

# Michigan Journal of Gender & Law

---

Volume 7 | Issue 1

---

2000

## A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses

Sharan K. Suri

*Fried, Frank, Harris, Shriver & Jacobson*

Follow this and additional works at: <https://repository.law.umich.edu/mjgl>



Part of the [Criminal Law Commons](#), and the [Law and Gender Commons](#)

---

### Recommended Citation

Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & L. 107 (2000).

Available at: <https://repository.law.umich.edu/mjgl/vol7/iss1/3>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

A MATTER OF PRINCIPLE AND CONSISTENCY:  
UNDERSTANDING THE BATTERED WOMAN AND  
CULTURAL DEFENSES

*Sharan K. Suri\**

- I. THE DEFENSES • 111
  - A. *The Battered Woman Syndrome Defense* • 111
  - B. *The Cultural Defense* • 117
- II. THE TWO DEFENSES ARE THE SAME • 120
  - A. *Criticisms of the Cultural Defense* • 122
  - B. *Criticisms of the Battered Woman Syndrome Defense* • 126
  - C. *The Cultural and Battered Woman Syndrome Defenses Compared* • 131
- III. IMPLICATIONS OF THE COMPARISON • 134
- CONCLUSION • 138

Domestic violence is one of the gravest threats to women's liberty in this country and around the world.<sup>1</sup> According to a 1994 Department of Justice report, sixty percent of all murders committed by a person against a spouse involve husbands killing their wives.<sup>2</sup> While the inevitability of death for many women in situations of marital violence is a significant infringement on liberty, the possibility of incarceration for those women who defend themselves likewise poses a threat. In fact, the Justice Department's Report found that forty percent of all murders committed by a person against her spouse involved wives who killed their husbands,<sup>3</sup> and these women usually ended up behind bars.<sup>4</sup>

---

\* Associate, Fried, Frank, Harris, Shriver & Jacobson, J.D., University of Michigan Law School, 1998; B.A., University of Michigan, 1995.

- 1. See, e.g., Amy Borrus, *What the U.N. Women's Conference Can Do For Women*, BUSINESS WEEK, Sept. 4, 1995, at 42 ("Domestic violence is the leading cause of death globally for women aged 14 to 44.").
- 2. See Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 284 (1996) (citing John M. Dawson & Patrick A. Langan, U.S. Dep't of Justice, *Special Report: Murder in Families*, 3 & tbl.2. (1994)).
- 3. See Angel, *supra* note 2, at 284 (citing John M. Dawson & Patrick A. Langan, U.S. Dep't of Justice, *Special Report: Murder in Families*, 3 & tbl.2. (1994)).
- 4. See Angel, *supra* note 2, at 311-12 ("Women spousal homicide defendants had a . . . conviction rate generally [of] 70% . . ." (citing Patrick A. Langan & John M. Dawson, U.S. Dep't of Justice, *SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES* iii (1995))).

Attorneys for defendants who kill their spouses or other intimate partners zealously try to protect their client's freedom by arguing various defenses at trial. The cultural and battered woman syndrome (BWS) defenses are two legal defenses attorneys for intimate homicide<sup>5</sup> defendants use that have generated an enormous amount of scholarly and practitioner debate. Immigrant minority men are the defendants who usually use the cultural defense in intimate homicides.<sup>6</sup> The cultural defense seeks to mitigate or justify the homicide by showing that the defendant's culture and values led him to commit the crime without the necessary bad mind or mens rea. Those who use the cultural defense sometimes offer evidence showing that in the defendant's culture, the defendant's act would not be criminal but socially acceptable; thus the defendant did not know that his act was wrong.<sup>7</sup> Because this defense only works if the defendant is a recent immigrant without reasonable knowledge of what Americans consider criminal, the more common way to use the cultural defense is to show that the defendant's culture led him to incorrectly interpret the facts or to react in a "heat of passion."<sup>8</sup> Used in this way, the cultural defense works to mitigate the criminal responsibility of the defendant, often reducing the charge from murder to manslaughter.<sup>9</sup>

The BWS defense, on the other hand, is used by women who kill their abusive intimate partners. A woman who presents this defense

---

5. I use the term "intimate homicide" to refer to all homicides involving persons in an intimate relationship, whether they are spouses or boyfriend and girlfriend.

6. Immigrant women also use the cultural defense. See *infra* notes 72-85 and accompanying text.

7. There are at least two other uses of the cultural defense. For an elaboration of the defense and examples of its use, see discussion *infra* Part I.B.

8. See, e.g., Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 57-77 (1994) [hereinafter Volpp, *(Mis)Identifying Culture*]; Susan Girardo Roy, Note, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women,* 9 GEO. IMMIGR. L.J. 263, 266-67, 280-81 (1995).

9. See Roy, *supra* note 8, at 281:

An example of the continuing effectiveness of the heat of passion defense, combined with cultural factors, is the case of Sea Thach, a Cambodian immigrant who killed his immigrant wife and her lover when he found them in bed together. The prosecutors charged him with first-degree murder, but the judge lessened the conviction to voluntary manslaughter. . . . In fact, a study prepared by the Justice Department, entitled "Murder in Families," indicated that 36.5% of all men who kill their spouses are convicted of voluntary manslaughter, the most lenient type of intentional homicide charge.

Roy, *supra* note 8, at 281 (citations omitted).

seeks to justify or at the very least to mitigate the defendant's criminal responsibility: the woman believed leaving was impossible, and therefore she had to kill. Thus, the defense reveals that the battered woman either acted reasonably in self-defense given the nature of domestic violence, or that the woman acted under a diminished mental capacity resulting from repeated abuse by the batterer. Through the successful use of this defense, battered women who kill are either acquitted or are convicted for the lesser offense of voluntary manslaughter as opposed to first-degree murder.<sup>10</sup>

The use of these two defenses has generated an abundant scholarship on the merits and demerits of each. Within this debate, multiculturalists who support the use of cultural defenses fight vigorously with feminists who argue that cultural defenses perpetuate sex discrimination and should therefore be prohibited.<sup>11</sup> Proponents of the cultural defense respond that barring cultural evidence that would properly show the defendant lacked the necessary mens rea to be held criminally responsible for the crime would be discriminatory against immigrants.<sup>12</sup> Moreover, they state that only by allowing immigrants to present evidence of their culture can the justice system live up to its commitment to individualized justice and cultural pluralism.<sup>13</sup> Feminists, however, claim that while individualized justice and cultural pluralism are proper goals of the criminal justice system, the call of multiculturalism must not strengthen sex-based stereotypes that

- 
10. See, e.g., *Commonwealth v. Grimshaw*, 590 N.E.2d 681, 682 (Mass. 1992); Angel, *supra* note 2, at 309–12; Shelby A.D. Moore, *Battered Women Syndrome: Selling the Shadow to Support the Substance*, 38 *How. L.J.* 297, 297–99 & nn.1–5 (1995) (discussing the case of *Banks v. State*, 608 A.2d 1249 (Md. Ct. Spec. App. 1992) in which the woman's sentence was reduced from second degree murder to manslaughter as a result of the battered women syndrome defense).
  11. See, e.g., Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 *B.C. THIRD WORLD L.J.* 231–51 (1994); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 *N.Y.U. REV. L. & SOC. CHANGE* 433, 477–80 (1994).
  12. See, e.g., Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 *N.Y.U. L. REV.* 36 (1995); Sharon M. Tomao, Note, *The Culture Defense: Traditional or Formal?*, 10 *GEO. IMMIGR. L.J.* 241, 241–43 (1996); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 *COLUM. L. REV.* 1573, 1611–14 (1996) [hereinafter Volpp, *Talking Culture*].
  13. See, e.g., Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 *DICK. L. REV.* 141, 141–44 (1994).

promote violence against women; multiculturalism cannot be permitted to supercede the law.<sup>14</sup>

While most feminists argue against the viability of the cultural defense, many support the legitimacy of the BWS defense. The BWS defense, they argue, educates juries on the realities of domestic violence and why women must sometimes take their safety into their own hands and kill in what should be seen as self-defense.<sup>15</sup> If a battered woman is not able to present evidence regarding the cycle of violence she endured and the effects of that violence, important information about the context of the murder would wrongfully be omitted; those women would be denied their constitutional right to a fair trial.<sup>16</sup>

Given the distinction feminists make between the cultural and the BWS defenses, the logical question that remains to be answered is whether this distinction is theoretically consistent. Can feminists concerned about the rampant problem of domestic violence differentiate between the acceptability of the BWS and the cultural defenses in a logically and theoretically consistent manner? This Article argues that the BWS and cultural defenses are equally useful in the legal system and too similar for feminists to discriminate between them. However, because the harmful effects are great, feminists and the legal system as a whole *must* find a way to deal with these problems. This could come from a radical re-evaluation of what our legal system does and should value. A partial solution could also be to sensitize the judicial and legal system while simultaneously establishing adequate social support networks and services to combat these problems. Whatever the solution, feminists must act consistently to promote a goal of equality for all. They cannot embrace a BWS defense while advocating the elimination of the cultural defense.

