from another man; he contended that these phone calls amounted to infidelity, which caused him such shame that he lost control (Maguigan 1995, 76; Arkin 1995; Renteln 1993, 477). Henry Ngo Wu, an ethnic Chinese immigrant from Vietnam, was found guilty of murdering his unfaithful wife despite his claim that her infidelity allowed him to seek revenge in his culture (Maguigan 1995, 77). In 1994, Moosa Hanoukai, an Iranian Jew, bludgeoned his wife to death with a wrench because he could no longer withstand his wife's

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25. In fact, such abuse has become almost synonymous with the entire field of cultural defenses. When a law professor at NYU polled her colleagues about the meaning of the cultural defense, their response was unanimous: "That's what makes men feel it's okay to kill their wives" (Jetter 1989).


27. The court of appeals reversed this conviction because the trial judge refused to permit expert testimony on the issue of Laotian shame responses (see Magnatella 1991, 68).
challenges to his manhood and was culturally prohibited from seeking a divorce (Mrozek 1994a). The jury, having found that he acted intentionally but without premeditation, convicted him of voluntary manslaughter rather than of second-degree murder (Mrozek 1994b). All of these defendants claimed that they were culturally compelled to respond to infidelity with violence; however, the jurors who heard the evidence found a criminal intent to kill apart from cultural influences and thereby rejected the defendants' assertions that culture was completely at the controls.

In contrast to those defendants whose cultural tolerance claims were rejected or moderated by the courts, Dong Lu Chen advanced a hard/interval cultural tolerance defense with near perfect success after he fatally beat his unfaithful wife with a hammer (Volpp 1994). His three-pronged cultural defense contained assertions about Chinese culture generally and about his own specific situation as an immigrant in the United States. Chen first claimed that culture determines perceptions of, and reactions to, infidelity: in China, any man who learns of his spouse's infidelity would be so ashamed that he would need to kill his unfaithful wife. He then argued that Chinese men are more volatile and would react in a more violent fashion to infidelity than would non-Chinese men. Finally, he asserted that as an immigrant, he lacked ties to a close-knit community of fellow Chinese who, if this had happened in China, would have prevented him from carrying out this revenge. After receiving uncontroversial testimony on all three prongs from a professor of Chinese culture, the court ruled:

Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court would have been constrained to find the defendant guilty of manslaughter in the first degree. . . . But based on the cultural aspects, the effect of the wife's behavior on someone who is essentially born in China, raised in China, and took all of his Chinese culture with him except the community which would moderate his behavior, the Court . . . based on the peculiar facts and circumstances of this case . . . and the expert testi-

28. The expert testified that adultery is a very serious matter to a Chinese man. "It reflects upon him as a person. It is a reflection upon his family. It is a reflection upon his ancestors and it is a reflection upon his progeny. It's a terrible stain" (see Volpp 1994, 69 n. 52). Moreover, the expert claimed, a Chinese man cannot divorce, because his wife's prior adultery will make him unmarrageable in the eyes of any future women (1994, 69 n. 55). Volpp points out that China reformed its divorce laws in 1981 and now allows for no-fault divorces; divorce rates have risen steadily ever since (1994, 70 n. 58).

29. While the expert testified that he could not recall a single incident in which a man in China killed his wife, he suggested that this practice was acceptable in China (Volpp 1994, 70 n. 57).

30. The prosecutors were criticized by Asian groups for not challenging this testimony (Jeter 1989). The prosecutors claimed that they were shocked that the judge was swayed by the defense expert's testimony (Maguigan 1995, 95 n. 226).
mony . . . finds the defendant guilty of manslaughter in the second degree. (Maguigan 1995, 77)

The court then used culture again to mitigate the defendant’s sentence from prison to probation. The judge justified the grant of probation by speculating that incarceration of the defendant might affect the marriage prospects of his daughters. Moreover, in imposing this sentence, the judge sought a promise from the defendant “on his honor and the honor of his family” to abide by the terms and conditions of probation; he reminded the defendant that failure to comply could result in not only a jail term, but also “a total loss of face” (Volpp 1994, n. 73). The court’s ruling is unequivocal in its acceptance of the influence of Chinese culture on Chen’s behavior: the hard/soft view of culture posited by the defense, unmitigated by any prosecution evidence, not only convinced the judge of Chen’s lack of free will during the killing but also affected the terms of the sentence.

One can only speculate as to why the outcome of the Chen case differed so dramatically from the results of the other spousal infidelity homicides mentioned above, given that these husbands all advanced the same basic argument and invoked the same theory of culture to justify killing their wives. Perhaps the other defendants failed to produce expert testimony to buttress their claims of culturally tolerated violence. Perhaps Chen appeared far more sympathetic in court than the other defendants or had a better lawyer or a flagrantly unfaithful spouse. Or perhaps the prosecution in the Chen case was simply caught off guard, while those prosecuting Aphiaylath, Wu, and Hanoukai were prepared with evidence to rebut the cultural claims. Whatever the reason, the Chen case stands as an exception to the trend regarding the success of cultural tolerance arguments in spousal homicide cases, as courts and juries at the beginning of the twenty-first century are generally reluctant to absolve men who kill their wives of responsibility for doing so.

Cultural tolerance arguments also arise in cases of nondomestic assaults that stem from verbal insults. The defendant usually claims that his culture has taught him to respond in a violent manner when insulted or dishonored by another man.31 A Chinese-American in Denver unsuccessfully claimed that suffering a “loss of face” justified his killing of his tormentor; he was apparently insulted when the victim told him to “roll his body” out of the victim’s restaurant (Pankratz 1995). Marcelino Rodriguez was more fortunate in his homicide case; he was convicted but later received a sentence reduction based on his assertion that, as a Puerto Rican, he was taught never to retreat from an enemy (Connecticut v. Rodriguez 1964).32

31. Although some defendants may claim that their culture requires this response, rather than simply condemning it, they can rarely support this claim with anthropological evidence. Hence, I consider them cultural tolerance arguments, not cultural requirements.

32. This argument did not save Mr. Trujillo-Garcia, who in 1993 asked the court to evaluate his actions (murdering a man who verbally insulted him) according to the reasonable
Although both cases resulted in convictions, it seems Rodriguez’s invocation of culture was more palatable to the judge who heard his case. We might be able to account for this difference by the passage of time (violence in response to disrespect may have been more acceptable in the mid 1960s than in the late 1990s) or by differences in the judge’s familiarity with the culture at issue (the claim about Puerto Rican culture may have resonated with Rodriguez’s judge, while the claim about Chinese cultural responses to insults may have been too foreign to be understood). In any event, defendants whose culture allows them to kill or assault their insults seem to have little ground to stand on during the guilt phase of their criminal case—at the time of the crime these defendants clearly intended to harm their victims and thus violated the criminal law. But as the Rodriguez case indicates, the cultural issue can become relevant during sentencing, when the judge seeks to balance the need for punishment with the risk that the defendant will re-offend (see Sikora 2001).

The guilt versus sentencing disparity also appears in child abuse cases, where cultural defendants assert tolerance claims centering on the notion of culturally appropriate discipline. American parents are legally allowed to discipline children, and many noncultural defendants facing child abuse charges contend that their intent was to discipline, not to abuse. However, where the level of violence used to discipline exceeds what most Americans would consider appropriate, courts infer that the parent’s intention was to harm the child—not to discipline her.  