To adequately explain and argue why feminists, as a matter of legal theory, must take both the BWS *and* cultural defenses seriously, these defenses need further elaboration. Section I details what these defenses are, how they developed, and how they work in the justice system. Section II enlarges the picture by revealing the similarities between the two defenses which share not only the same theoretical and practical goals, but also the same criticisms and flaws highlighted by scholars. Finally,

---

14. See, e.g., Volpp, *Talking Culture*, *supra* note 12, at 1573–76 (discussing Doriane Lambeler Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996), and calling it backlash scholarship).

15. See, e.g., Angel, *supra* note 2, at 309–12; Elizabeth M. Schneider, Symposium, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 509–12 (1996).

16. Elizabeth M. Schneider valiantly pursues this argument. Schneider, *supra* note 15, at 486.

Section III asserts that cultural evidence and evidence of battering must be admitted to show the absence of *mens rea*. However, because serious problems arise from the admission of these two defenses, Section III discusses one potential approach to mitigating or eliminating the resulting harms and urges the search for more alternatives. The Article concludes that feminists must accept the admission of cultural evidence *and* evidence of battering in domestic violence homicide trials. The proper response to the problematic aspects of each defense is the search for specific solutions and approaches to mitigate the harms, not the abandonment of either defense.

## I. THE DEFENSES

Two questions must be answered in the affirmative before a person is convicted of a crime: did the person commit the act and did the person have the mental state that the law requires to make the act culpable and punishable?<sup>17</sup> If the defendant committed the act but does not have the requisite *mens rea*, the jury may find that the defendant did not commit the crime<sup>18</sup> or that the crime committed is of a lesser degree than that charged. In domestic violence homicide trials, whether the woman or man killed her or his intimate partner is often not at issue. Rather, the question is whether the defendant possessed the proper *mens rea*—purpose, knowledge, recklessness, or negligence.<sup>19</sup> Both the BWS and cultural defenses seek to negate the requisite *mens rea* and thereby at least excuse, if not justify, the defendant's actions.<sup>20</sup>

### *A. The Battered Woman Syndrome Defense*

The BWS defense, which provides for expert testimony on the effects of domestic violence and why abused women kill their abusers, is derived from Lenore Walker's research and resulting theory of learned

---

17. See MODEL PENAL CODE §§ 2.01, 2.02 (Proposed Official Draft 1962).

18. Note the word "crime" as opposed to "act." Commission of the act without the requisite *mens rea* eliminates the existence of a "crime." See generally MODEL PENAL CODE, *supra* note 17, at § 2.02.

19. See MODEL PENAL CODE, *supra* note 17, at §§ 210.1–210.4.

20. An excuse results in a mitigated sentence, whereas a justification, such as self-defense, is grounds for an acquittal. See CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 801–46, 893–96 (Sanford H. Kadish & Stephen J. Schulhofer eds., 6th ed. 1995).

helplessness.<sup>21</sup> The theory exposes the cyclical nature of the violence: "gradual tension building, acute violence, and loving contrition."<sup>22</sup> As a result of this violent cycle, the theory states, battered women often become so accustomed to suffering abuse without any recourse that they begin to believe they have no control over the occurrence of battering. Feeling that the situation is hopeless they "give up" trying to leave. The learned helplessness theory therefore attempts to explain why battered women often fail to or are unable to leave the abusive relationship: "Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, 'helpless.' They allow things that appear to them to be out of their control actually to get out of their control."<sup>23</sup> The theory suggests that the reason these women kill their abusers in the end is that they do not understand the consequences of violence and that they are powerless to stop the abuse in any other way.<sup>24</sup>

Walker's theory of learned helplessness, published in 1979, was the first major articulation of the effects of domestic violence. The lack of knowledge and understanding of the battered woman prompted Walker's work. However, within a decade, the learned helplessness the-

21. See generally LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

22. Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 51 (1994).

23. WALKER, *supra* note 21, at 47.

[I]n applying the learned helplessness concept to battered women, the process of how the battered woman becomes victimized grows clearer. Repeated batterings, like electrical shocks, diminish the woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success is changed. She does not believe her response will result in a favorable outcome, whether or not it might. Next, having generalized her helplessness, the battered woman does not believe anything she does will alter any outcome, not just the specific situation that has occurred. She says, "No matter what I do, I have no influence." She cannot think of alternatives. She says, "I am incapable and too stupid to learn how to change things." Finally, her sense of emotional well-being becomes precarious. She is more prone to depression and anxiety.

WALKER, *supra* note 21, at 49-50.

24. See WALKER, *supra* note 21, at 52.

There seems to be little doubt that feelings of powerlessness by both men and women contribute to the cause and maintenance of violent behavior. . . . One result of learned helplessness can be depression, as discussed previously. Another result seems to be a change in the battered woman's perception of the consequences of violence. Living constantly with fear seems to produce an imperviousness to the seriousness of violence.

WALKER, *supra* note 21, at 51-52.

ory was attacked for promoting a "victim" view of battered women which misrepresents the attempts women actually do make to leave and seek help. One alternative explanation and theory that developed was the survivor theory, which maintains that battered women are active survivors who remain in "abusive situations not because they have been passive but because they have tried to escape with no avail."<sup>25</sup> Instead of becoming increasingly helpless, battered women increasingly seek assistance and make efforts to stop the abuse and/or leave.<sup>26</sup>

As the abuse escalates, battered women will seek more and more help from family and friends, from police, and from various community services such as shelters.<sup>27</sup> However, because the "help sources" can be inadequate or piecemeal, the women may have "little alternative but to return to the batterer," although the "help seeking continues."<sup>28</sup> In essence, therefore, the survivor theory points out that many of the women's decisions to stay represent rational decisions: although help seeking increases as the abuse increases, this help seeking "may be mediated, as current research suggests, by the resources available to the woman, her commitment to the relationship, the number of children she has, and the kinds of abuse she may have experienced as a child."<sup>29</sup> The help seeking is also mediated by the real potential for social stigma and poverty that battered women who leave face.<sup>30</sup>

25. EDWARD GONDOLF & ELLEN FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* (1988), *excerpted in DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES* 78, 82 (Nancy K.D. Lemon ed., 1996).

26. *See* GONDOLF & FISHER, *supra* note 25, at 82-83. It is interesting to note that Lenore Walker's work also provides support for this survivor theory: "Walker found . . . that the women in her . . . sample were not necessarily beaten into submissiveness; rather, help seeking increased as the positive reinforcements within the relationship decreased and the costs of the relationship in terms of abusiveness and injury increased." GONDOLF & FISHER, *supra* note 25, at 82-83.

27. *See* GONDOLF & FISHER, *supra* note 25, at 79-83; *see also* Angel, *supra* note 2, at 284-86.

28. GONDOLF & FISHER, *supra* note 25, at 79 & tbl.2-1.

29. GONDOLF & FISHER, *supra* note 25, at 82.

30. *See* GONDOLF & FISHER, *supra* note 25, at 82-83.

The women face tremendous uncertainty in separating even temporarily from the batterer. They fear reprisals for leaving, loss of custody of the children, and losing their home and financial support. The unknown of trying to survive on one's own can be as frightening as returning to a violent man. The prospects of obtaining employment sufficient to support oneself and children are minimal for most shelter women, especially considering their [possible] lack of previous experience and education. This coupled with the feminization of poverty in contemporary America . . . makes a return to the batterer the lesser of the two evils. At least there is a



It is only when this help seeking fails, according to this theory, that a woman will continue to remain in the abusive relationship until either she kills the batterer or he kills her.

Both the learned helplessness theory and the survivor theory share the view that leaving is extremely difficult for battered women, that the women are often unsuccessful because their batterers exercise power and control, and that the battering is largely unaffected by the women's attempts to appease their batterers and stop the violence. The theories differ as to the type of woman the battered woman is: passive and helpless versus active and a survivor. The dominant characterization of the BWS defense, which courts use today, was first formulated by Walker and contains the learned helplessness theory.<sup>31</sup>

Defense attorneys, through expert testimony, use the BWS defense either to support a claim of self-defense so as to be excused from criminal liability, or at the very least to support a claim for a lesser charge than premeditated murder, like voluntary manslaughter. When arguing self-defense, the BWS defense is used to show why the defendant believed that danger was imminent even though the batterer was asleep or was not beating her at the moment preceding death. The theory, after all, is that the woman has been so repeatedly subjected to the violence of the batterer that she knows when it is about to happen even though she has not done anything to provoke him. Secondly, attorneys use the syndrome to explain why deadly force was necessary.<sup>32</sup> According to the theory, the woman will be able to tell if the violence will be particularly brutal before the attack begins.<sup>33</sup> Since attempts to leave the relationship or stop the abuse have been unsuccessful in the past, the battered woman's only recourse is to kill her abuser.<sup>34</sup> Finally, the syndrome has been used to educate the jury and build the credibility of the battered woman.<sup>35</sup> Since many jurors find it hard to believe that the abuse was so severe if the woman has stayed in the relationship for a long period of

---

faint hope that the batterer will change, whereas the prospects for change in the larger community seem less favorable.

GONDOLF & FISHER, *supra* note 25, at 83.

31. See, e.g., *State v. Kelly*, 478 A.2d 364, 369-73 (N.J. 1984) (discussing the Battered Woman's Syndrome as derived from Walker's theory); see also Schopp et al., *supra* note 22, at 50.
32. See Schopp et al., *supra* note 22, at 52-53 (citation omitted).
33. See Schopp et al., *supra* note 22, at 52 (citations omitted).
34. See Schopp et al., *supra* note 22, at 53.
35. See Schopp et al., *supra* note 22, at 52-53.

time, expert testimony on the battered woman syndrome helps jurors understand the pattern of battering and why the woman stayed.<sup>36</sup>

*State v. Kelly*<sup>37</sup> provides a primary example of how the syndrome is used to support a claim for self-defense in domestic violence homicide cases. In this case, Ernest abused Gladys throughout their seven year marriage, and the violence often involved kicking, hitting, and choking.<sup>38</sup> Sometimes the violence occurred as often as once a week; one time Ernest even attacked and beat her in public.<sup>39</sup> According to Gladys, on the day of the murder, she and her daughter had gone to see Ernest at a friend's house to ask for money to buy groceries. When Ernest and Gladys left the house, Ernest yelled at her, pushed her to the ground, and started choking her.<sup>40</sup> Just when she thought she would pass out from the choking, two men from the crowd separated them. Gladys then got up and began to search for her daughter.<sup>41</sup> When she found her daughter, Gladys saw Ernest running toward her "with his hands raised."<sup>42</sup> In a moment, unsure of what would happen, Gladys reached into her pocketbook and stabbed Ernest with a pair of scissors.<sup>43</sup> Gladys was charged with murder, convicted of reckless manslaughter, and sentenced to five years imprisonment.<sup>44</sup> Gladys had tried to offer evidence about the BWS to support her claim of self-defense, but the lower courts would not admit the expert testimony.<sup>45</sup> The Supreme Court of New Jersey reversed and remanded for a new trial, holding that the BWS was "relevant to the honesty and reasonableness of defendant's belief that deadly force was necessary to protect her against death or serious bodily harm."<sup>46</sup>

---

36. See Schopp et al., *supra* note 22, at 52-53; see also Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2135-36 (1993) excerpted in DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES 87 (Nancy K.D. Lemon ed., 1996) (noting that abuse escalates when and if the woman tries to leave). Given separation abuse, it becomes even more rational to stay in the abusive relationship than leave, especially if adequate support systems for the woman are unavailable.

37. 478 A.2d 364 (N.J. 1984).

38. See *Kelly*, 478 A.2d at 369, 377.

39. See *Kelly*, 478 A.2d at 369.

40. See *Kelly*, 478 A.2d at 369.

41. See *Kelly*, 478 A.2d at 369.

42. *Kelly*, 478 A.2d at 369.

43. See *Kelly*, 478 A.2d at 369 n.1 (noting that Gladys' version of the homicide was hotly contested by the state who said that Gladys started the initial fight, that she was yelling her intent to kill Ernest, and that she ran after him to stab him).

44. *Kelly*, 478 A.2d at 368.

45. See *Kelly*, 478 A.2d at 369.

46. *Kelly*, 478 A.2d at 368.

The *Kelly* court defined the BWS as the combination of common symptoms “resulting from sustained psychological and physical trauma compounded by aggravating social and economic factors.”<sup>47</sup> The court further stated: “Only by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman’s state of mind be accurately and fairly understood.”<sup>48</sup> The expert in this case, Dr. Veronen,<sup>49</sup> wished to testify to the “feelings of anxiety, self-blame, isolation, and, above all, fear that plagues these women and leaves them prey to a psychological paralysis that hinders their ability to break free or seek help.”<sup>50</sup> The expert sought to break the common myths surrounding battered women—“primarily that such women are masochistic and enjoy the abuse they receive and that they are free to leave their husbands but choose not to”—and explain how Gladys perceived the situation at the time of the killing and that Gladys was suffering from battered woman’s syndrome.<sup>51</sup> Given that the claim of self-defense relies on the defendant having a reasonable belief that the force used was necessary to prevent imminent “death or serious bodily harm,” the court held that battered woman’s syndrome was relevant.<sup>52</sup> Moreover, because domestic violence is complex and subject to many myths and stereotypes, the court held that “this subject is beyond the ken of the average juror and thus is suitable for explanation through expert testimony.”<sup>53</sup>

As *State v. Kelly* demonstrates, the BWS defense is not a separate defense of its own, rather, it is a way to introduce evidence about the defendant’s mental state and educate the jury on the dynamics of domestic violence. The BWS defense helps show that the defendant lacked the necessary knowledge and purpose of killing the abuser, and that instead the killing was provoked and/or an act of self-defense. While the BWS defense has often been successful in mitigating the sentencing or reducing the conviction from premeditated murder to voluntary manslaughter, it is less successful in actually proving self-defense, although

---

47. *Kelly*, 478 A.2d at 372.

48. *Kelly*, 478 A.2d at 372.

49. Dr. Veronen apparently had “considerable experience in counseling, treating, and studying battered women” and was familiar with the various literature in the field. *Kelly*, 478 A.2d at 372–73.

50. *Kelly*, 478 A.2d at 373.

51. *Kelly*, 478 A.2d at 373.

52. *Kelly*, 478 A.2d at 375–78.

53. *Kelly*, 478 A.2d at 379.

that is its primary goal.<sup>54</sup> At the very least, it allows jurors to have a more complete picture of why and in what circumstances the defendant battered woman killed her abuser. The BWS defense, in that sense, serves to fulfill the legal system's goal of individual justice based on the unique facts of each particular case. The BWS defense ensures that the jury has as full a factual account as possible.

### B. *The Cultural Defense*

The cultural defense is a common law defense that allows defendants, typically immigrants or minorities, to support a claim of incapacity, provocation, or mistake of fact when faced with a murder charge.<sup>55</sup> The premise is that the defendant was acting in accordance with his culture's norms and expectations.<sup>56</sup> A defendant presenting some form of the cultural defense will likely make one of three different claims. First, he will argue that although he committed the act of killing someone, that act was justified because the act is not criminal in his own culture.<sup>57</sup> Second, the defendant will argue for a lesser sentence and lesser charge because the crime he committed would have been treated as less severe than murder in his own culture.<sup>58</sup> The idea behind these two types of arguments is that the recent immigrant has not yet had time to assimilate or understand America's social and legal values and thus should be held to the standards of his old country. Third, the defendant will argue that the act he committed was the product of provocation and mental impairment: given his cultural background, he reasonably perceived and responded to the situation.<sup>59</sup> As one commentator summarized, "A

---

54. See generally Schneider, *supra* note 15 (providing an overview of criminal law's treatment of battered women who kill their assailants); see also Angel, *supra* note 2 (using one woman's story to illustrate how women fare in the criminal justice system).

55. For a useful overview of the cultural defense's historical background, see Goldstein, *supra* note 13, at 144-46.

56. See, e.g., Tomao, *supra* note 12, at 241; Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 57-58 (1994).

57. See, e.g., Rivera, *supra* note 11, at 251 ("The defendant's theory . . . is that violence against women, or the particular act at issue, is sanctioned by the culture and may, in fact, be a recognized cultural norm."); Roy, *supra* note 8, at 276-77 ("The defense is usually utilized by recent immigrants, who argue that their lack of understanding of American norms, coupled with the fact that their actions are justifiable in their own culture, should justify at least a partial defense, or leniency in sentencing."). See also *infra* text accompanying notes 62-71.