This distinction makes a cultural dimension when the parent seeks to justify his disciplinary approach by pointing to cultural practices. For example, when a Houston insurance salesman faced charges of child abuse for hitting his misbehaving nephew with an electrical cord and then rubbing red pepper in the boy’s wounds, he argued that such discipline was acceptable in his native Nigeria. He pleaded guilty to “injury to a child” (a crime that requires an intent to harm) but received probation instead of prison due to his cultural claims at sentencing (Renteln 1994, 36–37; Oliver 1988). A Mexican woman in Los Angeles beat her 15-year-old son with a spoon and bit him for taking money from her purse. By arguing that this was standard discipline in Mexico, she avoided convic-

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33. This tension is codified in California’s jury instructions governing child abuse cases: “It is lawful for a parent reasonably to discipline a child, and in doing so to administer reasonable punishment, including the infliction of reasonable corporal punishment. However, it is unlawful for a parent to inflict unjustifiable punishment upon a child. Corporal punishment is not justified . . . if [it] was not reasonably necessary, or was excessive, under the circumstances” (California Jury Instructions—Criminal no. 4.80).

34. Renteln notes that the only evidence of Nigerian custom in this case was a statement made informally to the judge by a Nigerian attorney who was a law school classmate of the defense attorney (1994, 37). She also expresses concern about the surprisingly small amount of effort made by the participants in this case to ascertain what discipline practices actually are in Nigeria (1994, 38).
tion on felony child abuse charges and received probation. Although these cases resulted in guilty pleas, the cultural tolerance argument produced reduced punishments for both defendants: culture thus expanded the courts’ notion of mitigating circumstances in abuse cases involving immigrant children.

But not all defendants receive such lenient treatment when they assert cultural tolerance as discipline. If “cultural discipline” causes sufficiently severe injuries, the court will reject culture as an excuse in both the guilt and sentencing phases of a criminal case. In Stockton, California, a Laotian immigrant punished his 10-year-old son by putting a needle through his ear lobe, threading it with twine, and tying him to a closet, forcing his son to stand on tiptoe for hours (Renteln 1994, 38–39). He punished his other children by beating them with a fishing pole and then tying them together while they were naked. Although the defendant claimed this was traditional punishment for skipping school, the judge found him guilty of felony child abuse, sent him to jail for almost a year, and ordered him to have no contact with any minors (including his own children).

While the cultural tolerance cases seem to rely heavily on culture to the exclusion of law, in fact the spouse abuse and insult-homicide cases are textbook examples of the legal doctrine of provocation, and the child abuse cases draw upon the established legal defense of discipline. Provocation is considered a partial defense: acts committed in the heat of passion (most notably from catching one’s wife in an adulterous affair) diminish one’s culpability for an intentional killing (but do not eliminate all criminal liability). Killing in the heat of passion is not premeditated or deliberate, but is rather the result of “temporary excitement, by which the control of reason was disturbed” and is consequently considered less serious than murder.

In invoking the standard provocation defense, a cultural defendant needs to establish both that he acted under the “heat of passion” and that his violent reaction was reasonable under the circumstances. As the review of the above case law suggests, the judicial response has been mixed, particularly where the violent act occurred long after the discovery of the infidelity.

35. Maher v. People (1862). The court stated:
But if the act of killing, though intentional, be committed under the influence of passion or in the heat of blood, produced by adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of temporary excitement, by which control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition: then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.

Volp writes: “[A]dultery is the paradigmatic example of provocation sufficient to mitigate a charge of murder to a voluntary manslaughter conviction” (1994, 67 n. 45). Some states, such as Texas, made adultery a complete justification for homicide; Texas changed the law to recognize a partial justification only within the last decade (see Coleman 1996, 1141 n. 232).
(The *Chen* case stands as an anomaly here.) Moreover, particularly in non-domestic assault cases, defendants have difficulty convincing the courts that verbal insults, even racial or cultural epithets, reasonably inspire extremely violent responses, since most American cases hold that words alone are not sufficient provocation for an attack (see, e.g., *People v. Chavez* 1968).

In the child abuse cases, where no provocation defense exists, courts seem to regard the claim to cultural tolerance as too easily manipulable, too accessible by defendants who need to justify thoroughly cruel behavior as discipline. Where a defendant cannot establish conclusively that her culture (as a whole) requires a higher level of punishment than that practiced by mainstream American society, she will have difficulty convincing the jury that she deserves special treatment simply because her culture allows extreme forms of discipline. The jury may simply regard her as an angry, violent person who happens to be from a particular culture, rather than as a person whose anger (and subsequent violence) is determined by her cultural background. Moreover, where the injuries to the child are severe, juries seem unwilling to label “culture” as the only culprit. In sum, then, the cultural tolerance defense is highly susceptible to a soft/external explanation by a critical (and often unsympathetic) audience; jurors find it hard to believe that cultures determine, as opposed to merely tolerate, intrafamily violence.

The Third Strategy: Cultural Requirement

One legal commentator has suggested that “an ordinarily law-abiding person raised in a foreign culture may . . . commit a criminal act solely because the values of her native culture compel her to do so. Mere awareness that her act is contrary to the law may not be enough to override her adherence to fundamental cultural values” (Note 1986, 1299). Yet another has written “[w]e should be able to recognize . . . that [a defendant’s] actions were predetermined by her cultural background. If she did not have the choice a person of a different background would have had in the same circumstances, we should not call her a criminal” (Herman 1989). These suggestions form the basis of the final category of cultural defense strategies, which I have termed the cultural requirement approach.

As the quotes demonstrate, the cultural requirement strategy hinges on a purely internal approach to culture. When we speak of a defendant whose native values “compelled” her to commit a criminal act, or whose actions were “predetermined” by her cultural background, we strip her of all responsibility for her behavior. Although she knew her actions would violate U.S. law, culture, we say, left her no choice; breaking the law was an unfortunate side effect of her mandatory compliance with cultural dictates.  

36. I note here that the line between cultural requirement and cultural tolerance is not always clear. For example, if most people in the defendant’s community would have responded
The cultural requirement cases seem to fall into two categories: those concerning ritual requirements (such as tribal marking) and those concerning cultural obligations that are not explicitly tied to a ritual (such as protection of family or ancestors). In one of the most famous tribal marking cases, a Yoruban woman from Nigeria used a razor blade to make tribal marks on her sons' faces to ensure the maintenance of their cultural identity. While this strategy seems superficially to invoke "cultural reason" premises (her intention was to socialize, not to harm), the defendant asserted a cultural requirement defense: failure to make the marks would constitute child abuse from the point of view of her culture (Renteln 1993, 483; 1994, 29). The defendant, Mrs. Adesanya, claimed a form of cultural duress: her culture required her to commit an act that she knew would harm her children's bodies, but they would suffer more if she abstained.\(^{37}\) Although she was convicted by the jury, the judge discharged her from all penalties and warned future Yorubans against perpetuating this behavior. Notably, the defendant failed to introduce any evidence, other than her own testimony, of the cultural imperatives for ritual scarification (Renteln 1994, 30).

The practice of female genital mutilation (FGM) also falls within the purview of cultural requirement defenses. Parents subject their female children to this often dangerous and painful procedure in order to mark them, culturally, as marriageable virgins and to prevent them from becoming social outcasts (Renteln 1994, 31; Coleman 1996, 1112; Taylor 1998, 461–64).\(^{38}\) While this reasoning may appear unsound to many people in the United States, "[t]he crucial point is that the cultural logic dictates that the surgery be performed" (Renteln 1994, 31).\(^{39}\)

The cultural requirement strategy might also assist defendants who

\(^{37}\) The defendant admitted that she knew assault was a crime, but she failed to realize that cutting the cheek of another person for tribal markings would constitute assault (Renteln 1994, 29-0).

\(^{38}\) Various cultures in Africa, the Middle East, South America, and the South Pacific require girls to be circumcised to (1) guarantee their virginity before marriage and chastity afterwards; (2) avoid ostracism; and (3) avoid damaging a baby during childbirth (Renteln 1994).

\(^{39}\) European nations, as well as the United States, have had to confront this issue in recent years, due to sizable immigrant populations from countries that practice FGM. In France, many parents have been prosecuted for circumcising their daughters, but most of the mutilation trials have resulted in suspended sentences. In England, Parliament enacted the Female Circumcision Prohibition Act of 1985, which provides for up to five years imprisonment for anyone involved with circumcising a girl. In the United States those who practice FGM can be charged with assault, child abuse, mayhem (the intentional mutilation of a person’s body), or a violation of the newly enacted federal crime against FGM (18 U.S.C 116). However, the debate over FGM has remained largely in the political arena, because many women in FGM-based cultures favor its continuation. For a thorough discussion of the international debate on FGM, which is beyond the scope of this paper, see Renteln (1994, 31–35) and Coleman (1996, 1111–13).
claim to be fulfilling cultural obligations to their families or ancestors. For example, in *State of Oregon v. Buder* (1981), three Native Americans of the Siletz tribe killed an intruder who had desecrated sacred burial grounds and unearthed sacred artifacts (Note 1986, 1297; Goldstein 1994, 142). The defendants asserted that their culture required them to kill the grave robber in order to protect the spirits of their ancestors. Unfortunately, their attorneys decided that this defense would be unproductive and failed to raise it (Goldstein 1994, 155 n. 142).

The cultural requirement defense has most notoriously appeared in cases involving the killing of one's children by a parent-spouse in response to the shame produced by the other parent-spouse's infidelity. The argument, when made successfully, proceeds as follows: “When I found out my spouse had been unfaithful, I was desperately ashamed. My only recourse, culturally, was to kill myself. However, my culture forbids me to leave my children behind; to do so would be selfish and unforgivable. I must kill my children when I kill myself so that I can care for them in the afterlife.” The defendants who have been prosecuted for infanticide in these circumstances succeeded in killing their children but not in committing suicide.

In the murder case of *People v. Kimura* (1985), a Japanese woman drowned her two children and tried to drown herself in order to “purge the shame of her husband's infidelity” (Maguigan 1995, 64–67). The Japanese-American community gathered 25,000 signatures on a petition urging the district attorney of Los Angeles County not to prosecute her, arguing that “her actions were based on a different worldview” (Renteln 1993, 463). Kimura and the signatories contended that Japanese culture would not morally condemn her for the act; the parent-child suicide practice manifests the Japanese belief that “it is more merciful to kill children than to leave them . . . without parental protection[,] the mother who commits suicide without taking her child with her is blamed as a demon-like person” (Maguigan 1995, 68). Kimura’s defense team asserted that she suffered from a form of temporary insanity (arising from the pressure of the cultural requirement) and argued that, in Japan, her actions would subject her to a charge of involuntary manslaughter resulting in probation only. She ultimately pled guilty to voluntary manslaughter and received probation with credit for time served (one year in jail).

In another case brought against a distraught mother, Helen Wu killed her illegitimate eight-year-old son and tried to kill herself when she learned that the child's father was planning to leave her and would not care for the boy (*People v. Wu* 1991). Wu argued that she killed her son, and tried to kill herself, so that she could save herself and her son from shame and abuse and so that she could take care of him in the afterlife. The trial judge refused to allow her to use her culture as a defense, but the court of appeals reversed her murder conviction and held that she was entitled to a jury instruction regarding the effect of her cultural background on her mental state at the
time of the crime. On retrial, Wu was convicted of voluntary manslaughter (rather than murder) and was sentenced to 11 years in prison (Renteln 1993, 474).

In contrast to the relatively successful use of the cultural requirement strategy by these two mothers, two fathers who murdered their children received no sympathy and suffered the full weight of the criminal justice system. In Bui v. State (1988), a Vietnamese man murdered his three children and tried to kill himself in order to hurt his estranged ex-wife. Although he attempted to follow the protectionist argument outlined above, his testimony established that his true motive was revenge; he killed his children so that they would not live with his wife (Maguigan 1995, 72–73). Although a defense expert testified that Bui’s actions were rational and normal within the scope of Vietnamese culture, Bui received the death penalty for his crimes.

Similarly, in 1997 an Orthodox Jew in New Jersey killed his children in order to prevent his ex-wife from raising them as Christians (Wall 1997). Avi Kostner claimed that Judaism required him to kill his children in order to protect them from evil (“better dead than goyim,” he claimed). He was charged with capital murder, but on the eve of the trial, he pled guilty in order to receive a life sentence. Apparently he had learned that the Jewish community refused to support his depiction of Jewish law, thereby undermining his cultural requirement defense. Without the cultural requirement to explain his decision, Kostner became just another vengeful ex-husband who cared more about himself than his children.

As this review of cultural requirement cases shows, cultural requirement defendants invoke previously established legal defenses—duress and necessity—in order to excuse or justify their conduct, and thus are not asking the courts to create a uniquely cultural defense. The defense of necessity arises when the pressure of natural physical forces or circumstances leaves a person with the choice of two evils: either violate the literal terms of the criminal law and thus produce a harmful result, or comply with those terms and thus produce a greater harm. According to U.S. law, a defendant will be justified in violating the law only if the harm that results from such violation is less than the harm that would result from the alternative course of action; harms equal to or greater than those caused by the law violation are not justified.}

40. On necessity, see Renteln 1993, 447; California Jury Instructions—Criminal no. 4.43; on duress, see United States v. Villegas (1990).
41. Sec. 3.02 of the Model Penal Code, labeled “Choice of Evils,” sets forth this justification. “Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that [inter alia] the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law.” This balancing of evils is a matter for determination at trial; the defendant’s personal belief in the balance does not control. Moreover, this justification is unavailable in a prosecution for a crime of recklessness or negligence if the actor contributed to causing the emergency in the first place.
Duress relieves of liability a defendant who was coerced to commit the crime by threats of another. The law specifies that only a threat of imminent serious bodily harm or death (to oneself or another) is sufficient to excuse a law violation in this circumstance, but it will not excuse a murder.\(^{42}\) While the law of duress traditionally has addressed threats or dangers posed by other people, some jurisdictions\(^ {43}\) and scholars in recent years have extended the doctrine to cover duress by circumstances: a person who honestly and reasonably fears that his life is threatened by extraordinary circumstances (those which an ordinary self-controlled person could not overcome) may engage in otherwise criminal conduct without criminal penalty.\(^ {44}\) The law excuses this behavior because, given the limits of “moral fortitude” common to all humans, the circumstances leave the actor with no effective, meaningful choice regarding how to act (Kadish 1987, 274).

A cultural requirement defendant’s appeal to duress or necessity derives from her claim that failure to act in accordance with cultural dictates will cause some great harm to self or family: persecution or ostracism by one’s tribe, shame to one’s ancestors, or abandonment by one’s family. U.S. courts have not traditionally recognized these harms as sufficient to justify otherwise criminal behavior; our jurisprudence focuses on tangible threats to one’s body, rather than on future detriment to one’s soul, relationships, or ancestry.\(^ {45}\) The cultural requirement defendant invokes her culture to explain the consequences she faced when considering whether or not to violate the law and to convince the court that, in her culture, those consequences are just as (if not more) severe than death or bodily harm. She argues that she was coerced into committing this criminal act due to the pressure of these consequences, and she is thus no different than the noncultural defendant who claims he acted under the pressure of threatening circumstances.

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\(^{42}\) See, e.g., the defense of “threats and menaces” in California (California Penal Code § 26; California Jury Instructions—Criminal no. 4.40). Note, however, that New York law also imposes this imminence requirement on claims of necessity (New York Penal Law § 35.05).

\(^{43}\) These jurisdictions include Indiana, North Dakota, and Texas. The criminal codes of two Australian states, Queensland and Western Australia, also describe the defense of duress according to “such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise” (Kadish 1987, 273 n. 45). English common law has recognized duress by circumstance as a logical consequence of the duress by threats defense (Reed 1996, 65). In Louisiana, duress by circumstance has been regarded as defense in civil contract actions (Hunter 1985).