58. See, e.g., Rivera, *supra* note 11, at 251; Roy, *supra* note 8, at 277. See also *infra* text accompanying notes 62-71.

59. See Maguigan, *supra* note 12, at 48-49.

cultural defense will negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their propriety, based upon the actor's cultural heritage or tradition."<sup>60</sup>

The cultural defense is largely a product of case law and a desire to mete out individualized justice. Multiculturalists have vigorously advocated the admission of the cultural defense because it allows for "a wider variety of voices in American jurisprudence," acknowledges the diversity of American society, and "counteract[s] the injustice of applying the dominant culture's legal standards to defendants from other cultures."<sup>61</sup> To best understand how the defense works and who uses it, this Section of the Article will turn to a summary of some of the more celebrated (or notorious) cases dealing with the cultural defense.

*People v. Kong Moua*<sup>62</sup> represents an example of the first type of cultural defense in a domestic violence and rape case.<sup>63</sup> *Moua* is commonly known as the "Hmong marriage by capture case."<sup>64</sup> In this case, Kong Moua kidnapped and raped Seng Xiong believing that he was fulfilling the customary practice of marriage by abduction or capture, otherwise known as "zij poj niam."<sup>65</sup> Both of them had recently immigrated to the United States from Laos,<sup>66</sup> and Kong believed Seng wanted to marry him. Thus when Kong abducted Seng and forced her to have sex with him to fulfill the rite of *zij poj niam*, Kong thought that Seng's resistance was just a reflection of custom, not an expression of nonconsent to sex and marriage.<sup>67</sup> Seng however, did not believe she was following Hmong custom and instead viewed Kong's advances and sexual intercourse as rape aggravated by kidnapping.<sup>68</sup> Evidence of the Hmong practice of *zij poj niam* initially persuaded the prosecutor to

60. Goldstein, *supra* note 13, at 143 (quoting John C. Lyman, *Cultural Defenses: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 88 (1986)).

61. Maguigan, *supra* note 12, at 36.

62. No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985) *discussed in* Maguigan, *supra* note 12, at 48.

63. *See* Maguigan, *supra* note 12, at 48, 63-69.

64. *See, e.g.*, Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISCIPLINARY L.J. 1 (1995); Maguigan, *supra* note 12, at 63-69.

65. *See* Evans-Pritchard & Renteln, *supra* note 64; Maguigan, *supra* note 12, at 63-69.

66. *See* Evans-Pritchard & Renteln, *supra* note 64, at 9.

67. *See* Evans-Pritchard & Renteln, *supra* note 64, at 8-13 (discussing both Kong Moua's and Seng Xiong's version of the story and indicating that Kong believed Seng voluntarily went with him and "had sexual intercourse"); Maguigan, *supra* note 12, at 64 ("[Moua] described her resistance to his subsequent rape of her as necessary to consummate their betrothal and as a culturally appropriate response from a virtuous, willing woman.").

68. *See* Evans-Pritchard & Renteln, *supra* note 64, at 12-13.

accept a guilty plea for false imprisonment, a misdemeanor.<sup>69</sup> The cultural evidence, in this case, was then also used to persuade the judge to give Kong a low sentence of ninety days imprisonment and a one-thousand dollar fine.<sup>70</sup> In other words, the cultural defense, or, more accurately, the use of cultural information, helped show the existence of a mistake of law and/or fact<sup>71</sup> and therefore mitigated culpability and punishment. Kong essentially tried to prove that given his cultural background and his culture-based perception of Seng's wishes, he acted in a completely appropriate and legal way.

An example of the second type of cultural defense is *People v. Kimura*.<sup>72</sup> *Kimura* concerns a Japanese woman who was so distraught upon learning of her husband's infidelity that she drowned her children and attempted suicide.<sup>73</sup> Kimura was charged with first-degree murder, but pled to manslaughter and received a relatively light sentence of one-year imprisonment and five years probation with counseling.<sup>74</sup> Her defense rested on the premise that her actions resulted from her husband's infidelity and thus would have been punishable as involuntary manslaughter in Japan.<sup>75</sup> The fact that her country of origin did not believe what she did was a significant criminal offense coupled with the reasonableness of her shame and temporary lack of sanity led the prosecutor to recommend and the judge to give a lenient sentence.<sup>76</sup> As some commentators have suggested, the court essentially accepted the view that parent-child suicide is "not an uncommon way of escaping certain intolerable situations" and that in Japan, it is "more merciful to kill children than to leave them . . . without parental protection."<sup>77</sup> "The mother who commits suicide without taking her child with her is blamed as an *oni no yo na hito* (demon-like person)."<sup>78</sup>

---

69. See Maguigan, *supra* note 12, at 64.

70. See Maguigan, *supra* note 12, at 64-65.

71. There is a controversy over what the basis for the plea actually was. See Evans-Pritchard & Renteln, *supra* note 64, at 26-28.

72. *People v. Kimura*, No. A-091133 (Santa Monica Super. Ct. Nov. 21, 1985), *cited and discussed in* Maguigan, *supra* note 12, at 49, 67-69. See also Goldstein, *supra* note 13, at 147-49.

73. See Maguigan, *supra* note 12, at 67.

74. See Maguigan, *supra* note 12, at 67.

75. See Maguigan, *supra* note 12, at 68.

76. See Maguigan, *supra* note 12, at 67-68.

77. See, e.g., Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 INT'L J. Soc. L. 404, 411 (1989), *cited in* Maguigan, *supra* note 12, at 68 n.111.

78. Woo, *supra* note 77, at 411. This case is similar to *People v. Helen Wu*, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991). In that case, a Chinese woman attempted parent-child suicide, but was unable to successfully submit cultural evidence about her

*People v. Dong Lu Chen*<sup>79</sup> presents a famous example of the third type of cultural defense: the immigrant defendant lacked the requisite state of mind because the defendant's culture made it reasonable for him to perceive and to respond to the situation in a violent way. Dong Lu offered cultural evidence to show that, as a person from mainland China, his wife's adultery so completely obliterated his sense of control that he was provoked to kill his wife. Although Dong Lu had used a claw hammer to "smash the skull of his wife, Jian Wan Chen,"<sup>80</sup> Dong Lu received only a five-year probationary sentence.<sup>81</sup> The cultural expert successfully persuaded the judge to believe that "traditional Chinese values about adultery and loss of manhood drove Chen to kill his wife."<sup>82</sup>

As each of these cases shows, the cultural defense allows defendants to offer evidence regarding their cultural background to explain and justify their actions. "With excuses, cultural evidence is often introduced or proffered to demonstrate that a defendant's mental status was impaired to an extent inconsistent with a finding of criminal responsibility."<sup>83</sup> While controversial, defendants continue to use the cultural defense to give the prosecutor (in plea negotiations), the judge (in sentencing decisions), and the jury (at trial) a complete picture of the defendant's mental state and background to better achieve the goals of multiculturalism and individualized justice.

## II. THE TWO DEFENSES ARE THE SAME

At first glance, the BWS defense and the cultural defenses appear to be quite different. While the BWS defense first developed as a psychological theory designed to explain the effects of battering upon battered women, the cultural defenses are primarily a creation of common law and creative litigation strategies.<sup>84</sup> Moreover, the BWS is

---

subconscious state at the time of the attempted suicide because the jury never received the proper instruction. On appeal the trial court's ruling was overturned for failing to give the defendant's instruction on unconsciousness and instructions regarding the defendant's cultural background were held to be admissible. See *Helen Wu*, 286 Cal. Rptr. at 887.

79. *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988).

80. Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 64.

81. See Maguigan, *supra* note 12, at 78.

82. See Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 64.

83. Maguigan, *supra* note 12, at 72.

84. After all, there is no single, uniform culture or cultural "theory" that the cultural defense encapsulates. Rather, a "cultural defense" is simply a term used to refer to the

predominantly used by women who have suffered extreme abuse at the hands of their victim, whereas the cultural defense is used mostly by immigrant men who have neither suffered abuse nor been assaulted by their victim.<sup>85</sup> To make even clearer this last point, many commentators argue that while the BWS describes the reality that many battered women endure, the cultural defense relies on patriarchal and static cultural stereotypes that discriminate against women and harm the goal of multiculturalism.<sup>86</sup>

While the two defenses are distinct, further study and analysis reveal that the BWS and the cultural defense are quite similar. Indeed, many if not all of the problems and criticisms feminists wage against the cultural defense can be, and are, made against the BWS. This Section of the Article reveals and analyzes the common problems each defense faces. Because many feminists argue for the BWS while arguing against the cultural defense, this Part will begin with an analysis and exploration of the problems that the cultural defense faces. Critics commonly point

use of a defendant's cultural background as a way to explain why a defendant lacked the requisite mens rea and how the behavior of a particular defendant establishes the existence of such "traditional" defenses as diminished capacity and heat of passion. As Leti Volpp states, a "cultural defense" has been presented when "individual defense attorneys and judges use their discretion to present or consider cultural factors affecting the mental state or culpability of a defendant." Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 57-58 (referring to the cultural defense as a "legal strategy.>").