\(^{44}\) Sandy Kadish refers to this extension of duress as “the Necessity-Coercion Principle.” He describes its rationale as follows: “[w]here coercive predicaments exist[,] in yielding to a threat to which most of us would yield the person has not shown herself to be more blameworthy than the rest of us” (Kadish 1987, 272–73).

\(^{45}\) See, e.g., the notes to California Jury Instructions—Criminal no. 4.43, indicating that the defense of necessity has been limited to threats of bodily harm and that courts have been unwilling to extend the doctrine to cover psychological harm; and instruction no. 4.40, indicating that the duress defense is available only to one who perceives her life is in immediate danger.
PART 3: PUTTING THE "CULTURAL" BACK INTO THE CULTURAL DEFENSE: THE INFLUENCE OF MULTICULTURALISM

Based on the discussion in the preceding section of this essay, it could be argued that there is nothing distinctively cultural about these cultural defense strategies. They all fit squarely within established legal doctrines—lack of specific intent, self-defense, provocation, discipline, necessity, and duress—and culture merely provides the facts that establish and explain the defense.

But if we look more closely at the claims these defendants raise, it becomes clear that culture plays a far more important role than just providing factual background. All of these legal doctrines have flexible boundaries and incorporate flexible standards (such as reasonableness) that courts can expand or contract to suit particular facts. By taking advantage of this flexibility, culture assumes power in the criminal courtroom and challenges the nature, scope, and elasticity of these doctrines.

For example, the cultural requirement strategy, in drawing upon the doctrines of necessity and duress, asks judges and juries to expand their conception of what constitutes "serious harm" to reflect the importance certain cultures place on relationships with one’s family and community (an importance that supersedes that of the individual body). This strategy also compels a reexamination of our notion of “imminence,” as harms like ostracism or shame are certain and irrevocable, if not always immediate. Likewise, the cultural tolerance strategy, in suggesting the reasonableness of violence as a reaction to marital infidelity (or child misbehavior), invites us to reassess the role of marital fidelity (or parental control) in specific relationships and its salience to a stable society. In cultural reason cases, the very plausibility of the alternative, less-culpable explanation for the defendant’s behavior derives from cultural values and practices; culture supplies a noncriminal motivation for what otherwise appears to be criminal action and thereby renders it noncriminal. In all of these cases, the role of culture in shaping the defense is paramount.

But are all of these challenges to our criminal defenses legitimate? Should the criminal law expand its conceptions of harm, imminence, discipline, provocation, and reasonableness to accommodate the values and practices of cultural groups? Will empowering groups in this regard lead to greater rights for individuals, or will state-sponsored considerations of cultural

46. The battered spouse defense has compelled many state courts to conduct a similar reexamination of the imminence requirement in self-defense doctrine (see, e.g., State v. Leidholm 1983; State v. Norman 1989; Comment 1981). The Model Penal Code has also proposed a more expansive version of the imminence requirement, although its use is not limited to battered spouses: the actor must reasonably believe that the use of defensive force was "immediately necessary . . . on the present occasion" (Model Penal Code § 3.04(1)).
norms merely reinforce intragroup oppressive practices and rob victims of their rights under state law? Should the criminal law be concerned with either of those results? In asking these questions, we leave behind the defendant-centered issues addressed in the first half of this paper to concentrate on how the law should respond to cultural claims. Taking cultural defense strategies seriously requires us not only to decide when and how a defendant should assert the role of culture in shaping his behavior but also to determine when and how the law should allow these claims to affect the outcome of the defendant’s case and the scope of criminal defense doctrine generally.

In a culturally diverse society, there is an inherent conflict between the unity required to govern, the need to honor diverse traditions and practices of cultural groups, and the recognition accorded to autonomous individual actors. Post (1988, 299–305) suggests three ways that cultural diversity and democratic government can be reconciled: assimilation (which seeks social uniformity by imposing on all individuals the values of the dominant group); pluralism (which nurtures or safeguards diversity by protecting the values of competing cultural groups); and individualism (which favors individual rights and choices). Each of these legal orders contains an implicit hierarchy of values designed to settle conflicts between the state, the group, and the individual: assimilationist approaches prioritize the state’s need for uniformity at the expense of group tradition or individual expression, pluralist approaches prioritize the group’s need to maintain a distinctive and traditional identity at the expense of state order or individual expression, and individualist approaches prioritize the individual’s need for self-expression at the expense of state order or group tradition.

While liberal scholars have long recognized the tensions inherent in the relationship between the individual and the state (asking questions such as “To what extent do we want to empower the individual as against the state?”), multiculturalist proposals fall squarely within the pluralist component of Post’s typology (asking instead “To what extent do we want to empower groups as against the state?”). The groups at issue have been termed nomoi communities (Shachar 2001, 2 and n. 5), building on Robert Cover’s use of the Greek term nomos to refer to minority communities whose group-sanctioned norms of behavior differ from the norms codified in state law (Cover 1983). For Shachar the term nomoi communities identifies groups organized along religious, ethnic, racial, tribal, or national-origin lines whose members “share a comprehensive and distinguishable worldview that extends to creating law for the community.” This group will likely share “a unique history and collective memory, a distinct culture, a set of social

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47. These tensions may not be as great as one thinks; it has been argued that the state only recognizes those individual rights that further state-sponsored values: “Individual rights that seek to create spheres of personal autonomy do so in order to advance whatever social values have been embraced by the institution of the law” (Post 2000, 190).
norms, customs, and traditions, or perhaps an experience of maltreatment by mainstream society or oppression by the state, all of which may give rise to a set of group-specific rules or practices\(^*\) that the group would like to maintain as an alternative to full assimilation (2001, 2, n. 5).

Scholars working in the multicultural tradition contend that nomoi communities or minority cultures are not sufficiently protected by the guarantees of individual rights that liberal democracies offer, pointing to state policies and practices that (even unintentionally) infringe upon the rights of certain groups (see, e.g., Kymlicka 1999, 33). “Individual rights do not guarantee that cultural diversity will flourish; instead they merely protect the diversity which persons choose to enjoy. Individual rights are thus not very effective guarantors of cultural heterogeneity if a dominant culture exerts a strong hegemonic influence” (Post 2000, 191). In light of the weakness of the individual rights model, special group rights or privileges are needed to counteract the influence of majority norms on institutions (including education, the media, and the law) and to insure full autonomy and equality for minority citizens living within nomoi communities.\(^{48}\) Only “external protections” of this type can promote justice among groups and reduce the level of state interference in intragroup affairs (Kymlicka 1989, 165).

In making this appeal, multiculturalists remind us that the state and the law are not, in fact, unitary systems that treat everyone equally. They are instead institutions that adopt, incorporate, and normalize certain cultural claims to the exclusion of others when making policy and then promote those perspectives as universal, benign, and worthy of compliance. Once we acknowledge the constitutive relationship that exists between state institutions and majority cultural norms, we must prioritize substantive justice among the various cultural groups in order to achieve some semblance of equilibrium; procedural justice merely reinforces preexisting imbalances and dominant cultural norms.