On a related point, it is important to note that despite this difference between the two defenses, neither is really a "formal" defense. As Elizabeth Schneider appropriately points out, "Judicial opinions in a number of recent battered woman self-defense cases correctly remind us that there is no separate 'battered woman syndrome' defense." Schneider, *supra* note 15, at 510. Similarly, the cultural defense is nowhere uniformly used with any consistency. See generally Maguigan, *supra* note 12; Volpp, *(Mis)Identifying Culture*, *supra* note 8; Volpp, *Talking Culture*, *supra* note 14.

85. I realize that women also use the cultural defense, and other minority groups who have not just immigrated to the States use its variant. As Maguigan notes, "the use of cultural information is not a new phenomenon. It is not limited to immigrants. It does not occur primarily in cases involving violence against women or children." Maguigan, *supra* note 12, at 56. She points out that the cultural defense has been used by Native Americans and African Americans. One notable case regarding the attempted use of a "cultural" defense is *People v. Rhines*, 182 Cal. Rptr. 478 (Ct. App. 1982), which excluded testimony that Black people are culturally different from other Americans and that Black people tend to talk loudly to one another. The victim had testified that "the defendant had raped her by using physical force and an intimidating tone of voice." Maguigan, *supra* note 12, at 37. The defense in *Rhines* wished to offer the testimony to support the defendant's claim that he made a "reasonable mistake about the complainant's consent" to sexual intercourse. Maguigan, *supra* note 12, at 37.

86. See, e.g., Smith, *supra* note 11, at 477-85.



to six different arguments against the cultural defense: 1) it promotes stereotypes of cultures and can therefore be racist and ethnocentric; 2) a cultural defense cannot exist when culture is changing and not static; 3) judges tend to apply the defense arbitrarily and in an apparently sexist manner; 4) it often works to the disadvantage of women; 5) there is so much anti-immigrant and racist sentiment in this society that we cannot trust a judge and jury receiving cultural evidence to use it properly; and 6) it promotes a view that immigrants and minorities should get a special defense in violation of equal treatment and anti-discrimination ideals. Once those issues are exposed, this Part will explore the criticisms of the BWS defense and show that each critique of the cultural defense also applies to the BWS defense.

### A. Criticisms of the Cultural Defense

The first argument waged against the cultural defense concerns its promotion of cultural stereotypes.<sup>87</sup> The *Chen* case presents a good example of how the cultural defense has promoted the stereotype that Asian men are sexist and must maintain control over “their” women in order to be true men in their culture. In *Chen*, the expert witness, a white anthropologist named Burton Pasternak, claimed that it was completely reasonable and acceptable in Chinese society for a man to kill his adulterous wife in a fit of rage or sudden “insanity”: “In the Chinese context, adultery by a woman was considered a kind of ‘stain’ upon the man, indicating that he had lost ‘the most minimal standard of control’ over her.”<sup>88</sup> Pasternak further claimed that “[t]he Chinese male would [therefore also] be considered a ‘pariah’ among Chinese women because he would be viewed as having been unable to ‘maintain the most minimal standard of control’ within his family.”<sup>89</sup> As Leti Volpp succinctly commented:

Pasternak’s bizarre portrayal of divorce and adultery in China in fact had little basis in reality. . . . [Pasternak] admitted he could not recall a *single instance* in which a man in China killed his wife or having ever heard about such an event, yet he suggested that this was accepted in China. Pasternak’s de-

---

87. See, e.g., Goldstein, *supra* note 13; Rivera, *supra* note 11; Volpp, *(Mis)Identifying Culture*, note 8, at 68–72; Volpp, *Talking Culture*, *supra* note 12, at 1589.

88. Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 69 (citations omitted).

89. Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 70 (citations omitted).

scription of 'Chinese society' thus was neither substantiated by fact nor supported by his own testimony. The description was in fact his own *American* fantasy.<sup>90</sup>

Indeed the *Chen* case shows not only the stereotyping of Asian society but also of American society. Pasternak insisted that he was exemplary of the "average" American and that therefore, the average American was white and male—an identity completely distinct from the Chinese "foreigner."<sup>91</sup> The stereotyping evidences itself even more clearly in Pasternak's "expert" opinion that Chen was an "inassimilable alien" because "[o]f all the Asians who come to this country, . . . the people who have the hardest time adjusting to this society are Chinese. The Japanese do a lot better."<sup>92</sup> In essence, the argument that the defense promotes cultural stereotypes consists of two points: 1) that a culture cannot be defined accurately as a generalization; and 2) that stereotypes of a minority culture inherently promote inaccurate stereotypes of the majority culture.

Related to the second argument—that the cultural defense promotes inaccurate stereotypes—is the argument that a "cultural defense" is infeasible because there is no such thing as a static culture or even a uniform definition of a certain culture.<sup>93</sup> As Maguigan states, "[t]he issue of simply defining 'culture' and its relationship to criminal justice has long engaged the attention of anthropological scholars, one of whom suggests that it may be impossible, and it is difficult to imagine the criminal justice system doing a better job."<sup>94</sup> Understanding the impossibility of actually defining a single culture in total leads to an appreciation of the fact that whenever defendants present a cultural defense, they naturally present a static, incomplete picture. The defense also ignores the possibility of variety and diversity within a culture, as the *Moua* case exemplifies.<sup>95</sup> Just as Kong acted within the norms of Hmong culture by kidnapping and consummating the marriage/raping Seng, so too did Seng act as a "Hmong woman" who had rejected *zij poj niam*. Although Seng did not accept Kong's actions as culturally appropriate, Seng is nevertheless a Hmong woman and a part of the Hmong culture, however it is defined.

90. Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 70 (citations omitted).

91. See Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 70–71.

92. Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 72.

93. See generally, e.g., Volpp, *Talking Culture*, *supra* note 14, at 1589; Tomao, *supra* note 12.

94. Maguigan, *supra* note 12, at 52 (citations omitted).

95. See *supra* text accompanying notes 63–71.

The third, fourth and fifth arguments against the culture defense concern the fact that judges arbitrarily apply and accept or reject cultural defenses, and that in the application of the defense, the legal system justifies violence against women. Both of these points stem from the reality that the cultural defense is not a formal defense (which means that it is applied in an ad hoc manner) and that when judges and juries evaluate such cultural evidence, they can only do so through the lens of their experience. As Judge Leon Higginbotham remarked regarding the limitations of a judge's objectivity:

A judiciary that is always unrepresentative of the population's racial groups and that basically excludes women is bound, at its best, to lack credibility, and, at its worst, to be partisan. . . . The bench is more likely to uphold, often even subconsciously, the prejudices of the race it "represents," particularly when given the discretion to make value judgments.<sup>96</sup>

Similarly, what jurors find credible *and* relevant as a matter of fact will depend on whether what the expert tells them comports with their experiences and specifically addresses myths in a way that is both accurate and persuasive. If an expert states, as Pasternak did in *Chen*, that Asian women are supposed to be passive and that the Asian culture is inherently sexist and misogynistic, the judge and jury will likely believe him. This information is consistent with the widely held view that Eastern cultures are less developed, less progressive and more patriarchal than Western cultures.<sup>97</sup>

Even if the judge and jury do listen with a relatively "open" mind and weigh the evidence, the same cultural defense which will be successful in one case may fail in the next—or worse, the defense may not even be accepted. For instance while Fumiko Kimura and Helen Wu<sup>98</sup> were able to benefit from the cultural defense regarding the acceptability of parent-child suicide in their "home" countries, the same defense was denied to a Korean woman who had accidentally killed her son when

---

96. A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1054 (1993), cited in Maguigan, *supra* note 12, at 54.

97. See, e.g., Volpp, *Talking Culture*, *supra* note 14, at 1577–80 (criticizing Coleman, *supra* note 14).

98. See generally Volpp, *(Mis)Identifying Culture*, *supra* note 8; Woo, *supra* note 77; Helen Wu, 286 Cal. Rptr. at 868.

she left him alone in a motel room drawer.<sup>99</sup> In that case, the woman was a single mother who had to work and did not have money for a babysitter.<sup>100</sup> The cultural evidence would have shown that it is common for Koreans to leave their children alone because in Korea neighbors and friends are the unpaid “babysitters.”<sup>101</sup> The evidence also would have emphasized the woman’s difficulty in learning English and becoming financially secure for her children.<sup>102</sup> Such evidence would not have excused her conduct, but it might have exonerated her from culpability beyond gross negligence or recklessness—a far cry from the purpose and knowledge needed for a murder conviction.