Despite this initial preoccupation with state-group conflicts, more recent works have identified tensions between the nomoi group and the individual that arise when state policies override or defer to group norms that inherently subordinate or burden certain group members (see, e.g., Okin 1999, Parekh 1999). Most scholars agree that cultural practices that restrict the basic civil and political liberties of certain members, which Kymlicka calls “internal restrictions,” should not be enforced by the state (1995, 36). But as we begin to closely examine Kymlicka’s distinction between external protections (those offered by the state to the group to ensure justice) and

\(^{48}\) Group rights can take the form of language rights, political representation, funding of ethnic media, land claims, compensation for historical acts of injustice, or regional centers of power (Kymlicka 1999, 31). Monique Deveaux (2000) argues that group rights should further the political respect and recognition afforded minority groups by securing their inclusion in decision-making processes and their consent to relevant policies. The result would be a form of “deliberative liberalism” that is more true to the ideals of a liberal state.
internal restrictions (those imposed by the group on the individual to ensure compliance), the prescription for state action or deference becomes unclear. If we consider marriage law as an example, should the state require members of a cultural group to marry according to state law (with its attendant burdens and benefits at the time of dissolution) or should the state defer to group marriage norms (which may differentially burden or benefit)? If the state requires civil marriage, it may fail to recognize the sanctity of the group's traditions; if it defers to cultural norms, it may leave the traditionally disadvantaged spouse (i.e., the wife) unprotected at the time of dissolution and thereby render her state citizenship less meaningful, less valuable, or less worthy. Shachar (2001, 3) has termed this "the paradox of multicultural vulnerability": in certain circumstances, one cannot simultaneously protect the rights of the group as against the state without harming the rights of the individual as against her group.

The individual versus group dilemma also poses troubling questions about the nature of multiculturalist claims. Robert Post, for example, recognizes that cultures can be deeply oppressive not just in their public or family policies, but also through the "values or roles they inculcate" (1999, 67). Where these types of oppression do not involve group rights or restrictions on civil liberties, we are left with no clear answer from the multiculturalist camp as to whether or not the larger culture is obligated to enforce them. Furthermore, culturally specific practices that may not have caused concern in one's home country may become oppressive to certain group members once they have moved to a foreign land, thereby causing a rift in the immigrant community:

Once a culture becomes one among several, within a closely integrated political and economic system, practices that used to shape opportunities may come to restrict them. And they may conflict with aspirations legitimately encouraged by the larger society within which members of that community live. It is a mistake to think that multicultural measures can counteract these facts. (Raz 1999, 99)⁴⁹

When deciding how to regulate the relationships between the state, the group, and the individual, we must balance the competing interests and rights associated with each of these entities. Asking "to what extent do we want to empower group rights?" is not simply a call for symbiosis among various sources of authority; it requires us to measure a specific group's rights against both the state's right to promote uniformity among its citizens and the individual's right to express or to defend herself against group-imposed oppression. Moreover, there is no "one size fits all" equilibrium point: each social arena or subset of legal regulation will likely require its own accommodation framework, based on the rights at stake: the right of the group to

⁴⁹. For general critiques of multiculturalism, see Grillo (1998, 194–203).
control the education of its members, for example, may hold more or less weight (relative to those of the individual or of the state) than the right of the group to control marriage ceremonies or divorce proceedings.

The vast majority of multiculturalist scholarship has addressed issues of civil law and political regulation, and scholars have offered various solutions or accommodation strategies to allow nomoi groups and state rules to coexist within particular jurisdictions. But the criminal law is an altogether different animal from marriage or education law and is thus likely to require a distinctively different accommodation framework. The criminal law has strong assimilationist tendencies and plays a significant role in maintaining the stability of the state. In offering protection from harm to all residents of the nation and assurances of fair treatment to all offenders, the criminal law aims to consolidate cultural practices and values and to reinforce a community identity; it is not in the business of making exceptions in order to nurture diversity. As Robert Post notes, “[G]eneral regulations of interpersonal behavior constitute a national culture’s baseline of acceptable conduct, and exemptions from that baseline, even though justified by group norms, can easily be perceived as a license to harm” (2000, 199).

Furthermore, we traditionally understand the criminal law to regulate the relationship between the individual and the state according to due process rights and obligations that are national (or statewide) in scope; this understanding leaves little room for considerations of the group to which the individual belongs or to which he may return once his legal matter is concluded. To satisfy what have been termed “principles of legality” (Fuller 1969), laws that criminally prohibit behavior must be specific, clear, and provide fair notice of their contents; allowing cultural norms to change the terms of the criminal law in certain circumstances, for specific defendants from specific communities, would lead to unacceptable contradictions, concerns about retroactive application, and mass confusion among the public as to what constitutes criminal behavior.

This is not to say that the issue of group rights is entirely misplaced in the criminal arena. Although the criminal law presides over a heterogeneous

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50. Shachar (2001, 88) describes various strategies of joint governance by which the state and the nomoi group can share control of particular issues. The strategies differ according to the mechanism of sharing: by time, by issue, by territory, by choice of the individual, etc. She suggests that the best approach is “transformative accommodation,” under which the state and the nomoi group must recognize specific areas in which one will have dominant control and the other secondary control. While the individual facing a certain issue must abide by the rules of the authority with dominant control, she can opt out of these rules—or subject herself to the secondary authority—at will. Shachar argues that this approach will force the state and the nomoi group to negotiate control over certain issues and will force nomoi groups to offer protections similar to those found in state law in order to dissuade its members from opting out of group control (2001, 117). Notably, her only suggestions for criminal law transformative accommodation concern sentencing practices; she conceives that guilt is a state law issue, but allows for sentencing to be handled by nomoi community norms such as sentencing circles and restorative justice (2001, 160).
population, not all cultural groups have access to the same opportunities, resources, or mechanisms of power to control its content or enforcement. The criminal law does not result from any decision-making process in which representatives of all groups have a voice; it instead reflects the interests and norms of the dominant culture and then imposes those norms on all other subcultures (see Post 1993, 168). Second, although it is drafted by only a small subset of the population, the criminal law promises to apply equally and fairly to all who commit crimes within the jurisdiction. Where the individual accused of a crime belongs to a cultural group whose practices, beliefs, and traditions may have played some role in guiding or determining his behavior and those practices or beliefs are not currently recognized by the jurisdiction (because they do not stem from the dominant Anglo-American traditions), considerations of culture might be relevant and probative, and perhaps even appropriate, to advance substantive justice.

But acknowledging that the criminal law could—or even should—accommodate cultural group norms in some fashion is not the end of the story. Every invocation of culture is not equally proper or beneficial. Cultural defense strategies must be viewed in light of the doctrines and due process standards that lie at the heart of our criminal jurisprudence; while there may be some flexibility in application, only those strategies that comply with our due process concerns deserve to be accommodated. It is my position that only two of the cultural strategies I have examined—cultural reason and cultural requirement—properly fall within that scope, and therefore merit recognition by the courts. For reasons I will discuss below, the cultural tolerance strategy does not implicate due process concerns; it thus should not be considered a viable defense.

First, from a purely legal perspective, the introduction of cultural evidence to explain the defendant’s behavior is unquestionably relevant and probative; that is, it is more likely than not to prove a fact at issue. Indeed, the cultural evidence in all of these cases establishes that the defendant committed the acts for which he was charged—rolling a hot coin along his child’s skin, beating his wife, or killing a pursuing police officer. It is thus relevant to prove the actus reus component of the crime.

But whether the defendant’s culture may be considered to excuse or to justify this conduct is another issue entirely. The cultural reason cases present the most straightforward examples, because they directly implicate the defendant’s mens rea at the time of the crime. Where the defendant claims lack of specific intent or mistake of fact based on cultural interpretation or practices, the honesty and reasonableness of the defendant’s reliance on culture is the central fact at issue. In order to fully evaluate the defendant’s mental state at the time of the crime, the jury must be allowed to consider evidence of the defendant’s reliance on cultural interpretations and practices, even if those interpretations and practices are directly at odds with U.S. traditions. Considerations of multiculturalism are therefore misplaced.
(or perhaps redundant) in cultural reason cases, as we need identify only the presence or absence of mens rea to adjudicate guilt: If a defendant’s reliance on culture prevented him from forming the state of mind required to make his actions criminal, he is not guilty of the crime. He might benefit from education about the potential harmful effects of his behavior, but he cannot be subject to criminal law sanctions.

The intent requirement is likewise implicated in cultural requirement cases. A defendant raising the cultural requirement defense implicitly asks us to reexamine the boundaries of our notions of harm (and of imminence) in order to understand her intent and to excuse her behavior. She contends that our established doctrines are not neutral, but rather derive from Anglo-American conceptions of harm based on Anglo-American values (that which is valued most by our society produces the greatest harm when injured, and therefore receives the greatest level of protection by the law). Hence, she argues, our doctrines are already influenced by culture, rather than by any notion of absolute right, and should be flexible enough to include other conceptions of harm and immediacy.

This point merits serious consideration. I think our duress by circumstances excuse could be expanded to incorporate extraordinary circumstances posed by one’s culture without eviscerating the defense or its underlying principles. The duress doctrine is, by its very nature, elastic; it must regularly take account of the effect of particularly awful and unusual circumstances on reasonable people in order to assess whether a given defendant’s behavior should be excused. This very elasticity should allow consideration of other cultures’ notions of serious harms and circumstances that cause undue stress, both to promote justice for the accused and to inspire us to reexamine the bases for our own focus on tangible losses and immediate consequences.

Allowing cultural evidence in requirement cases does not

51. I think the duress by circumstances excuse is more compelling for cultural defendants than the necessity justification, because the latter requires a favorable balancing of the harms in order to justify the act (to declare it was morally right). A defendant claiming duress, in contrast, merely asks us to conclude that circumstances were so extraordinary that his behavior should be excused. U.S. courts have steadfastly determined that only significantly great harms (such as death or serious bodily injury) will justify criminal behavior; the duress excuse is more flexible, as it allows the court and the jury to take account of the particular circumstances faced by the defendant and the actual stress caused by those circumstances.

The limited nature of justification likely stems from the result which the defendant seeks: to have his actions declared morally right. Given that courts are familiar with the harms caused by law violations, but would be unfamiliar with the “spiritual” harms the defendant claims he needed to avoid, it seems unlikely that a balancing of harms approach would work in the cultural defendant’s favor.

52. Inviting reassessment does not automatically signal acceptance of all cultural practices, however. As explained by Stanislaw Pomorski, “Conduct violating fundamental human rights should never be exempt from the reach of criminal statutes under the theory of customary license. ... If recognition of the custom would run counter to the maintenance of any of the fundamental human rights and freedoms [the human rights conventions] express it can generally be safely assumed that a tolerant approach would be inappropriate” (1997, 59). I would expect juries to understand this limitation when they consider the legitimacy of a defendant’s duress claim.
imply that any defendant who identifies any troubling circumstance deserves to be acquitted; rather, it would be appropriate for the jury, as arbiter and representative of community standards, to assess whether the circumstances faced by a given defendant reasonably excuse her behavior. "If a criminal trial represents a theater of morality, then the jury is perfectly capable of delineating legitimate societal expectations of the coerced actor" (Reed 1996, 69). 53

The cultural tolerance strategy is another matter, however. In these cases, defendants who have engaged in purposefully violent, often homicidal behavior seek to extend the doctrines of provocation and discipline to justify their actions. Cultural tolerance defendants concede that they intended to harm their victims but go on to argue, in essence, that their cultures' barometer of violence is different from that of the United States. Hence, the argument goes, they should be allowed some discretion in deciding when and how to respond violently because of their cultural background. These defendants might contend (much like their cultural requirement counterparts) that the United States' criminal law's intolerance of violence is a cultured phenomenon and does not reflect any implicit notions of right and wrong. Consequently (they argue), some flexibility is needed in our courts' notions of appropriate responses to child or spousal misbehavior, and cultural practices should count for something in the effort to increase marital fidelity and parental control over children.

These arguments are unconvincing. First and foremost, the cultural tolerance defendant has intentionally harmed his victim and is thus significantly different from his cultural reason and cultural requirement counterparts (whose claim to legitimacy rests on an alternative, noncriminal intent). Intentional harm is the precise conduct we want to make criminal. If the criminal law were to overlook the cultural tolerance defendant's intent to harm in an effort to accommodate multicultural perspectives on appropriate levels of violence, we would sacrifice the very principles on which our notions of criminal liability are based. Where harm is the defendant's primary goal, not just the side effect of an act meant to be beneficial, our criminal law should allow very little leeway. 54

53. Moreover, one of the principal purposes of the criminal law is to deter future violators. There is no deterrent value in convicting a defendant who sincerely asserts the cultural requirement strategy. A defendant whose cultural beliefs are strong enough to compel him to commit a crime in order to serve his culture is unlikely to forfeit or to dilute those beliefs in the future if a similar circumstance were to present itself. The same could be said of others in his culture who hold the same beliefs to the same degree. Those who hold different beliefs, or who are less firmly committed to the cultural way of life, would be adjudicated according to their own level of sincerity. In other words, the sincerity of a defendant's beliefs is a highly individual trait, and there would be no precedential value in a conviction or an acquittal based on the cultural requirement strategy.

54. I thank Virginia Mellemma for helping me flesh out this distinction between incidental and intentional harm. I also note that the intentional violence argument applies more directly to a perpetrator of spousal abuse (who explicitly intended to beat or kill an unfaithful spouse)
Moreover, the call to reconsider our position on the importance of family stability not so subtly masks a preference for accepting increased violence in the private sphere, where victims will surely be women and children.\textsuperscript{55} We already have more than our share of violent crimes, spousal assaults, and crimes against children. But we also have strict laws prohibiting those acts and thousands of prosecutors across the country who vigorously prosecute persons who violate them, not always perfectly, but with an eye toward punishing intrafamilial violence.

The cultural tolerance argument asks us to allow certain members of society to be more violent just because their native lands would allow such behavior.\textsuperscript{56} But that some people in some countries may legally harm their spouses or children does not seem to be a compelling reason to allow for such tolerance in the United States.\textsuperscript{57} "'Culture' has been used as an excuse for cruelty and violations of human rights by members of minority cultures in the United States as well as by states like China. When men or states

\begin{itemize}
\item \textsuperscript{55} If the United States becomes truly concerned about fidelity or respect in family relationships, we can call upon a variety of social institutions—other than family violence—to address this concern. We have a vast network of social workers, help centers, educators, and counselors who provide assistance to troubled families and who advocate alternatives to violence on a daily basis.
\item \textsuperscript{56} Even if the argument were formulated as a character explanation ("I was raised in a violent culture and therefore respond violently in certain situations"), it would be no more persuasive. As Sandy Kadish so eloquently writes, "$'There is a difference between explaining a person's wrongful behavior and explaining it away. Explanations are not excuses if they merely explain how the defendant came to have the character of someone who could do such a thing. Otherwise, there would be no basis for moral responsibility in any case where we know enough about the person to understand him" (Kadish 1987, 284).
\item \textsuperscript{57} This argument cannot be made by just any immigrant—it seems steeped in assumptions about Third World nations. As Katha Pollitt explains: "A Russian, an Italian, could not justify beating his wife to death by referring to the customs of dear old Moscow or Calabria, although Russian women are killed by their male partners at astronomical rates and parts of Italy are very old-fashioned indeed about these matters. That is partly because of multicultur- alism's connections to Third Worldism, and the appeals Third Worldism makes to white liberal guilt, and partly because Americans understand that Russia and Italy are dynamic societies in which change is constant and interests clash. The cultural rights argument works best for cultures that most Americans know comparatively little about" (1999, 28–29).
\end{itemize}
claim that 'my culture made me do it,' they are claiming a kind of privacy or privilege that must surely be resisted for the sake of both human rights and 'culture': neither is well served by it" (Honig 1999, 36). Refusal to accept the cultural tolerance strategy is not to say that citizens of the United States should condemn other countries or cultures for their practices, merely that we should not redesign our laws governing abuse and provocation—and thereby increase the tolerance for intentional violence in the United States—based on what other countries allow.9

Furthermore, multicultural scholars warn us against viewing other cultures as monoliths. Foreign cultures, particularly those of the Third World, too often are portrayed as unitary conglomerations of complex rites and rituals that all members obey and respect to equal degrees (Tamir 1999, 47–48; Bhabha 1999, 82). But this notion is both essentialist and incorrect, as we can find in almost every society the existence of indigenous women's movements, reform movements, and local traditions of protest to combat inequality and injustice.