The second point, that the cultural defense supports and perpetuates the acceptability of violence against women is evident by each of the cultural defense cases discussed thus far. Chen’s “slap on the wrist” punishment for murdering his wife with a claw hammer sent the resident Asian community the message that “battered immigrant Asian women . . . had no recourse against domestic violence. As one abuser reportedly told his wife, ‘If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.’”<sup>103</sup> *Moua* sends the same type of message since the cultural defense in that case enabled a man to be convicted of merely false imprisonment rather than the felonious kidnapping and rape with which he was actually charged.<sup>104</sup> In *Kimura* and the similar case of *People v. Helen Wu*, the criminal justice system validated the immigrant “culture’s” devaluation of women by accepting the cultural defense and granting such lenient sentences. As one commentator aptly put it, the bottom line is that the women and children die.<sup>105</sup>

99. See *State v. Chong Sun France*, 379 S.E.2d 701 (N.C. App. 1989), cited and discussed in Volpp, *(Mis)Identifying Culture*, supra note 8, at 96–97 & nn.164–67.

100. See Volpp, *(Mis)Identifying Culture*, supra note 8, at 96–97 & nn.164–67.

101. See Volpp, *(Mis)Identifying Culture*, supra note 8, at 96 & n.167.

102. See Volpp, *(Mis)Identifying Culture*, supra note 8, at 96 n.167.

103. Volpp, *(Mis)Identifying Culture*, supra note 8, at 77. This comment also raises another point that poverty and legal aid attorneys will be sure to note: with the acceptance of such cultural defenses, the cost of a successful defense limits the availability of such “individualized justice” to the privileged rich immigrant. For women who kill their abusers, such status and money is likely to be unavailable.

104. This conclusion assumes that Seng Xiong’s version of the story is correct. There is a dispute about what actually happened, and the settlement or plea bargain which entailed pleading guilty to false imprisonment, spending 90 days in jail and paying \$1,000 to Seng’s family, ensures that the true details remain obscure. See Evans-Pritchard & Renteln, supra note 64, at 8–13, 26–29.

105. See Smith, supra note 11, at 478. But see, e.g., Volpp, *Talking Culture*, supra note 12, at 1576–80 (advocating an intersectional analysis and arguing that the goals of multiculturalism and feminism are not antithetical). Goldstein argues that use of the

The sixth argument, finally, concerns the belief that immigrants and other minorities, by virtue of their race, ethnicity and immigrant status, are benefiting from a separate defense that others cannot use which violates the equality principle in our law.<sup>106</sup> The opponents of the cultural defense claim it carves out a special exception to the fact that “mistake of law is not a defense” to further the goal of multiculturalism and respect for different races.<sup>107</sup> Treating people equally means treating people as individuals without regard to group stereotypes. The cultural defense appears therefore to be a separate defense in violation of the equality principle because it renders convictions on the basis of group characteristics and stereotypes. As Sharon Tomao asserts, the cultural defense “undercut[s] efforts to secure individualized justice within the criminal justice system by shifting the focus from the defendant to her culture.”<sup>108</sup>

### *B. Criticisms of the Battered Woman Syndrome Defense*

Although the BWS has enjoyed greater success than in the past and has promoted an awareness of the complexity of domestic violence, it too has fallen prey to many criticisms. Opponents of BWS as a defense for women who kill their assailants also make six different arguments: 1) it promotes stereotypes of women as passive and helpless; 2) it inaccurately portrays women as mentally ill and hysterical; 3) there is no single “battered woman” and different women or victims of abuse respond in different ways; 4) the defense works to the disadvantage of minorities; 5) it provides special treatment to women who kill in violation of equal treatment and anti-discrimination ideals; and 6) there is so much sexism in today’s society that we cannot trust a judge and jury to use BWS de-

---

cultural defense works against women in an even more severe way—under the guise of helping each member of the culture. Women and children comprise a sizeable proportion of these other cultural communities; yet when the cultural defense is used, it is often used to condone violence against them—the very people the defense is meant to respect and protect. See Goldstein, *supra* note 13, at 163–64. “Only a small percentage of immigrant populations are protected under a blanket cultural defense. The women are not protected from violence, and the children are not protected from abuse or, even, death as in *Kimura*.” Goldstein, *supra* note 13, at 163 (citations omitted).

106. See Goldstein, *supra* note 13, at 144. See generally Tomao, *supra* note 12.

107. See, e.g., Goldstein, *supra* note 13, at 144, 158; Tomao, *supra* note 12, at 256.

108. Tomao, *supra* note 12, at 255.

fense appropriately.<sup>109</sup> This list of arguments against the BWS defense is strikingly similar to the list of arguments waged against the cultural defense. Indeed all that differs between the two lists is the application of the arguments—in one case we are talking about race and culture while in the other we are talking about women and sexism.

The argument that the BWS defense promotes a stereotype of women as weak and helpless is easy to see given the syndrome's meaning and definition. The whole defense is predicated on the notion that battered women are helpless and weak; the abused woman is a passive victim. In this country, viewing women as weak and inferior is part of our sexist society. It is the idea that women are weak and emotional that has kept women out of the workforce, out of the armed forces and in the home; it is the notion that women are frail that has kept women constantly dependent on men.<sup>110</sup> To support the BWS, its opponents argue, is to support the stereotypes that have subjugated women for a long time.<sup>111</sup> Professor Anne Coughlin, for instance, has even argued that the syndrome not only reinforces negative gender roles, but also "reaffirms [the] invidious understanding of women's incapacity for rational self-control."<sup>112</sup> She claims that "by denying that women are capable of abiding by criminal prohibitions, in circumstances said to afflict many women at some point during their lives, the defense denies that women have the same capacity for self-governance that is attributed to men."<sup>113</sup> In other words, the opponents attack the BWS defense because, while it may keep women out of jail or at least keep them from having as long a sentence as they otherwise might have, the BWS defense reinforces the same negative stereotypes that have kept women, as a class, subordinate to men. The practical implications of reaffirming this stereotype is the further subjugation of women.<sup>114</sup>

109. See, e.g., Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); GONDOLF & FISHER, *supra* note 25, at 78; Angel, *supra* note 2, at 309–12; Moore, *supra* note 10; Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996).

110. This is not to say that the perception of women is the only reason for their "second class" status in society. Indeed there are many factors that have led to women's inferior social status, the most important of which is male power. See, e.g., CATHERINE A. MACKINNON, *The Art of the Impossible*, in FEMINISM UNMODIFIED 1, 1–17 (1987).

111. See, e.g., Coughlin, *supra* note 109, at 6; Goldfarb, *supra* note 109, at 608–11; Moore, *supra* note 10.

112. Coughlin, *supra* note 109, at 6.

113. Coughlin, *supra* note 109, at 6.

114. This particular argument—that admittance of the BWS defense means that women do not have the capacity for rational self-control and responsibility—seems at least facially problematic. The BWS defense could also be interpreted as a recognition of

A related argument is that the BWS defense portrays women inaccurately. As previously discussed, the BWS defense indicates that battered women are mentally ill and require "specialized counseling to address their debilitated psychological state."<sup>115</sup> However, what many feminists have pointed out is that battered women are not suffering from learned helplessness but are constantly making efforts to survive. Many battered women do not just sit idly by, passively accepting the abuse; rather they try to alleviate the abuse by making their partner happy, and when that fails, by seeking help or trying to leave. The reason battered women stay in an abusive relationship, according to this alternate theory, is that they lack access to resources that help them leave for good. Battered women are actors who try to leave and reach out for help but often meet little or no success. This lack of options and an intimate awareness of when their assailant will strike next leads the battered woman to kill.<sup>116</sup> Seen in this light, many feminists argue that the BWS defense mischaracterizes the reality of the abuse and the effect it has on some women because women who kill in these situations truly are acting in self-defense.<sup>117</sup> Unlike the message of the BWS defense, that women are mentally ill and hysterical, the survivor theory shows that women are responding reasonably to violence that threatens their own lives.<sup>118</sup>

---

the severe injustice and violence that women suffer at the hands of men. It acknowledges that women should not be responsible for reacting in the only logical self-defense way possible when confronted with life-threatening violence. Why blame the woman, when the man is the one who has attacked the woman in the past with impunity?