Culture is a living, breathing system for the distribution and enactment of agency, power, and privilege among its members and beyond. Rarely are those privileges distributed along a single axis of difference such that, for example, all men are more powerful than all women. Race, class, locality, lineage all accord measures of privilege or stigma to their bearers. (Honig 1999, 39)

We must guard against allowing the powerful members of any society to assert that adherents of their culture uniformly and unquestioningly condone or encourage practices that produce inequality. The cultural tolerance strategy too readily accepts claims of "organic unity" (Post 1999, 67) with regard to violence, rather than challenging us to look below the surface for signs of dominance, coercion, resistance, and reform.

In advocating an accommodation framework that centers principally on our notions of criminal intent—requiring the courts to accept cultural evidence that directly challenges the criminal intent but to reject cultural

58. From her interviews with Asian Americans in the Los Angeles area, Nilda Rimonte (1991) learned that the reasons offered for domestic violence in that community are strikingly similar to those offered everywhere in this country: men have to cope with numerous stresses from employment (or lack thereof), substandard housing, and general feelings of incompetence and unease. Additionally, men attribute violence to use of alcohol and lack of patience for "nagging, talkative wives who push their husbands to the limits of tolerance" (1991, 1313). Because these pressures are found in the larger society and affect people of all races and cultures, they are insufficient, in and of themselves, to give rise to a cultural defense.

59. I recognize that I am making a policy argument on behalf of lower levels of violence in U.S. society. Perhaps this policy is not sufficient to trump the benefits that scholars of multiculturalism believe would flow from culturally pluralistic ideals. It is, however, a risk I am willing to take.
evidence in other circumstances—I am mindful of the burdens the intent requirement places on other, nonimmigrant but also nonmajoritarian, defendants. For example, defendants from certain racial groups or inner city neighborhoods have been known to allege a "rotten social background" defense, which depends on the idea that growing up in a subculture of poverty and racism severely constrains one's choices and predisposes one to use force as part of a survival strategy (see, e.g., Delgado 1985). To the extent that someone from this subculture can establish the existence and power of a nomoi group (as defined earlier), it would certainly be possible for her to rely on the cultural accommodation framework I have set forth above. However, the essence of the rotten social background argument is much closer to the cultural tolerance strategy than to the cultural reason or requirement strategies, in that it seeks to explain and to justify the intent to harm, rather than to offer an alternative, noncriminal explanation of intent. As a result, I would expect courts who follow this accommodation framework to reject assertions of subcultural influences in much the same way they would reject claims of cultural tolerance. As for defendants claiming religious influences on behavior, the accommodation framework based on intent would additionally incorporate First Amendment free exercise concerns, to the extent those still exist in criminal cases.

While I support the introduction of cultural evidence in cultural reason and cultural requirement cases, I am also wary of the side effects of this policy: promoting cultural determinism in the courtroom. Nilda Rimonte provides an important insight about abdication of responsibility:

It is important to understand the ways in which certain cultural traditions reinforce behavior, but it is more important to understand that human beings must ultimately accept personal responsibility for behavior which harms others. . . . Shifting responsibility from the abuser to his culture denies his personal responsibility and demeans him. Shifting responsibility from the abuser to his culture means accepting and legitimizing the view that there is no crime and no victim. It means accepting the notorious notions of victimless violence and legitimate

60. In advocating this approach, I agree with the comments of scholars such as Maguigan (1995) and Taylor (1998), who advise that no new "cultural" defense is needed as long as we remain committed to the core rss principles already established in our jurisprudence.
61. This is not to say that courts should ignore differences rooted in (for example) economics, but rather that unless such differences give rise to alternative, noncriminal intents, they do not sufficiently implicate due process concerns so as to justify or excuse behavior we would otherwise consider criminal.
62. The U.S. Supreme Court rejected free exercise of religion as a defense to peyote smoking by Native Americans (Employment Division, Oregon Department of Human Services v. Smith 1990). Three years later Congress attempted to reinstate religious freedom by enacting the Religious Freedom Restoration Act, which required strict scrutiny for as-applied challenges to facially neutral laws that adversely impact religious groups. However, the Supreme Court struck down the act in City of Bourne v. Flores (1997).
victims. If culture is responsible for the [victim's] death or injuries, then no one is. (1991, 1324)

Coleman (1996, 1136) warns that rewarding the defendant who claims "culture made me do it" will do little to deter him, or other members of his culture, from committing the same act in the future; such a perspective thus offers no protection to victims of cultural violence (such as the brides in marriage by capture cases). Further, Sacks (1996, 544) emphasizes that reliance on the internal/deterministic view of culture will ultimately promote disdain for minority groups, pursuant to the theory articulated by Richard Fox. "To use the words 'compelled' or 'propelled,' or to say that one follows the 'dictates' of one's culture . . . reinforces Western notions of a primitive, not quite autonomous 'other' who is too culture-bound to make reasoned judgments—implicitly unlike 'Americans" (1985, xii). These "essentializing and reductive stereotypes," once employed, "are likely to long overstay their welcomes, even where they are used for seemingly benevolent purposes" (Sacks 1996, 550; see also Tamir 1999, 51). Thus, while introducing cultural evidence may further the defendant's personal interests, exclusive reliance thereon could ultimately damage his culture and his community.

There are also practical considerations at work in the use of culture as a defense strategy. The above cases demonstrate that cultural claims often have been invoked in a backhanded or indirect fashion, and that judges and/or prosecutors often have taken account of such claims in backhanded or indirect ways. It is essential that we bring considerations of culture out of the backrooms and into the courtrooms through the formal introduction of evidence concerning the influence of culture on the defendant's behavior. The defense must proffer hard evidence of culture to even raise any of these defenses: an expert must testify to the current existence of the cultural practice on which the defendant allegedly relied, and the defendant must introduce evidence (testimonial or otherwise) that she actually relied on this practice when committing the act for which she has been charged.

But the prosecution also has responsibilities when the defendant undertakes a cultural defense strategy. The government's lawyers must educate themselves concerning the cultural practice at issue in order to recognize and to rebut stereotypes, outdated impressions, or incorrect information of-

63. See also Magnarella (1991, 78–79) quoting Michael Yamaki, a third-generation Japanese American criminal lawyer, who "believes a well-publicized court case provides [immigrant] men with the best education. 'As they start going to court and start getting carted off to jail for things like wife beating, the word gets out.' It educates the whole community."

64. Roberts contends that cultural defenses are, in fact, a weak substitute for a far more important project: "ensuring that subordinated groups can participate in the construction and enforcement of the criminal law" (1999, 99).

65. Pamphlets, such as those introduced by Kong Moun, would be insufficient to establish the tradition because they do not allow for cross-examination.
ferred by defense witnesses. Such preparation surely would have affected the outcome in cases such as New York v. Chen (1988), where the prosecutors offered no rebuttal evidence on the culture issue because they did not expect the judge to take the defense seriously.

To further these goals, I suggest that a form of notice pleading would be appropriate when a defendant opts to use a cultural defense strategy. Just as defendants are often required to provide the prosecution with notice of an alibi defense in order to allow the government time to investigate and to respond to the merits of an alibi claim,66 court should require the cultural defendant to notice her intention to use a cultural reason or requirement strategy in her defense. By providing notice pretrial, both parties would be cognizant of the issues at stake and would be wise (if not compelled) to research the cultural practices. Both sides would then be able to present and to cross-examine witnesses, to inspect evidence, and to argue to the jury the relevance and effect of culture on the defendant's behavior.