115. GONDOLF & FISHER, *supra* note 25, at 78.

116. *See* GONDOLF & FISHER, *supra* note 25, at 78, 79 & tbl. 2-1 (providing a helpful summary of how the "survivor hypothesis" works).

117. *See* Angel, *supra* note 2, at 309-12; *see also*, Moore, *supra* note 10, at 302 ("The effect of asserting the battered woman syndrome in the courtroom has been to treat battered women in a way that is demeaning and inferior to men by treating them as people with diminished intellectual capacity, rather than treating them as reasonable people who act in self-defense to save their lives, particularly when they kill absent a confrontation.").

118. While it is true that abused women often kill their assailants when the assailants are not using life-threatening force, the reality of domestic violence is that the abused woman will die of the abuse if she does not get out of the situation and adequate intervention is not available. *See* Moore, *supra* note 10, at 300 ("[A] 1991 United States Department of Health and Human Services study on family violence reports that more than one-third of all women slain in this country die at the hands of a husband or partner. The study also estimates that four million women are beaten each year by their husbands or mates, and as a result of the battering, more than four women die each day." (citations omitted)).

This argument naturally flows into the criticism that the BWS defense improperly and inaccurately essentializes<sup>119</sup> who “women” are and what a “battered woman” is. In order for the syndrome defense to work, the woman must be portrayed as passive and weak—a subject of violence. Needless to say, this is not true for all women; many are strong, assertive, and active. Many women, simply said, do not fit the stereotype. What attorneys will do is try to fit their client into the BWS defense—make them appear weak and passive. However, while many white and Asian women may be able to fit themselves believably into that stereotype because society invests in such a stereotype for these groups of women, black women are abandoned. As Professor Shelby A.D. Moore persuasively reveals,

African American women are viewed as angry, masculine, domineering, strong, and sexually permissive—characteristics which do not denote ‘victim.’ As a result, judges and jurors are less likely to believe African American women are ‘victims’ when they assert self-defense while relying on the battered woman syndrome as the justification for killing their abusers.<sup>120</sup>

Thus, although the BWS defense purports to help battered women as a whole, it actually promotes not only a sexist view of women but also a racist view of who battered women are.<sup>121</sup> What the BWS defense fails to do is account for the reality that women cannot be essentialized into this unitary being divorced from race, class, and sexual orientation.<sup>122</sup> In this way, opponents of the BWS argue, the defense both falsely defines women and the battered woman and disadvantages minorities. Indeed, the syndrome does not even help the entire group which it was designed to help—all women, not just women who fit the racial stereotype.

Because of the success and general acceptance of the BWS, some commentators feel that a special defense has evolved just for women

---

119. I use the term “essentializes” to refer to the process of defining the core essence or “being” of *all* women, as if all women share a particular trait. See, e.g., Moore, *supra* note 10, at 336–46.

120. See Moore, *supra* note 10, at 302–03.

121. Moore further points out that “[t]he unfortunate result is that African American women stand before the court without the same defense readily available to white women and, perhaps, without a constitutionally guaranteed right to a fair trial.” Moore, *supra* note 10, at 336.

122. See Moore, *supra* note 10, at 337.



who kill.<sup>123</sup> On the basis of gender, they claim, the law is allowing women to receive possibly lighter sentences, if any, for the crime of killing their assailant.<sup>124</sup> The defense does not account for men or partners of same-sex couples who are abused.<sup>125</sup> As one commentator argued, “[The issue of domestic violence is] being pushed beyond reason . . . [by] allowing the self-defense argument to be muddied by revenge.”<sup>126</sup> Others, like Professor Coughlin, argue that the defense demeans women by giving them an option that only women can exercise; if women wish to be equal, the BWS defense must be eradicated.<sup>127</sup>

Finally, opponents argue that the BWS defense cannot be appropriately used because of the sexist society in which we live.<sup>128</sup> The BWS defense in a sense is discriminatory not only because it perpetuates gender stereotypes in a racist manner but also because a judge and jury will interpret the evidence of battering in a sexist manner. The believability of the syndrome as a defense rests on how likely the evidence comports with the judge and jury’s understanding of what is reasonable for a person to do. It is this fact that prevents African American women from being able to successfully use the BWS defense. As Professor Moore reveals, “If judges and jurors view [African American women] as strong and domineering, they are unlikely to believe that African American women suffer psychologically as a result of being battered.”<sup>129</sup> In addition to the problems with the BWS defense arising from the reality of our sexist society, problems exist with the genesis of the defense. As Professor Coughlin has argued, “the defense is the offspring of the patriarchal assumptions from which the discipline of psychology, as well as law, [is] constructed.”<sup>130</sup> Given the sexist society reflected in the judge and jury and the syndrome’s inherently sexist origins, the opponents ask, how can it be the right tool for battered women?

---

123. See, e.g., *infra* notes 125–27.

124. See, e.g., *infra* notes 125–27.

125. See, e.g., Goldfarb, *supra* note 109.

126. Margaret B. Carlson, *The Feminist Mistake*, REDBOOK, Nov. 1991, at 24.

127. See Coughlin, *supra* note 109, at 8 (“by providing this kind of accommodation for women only, the criminal law would continue to affirm that men possess the capacity for rational self-governance, but women do not”).

128. See, e.g., Moore, *supra* note 10, at 347; Coughlin, *supra* note 109.

129. Moore, *supra* note 10, at 333.

130. Coughlin, *supra* note 109, at 7.

*C. The Cultural and Battered Woman  
Syndrome Defenses Compared*

Each of the arguments against the BWS defense mirrors the arguments against the cultural defense. Both defenses perpetuate and use stereotypes in a harmful way. Both essentialize<sup>131</sup> their subject, whether it is culture or who a "battered woman" is. Both disadvantage minorities and women; each harms the group it is supposed to protect. Both provide special defenses for a group of people that non-group members cannot use. Both defenses serve to reinforce sexism and racism that exist within society. Indeed the two defenses appear to be more similar than different. To some extent, the only real difference between them is that the cultural defense deals with culture and the BWS defense deals with battered women.

Still, feminists argue that the cultural defense is different from the BWS defense and that the cultural defense should not be among the tools of defense attorneys.<sup>132</sup> For instance, Taryn Goldstein argues that because the BWS defense is an accepted psychological syndrome that has evolved from extensive research and the cultural defense is based more on subjective social science and social mores, the cultural defense should be excluded from trial, but the BWS defense maintained.<sup>133</sup> She argues that while the BWS defense is an objective, identifiable and accepted defense, the cultural defense is subjective and lacks a constant definition.<sup>134</sup> As explored above, however, such a commentary disregards half of the analysis. It is true that the cultural defense falsely presumes the existence of a static culture and is often based on varying subjective social mores, but the same can be said about the BWS defense. Indeed, Professor Moore attacks the notion that the BWS defense is objective and accurate. Her critique exposes the flawed methodology of Walker's research,<sup>135</sup> the way in which the BWS defense relies on a victim status paradigm that subjugates women,<sup>136</sup> and the fact that the BWS defense misstates the reality that "one is neither a victim nor a victimizer at all times during one's existence."<sup>137</sup> Thus the same criticism made about the cultural defense more than aptly applies to the BWS defense.