Despite concerns about unfairly forcing the defendant to testify against himself, this type of notice pleading for cultural strategies would not violate the defendant's privilege against self-incrimination. As Justice Traynor of the California Supreme Court wrote with regard to the alibi notice requirements in 1962:

[The notice statutes] set up a wholly reasonable rule of pleading which in no manner compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial. Such statutes do not violate the right of a defendant to be forever silent. Rather they say to the accused: If you don't intend to remain silent, if you expect to offer an alibi defense, then advance notice and whereabouts must be forthcoming; but if you personally and your potential witnesses elect to remain silent throughout the trial, we have no desire to break that silence by any requirement of this statute. (Jones v. Superior Court 1962, 61-62)

Since the time Jones was written, defense discovery obligations have proliferated across the nation (Mosteller 1986; e.g., California Penal Code § 1054.3). Many states require the defense to disclose names and addresses of all witnesses who will be called at trial; some give the prosecution an independent right to obtain the statements of all potential defense witnesses;

66. More than 80% of the states and the U.S. government require the defendant to provide notice of an alibi defense (Irish 1984; Federal Rules of Criminal Procedure 12.1). Under most of these rules, a defendant's failure to provide timely notice may result in the exclusion of his alibi evidence at trial. Where the prosecution has reciprocal discovery obligations, these provisions have been held constitutional (Williams v. Florida 1970). Likewise, defendants generally must notice insanity defenses before trial by entering a "not guilty by reason of insanity" plea during arraignment (a simple "not guilty" will not suffice).
still others allow discovery of expert witness reports, documents, and tangible evidence the defense intends to use (Mosteller 1986, 1580–81). These rules help the courts (1) eliminate unfair surprise in trials, (2) deter perjured testimony, and (3) reduce mid-trial delays (which inevitably result when the prosecution needs to investigate a surprise defense) (Mosteller 1986, 1574). Under our current understandings of defense discovery obligations, then, a rule that required the defendant to disclose her intention to introduce cultural evidence would pose only a minimal burden and would further the interests mentioned above.

CONCLUDING REMARKS

In this essay I have argued that we should view the use of cultural defense strategies in the criminal courtroom through both cultural and legal lenses. We must understand the way in which culture is being invoked by a given defendant—as a reason, requirement, or form of tolerance; as a soft explanation or as a hard determinant of behavior—in order to assess whether the criminal law need take account of the role of culture in assigning culpability for the crime.

I have further argued that while culture may explain the behavior of a defendant who acts in accordance with its principles, not all uses or invocations of culture appropriately challenge the existing boundaries of our criminal law or serve as legitimate excuses or justifications for criminal behavior. The law should allow cultural evidence where culture provides an alternative, noncriminal explanation for the defendant’s actions or where cultural demands place the defendant under extraordinary stress and rob him of meaningful agency. In contrast, the law should refuse to accommodate defendants whose primary intention is to harm others and who merely claim cultural tolerance of such violence.

In distinguishing between intentions the law should honor and those it should repel, I am, of course, making a statement about the values we promote or discourage in U.S. society. But more importantly, I am recognizing, as have other commentators (see, e.g., Goldstein 1994), that defendants who bring cultural defenses put their own cultures on trial. As a review of the cases shows, defendants ultimately prevail on the cultural defense issue by demonstrating that, although their behavior might differ, their cultural values are consistent with the values of mainstream American culture. Successful cultural explanations draw upon universal principles to which mem-

67. In stressing the importance of universal principles, I aim to distinguish them from relativist principles. Universalism affirms that “the deep structural similarities in . . . all cultures comprise a set of universal culture patterns which, in interaction with a common biological heritage and common features of social interaction, creates a generic human mind. It is to affirm, in short, that despite surface structure differences in their cultures—and perhaps in their deep structures, too—the minds of [everyone] work in accordance with the same
bers of the jury and of the community can relate: where the principles relied on by the defendant appear foreign or repugnant, the jury and the larger community seem unable to accept or to excuse the defendant’s behavior. But "where the jury finds common ground with the defendant, its deliberation and verdict become an exercise in recognizing cultural sameness, not difference" (Chiu 1994, 1114).68

Consider, for example, the cultural reason cases concerning child abuse. Even if we disapprove of a parent’s method for healing or showing affection to a child, we will view her claim with sympathy if we understand and appreciate the intention behind her behavior. Similarly, a Hmong defendant in a marriage by capture case resembles the typical date rape defendant who asserts that his victim actually consented or did not sufficiently put him on notice that she was not interested; this second argument, detached from its cultural moorings, resonates with the experience of many men in the United States who misunderstand or ignore women’s sexual agency. In the spousal violence cultural tolerance cases, the claim to provocation by spousal infidelity is well established in our jurisprudence,69 although we no longer allow angry spouses free rein to punish their partners. And in the cultural requirement cases involving parent-child homicides, we can readily distinguish between the values motivating despondent parents who kill their children to protect them from an awful life of shame (like Kimura and Wu) and those who kill their children in order to seek revenge on their estranged spouses (like Kostner and Bui).

Even my own reliance on the intent standard to differentiate between legitimate and illegitimate invocations of culture is an example of this tendency to prioritize established values. In arguing that we should not only allow but actually require courts to admit cultural evidence where it implicates due process concerns by challenging the alleged criminal intent, I assess cultural claims in accordance with, rather than in opposition to, the fundamental values of modern American society, at least as those values are expressed in our criminal jurisprudence. This approach opens up the crimi-

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68. For example, one insightful Asian American commentator has observed that “society’s message is that Asian culture is ‘exotic’ [and thereby acceptable] when our values overlap with white American values, such as the sexual (de)valuation of women. Usually, however, it is viewed as patriarchal, sexist and inferior to white American culture” (Chiu 1994, 1110). Chiu finds irony in the fact that the United States criminalizes the Asian practice of eating dog meat, but ignores the European practice of eating rabbit meat (1994, 110 n. 139).

69. Indeed, Dorothy Roberts predicted that an American man traveling abroad who fatally shot his wife would have no difficulty eliciting expert testimony on the prominence of domestic violence in the United States to establish an American cultural defense (1999, 99).
nal law to considerations of culture that bear on the issue of intent, but the flip side of this tendency is also at work: restricting courts' consideration of cultural evidence to issues of criminal intent means that the intent standard itself will remain largely unchallenged by competing cultural values.

Indeed there appears to be a certain irony in the cultural defense strategy. Although the defendant raises the issue of difference as a factor favoring acquittal or mitigation, her underlying message is one of sameness. She attempts to rid her cultural behavior of its cultural nature by emphasizing common values and principles. But this appeal to sameness presupposes that the United States is a unitary society and its law a unitary, coherent system of rules and values with which defendants can claim affinity. This facade of unity was shattered in the latter part of the twentieth century by critical legal scholars, critical race scholars, feminist scholars, and queer theorists, but it remains an image to which the criminal courts ardently cling. Indeed, it is the basis of authority by which the criminal law regulates and punishes behavior: certain values merit protection, and certain actions which threaten these values warrant punishment. By identifying with these principles and de-emphasizing her individual behavior, the cultural defendant simultaneously embraces and denies difference; she reinforces the facade of unity and diffuses the threat that her difference poses to our law, our institutions, and our way of life. She thereby allows the law to sidestep the challenges cultural pluralism offers and brushes culture back under the rug.

REFERENCES


70. "A policy that gives certain cultural minorities the option of assimilating to dominant American norms or preserving their own nonthreatening custom leaves the political order intact" (Roberts 1999, 98). See Sarat and Kearns (1999, 12) for a thoughtful discussion of how gestures of accommodation do violence to cultural pluralism and identity politics.


CASES


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