---

131. See *supra* note 119.

132. See, e.g., Angel, *supra* note 2, at 296-99; Goldstein, *supra* note 13, at 164-67.

133. See Goldstein, *supra* note 13, at 164-67.

134. See Goldstein, *supra* note 13, at 164-67.

135. See Moore, *supra* note 10, at 317-21.

136. See Moore, *supra* note 10, at 318.

137. Moore, *supra* note 10, at 325.

If the first argument distinguishing the two defenses fails to be persuasive, Goldstein argues that permitting the cultural defense would lead to a slippery slope: because “the cultural defense could literally be applied to everyone, there is nothing to stop every defendant from attempting to utilize the defense.”<sup>138</sup> According to Goldstein, the BWS defense does not fall prey to this argument because the defense only applies to battered women—an identifiable group.<sup>139</sup> The first response is simply that there is no such thing as an “identifiable” single, unitary type of battered woman. The second reply is that although the cultural defense could theoretically apply to anyone—American, Asian, African, European—the practical reality is that it cannot be so used. The defense only works for immigrant and some minority groups. The idea is that the criminal justice system only finds culpable those who have the necessary mens rea and those who can reasonably be expected to “know” the values and mores of our society.<sup>140</sup> Thus while everyone has a “cultural history,” only immigrants and a few specially situated non-immigrants will be able to take advantage of the cultural defense.<sup>141</sup>

An insistence that the cultural defense is *more* problematic than the BWS defense is also insufficient to materially distinguish between the two defenses. One could argue that the cultural defense is improper because it poses more material and symbolic harms to society in general than does the BWS defense. The material harms are that the cultural defense causes the female victims to disappear and permits violence against women and children under the guise of multiculturalism. The symbolic harm is that racist and ethnocentric stereotypes are taken to be true reflections of reality such that minorities and immigrants will continue to be viewed as inferior members of our society. While these harms do result from the current use of the cultural defense, the same harms arise from the current use of the BWS defense. As discussed above, the BWS defense also perpetuates a harmful view of women as weak and passive, allows a black woman to suffer behind bars for killing

---

138. Goldstein, *supra* note 13, at 167.

139. See Goldstein, *supra* note 13, at 166–67.

140. After all, the reason why mistake of law is not a defense is that the law merely codifies society’s moral values. If a person commits an act that he should have known that society abjured, then whether he knew a law also existed to prohibit the conduct is irrelevant. Our criminal justice system does not expect that everyone will go to their lawyer to see whether their proposed action is legal; rather the criminal justice system wants to ensure that people act in a socially moral way. See generally KADISH & SCHULHOFER, *supra* note 20, at 257–82. See *supra* notes 17–20 and accompanying text.

141. For a discussion of who can use the cultural defense, see *supra* Part I.B.

her assailant when a white woman making the same claim would likely have a lesser sentence or go free. The BWS defense allows the focus at trial to shift from the woman who actually was abused and survived, to a stereotypical woman who was helpless and mentally ill. The BWS defense, quite simply, is not much better than the cultural defense in this respect. To the extent that the BWS defense can legitimately be viewed as less harmful, the bottom line is still that both defenses have bad consequences and fail to help the defendants in a nonracist and nonsexist manner.

A last attempt to distinguish the two defenses might focus on the fact that while the cultural defense is predominantly used by men who kill, abuse and/or rape relatively innocent women,<sup>142</sup> the BWS defense is predominantly used by women who kill their abusers—men who have wrecked havoc and terror in the women's lives.<sup>143</sup> This argument focuses on who the "victims" are and whether they "deserved" to die. On its face, this argument is sympathetic. However, this argument misses the mark in two distinct ways. First, it is important to realize that men aren't the only ones who can and do use the cultural defense; Asian women, for instance, have justly and successfully used the defense to receive a lighter sentence.<sup>144</sup> Battered women who use the BWS defense, moreover, can successfully use the defense only where the battering was so severe as to make it reasonable for the woman to use deadly force.

Second, and more significantly, the argument fails to recognize that the criminal justice system only punishes those who both commit the wrong act and have the corresponding bad mind, such as malice aforethought, purpose or knowledge. Thus, the fact that we don't believe the victim should have died or been raped by the defendant just makes us think that the defendant *had the requisite bad mind*, but it is not conclusive proof. The cultural defense then would come in to possibly defeat that presumption and show that in fact the person lacked the evil mental state and is therefore guilty of a lesser crime—he was incapacitated, temporarily insane due to cultural provocation, or reasonably believed he was doing nothing wrong because of the particular cultural lens he wears, and he was reasonably unable to be familiar with the mores of American society. The BWS defense functions in the same way.

---

142. In other words, the woman usually has done nothing more than have an affair with another man. See *Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), *cited and discussed in* Volpp, *(Mis)Identifying Culture*, *supra* note 8, at 64-77.

143. Cf. Smith, *supra* note 11, at 465-70 (arguing that the batterer's violence narrows the choices available to battered women).

144. See *supra* note 98 and accompanying text.

Without the BWS defense, the judge and jury would not know that the “victim” abused and battered the defendant; the judge and jury would only see that the deceased was sleeping at the time that the defendant murdered him. Both the cultural and the BWS defenses seek to rebut the presumption of bad mind by offering a clearer picture of the defendant’s life, act, and mental state.

The arguments against the two defenses are real, and the worries are substantial. The bottom line is that no matter how hard feminists try to distinguish between the two defenses to argue that the cultural defense is indefensible as a matter of law, the cultural defense and the BWS defense are materially similar. One cannot accept one defense without accepting the other defense in a theoretically consistent manner. After all, the same arguments for why the cultural defense is flawed apply with equal force to the BWS defense. Feminists cannot simply discredit the cultural defense by claiming that it perpetuates violence against women, because the same argument can forcefully be made against the BWS defense. Stereotypes, essentialism, and inaccuracies in theory and application to reality abound in both defenses. Moreover, the two defenses are used for the same purposes—to show a lack of the appropriate mens rea and thereby serving to excuse or mitigate the defendant’s conduct. The very real similarities and lack of material differences indicate that feminists must treat the cultural and BWS defenses the same way. No basis exists for privileging one over the other.

### III. IMPLICATIONS OF THE COMPARISON

Given the similarity of the defenses and the numerous problems associated with them, the legitimate question is whether both defenses should therefore be eliminated. The criticisms against the cultural and the BWS defenses are persuasive. However the criticisms do not necessarily lead to the conclusion that both defenses should be abandoned completely. Rather, this Section of the Article takes the position that both defenses should be admissible in an informal way: *evidence* of battering and *evidence* of culture should be admitted to show that the defendant did not have the requisite mens rea to be criminally culpable. Because the fear of stereotyping and racist/sexist usage of both defenses is warranted, this Section briefly discusses one possible way to deal with the evidence without promoting racist, ethnocentric, and sexist stereotypes. This Article does not arrive at a conclusion of how best to mitigate the harms caused, however. Instead, this Article promotes the search for creative ways to effectively curb the harmful effects of admit-

ting such information in our racist and sexist society without denying each defendant the right to individualized justice and a fair trial.

The criminal justice system's emphasis on mental state and the constitutional demand of a fair trial for all defendants dictate that cultural evidence and evidence of domestic violence must be admissible. To determine whether a defendant had the requisite purpose and knowledge when committing the criminal act, the judicial system must probe the psyche; the judge and jury must know what the person was likely to think or perceive given his or her specific circumstances. Evidence of the defendant's culture or history of abuse by the victim is therefore relevant to know the full story, whether there was malice aforethought, incapacity, or a reasonable belief of imminent bodily injury that would qualify the defendant for self-defense. In the case of *People v. Kimura*,<sup>145</sup> the cultural evidence indicating that Japanese culture views parent-child suicide as involuntary manslaughter and that the culture would find Ms. Kimura's wish to commit the suicide due to her husband's adultery reasonable was relevant and necessary to establishing Ms. Kimura's mental state. Similarly, evidence that the defendant suffered repeated abuse by the "victim" is relevant to state of mind because it may show that the woman was acting in self-defense or in a state of trauma induced by the victim. Indeed, the primary reason feminists developed and started using the BWS defense was to educate the jury and ensure that they heard the full story—the "woman's story."<sup>146</sup> If, in fact, the criminal justice system values individualized justice,<sup>147</sup> such that people are punished only for the crimes they actually committed, then the full story must include both the battered woman's story and the immigrant's cultural story. As Professor Lawrence said:

---

145. No. A-091133 (Santa Monica Super. Ct. Nov. 21, 1985).

146. As many feminists have forcefully argued, the criminal justice system is male-centered. See generally MACKINNON, *supra* note 110; Angel, *supra* note 2. Male perception and experience define what is reasonable and what equals self-defense. The law is not neutral, although it aims to give neutral individualized justice by looking at one's mental state and punishing only those who have the evil mind and did the evil deed. See, e.g., Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (critiquing the notion of neutrality and arguing against the falseness of abstraction). If individualized justice is the goal, as it should be, then the justice system must take into account alternate, yet legitimate, experiences of women and immigrants—viewpoints that often are not heard. The "facts" sought at trial naturally must include the fact of the woman's and immigrant's experience as it relates to the crime committed.

147. See, e.g., Tomao, *supra* note 12, at 242–43, 251–56; Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1296–99 (1986).

The historical and cultural setting is critical to the reader's [or juror's] interpretation of the facts, feelings, and understandings. . . . Human problems considered and resolved in the absence of context are often misperceived, misinterpreted, and mishandled. But the hazards and liabilities of noncontextual interpretation and decision making are not experienced randomly. Blacks and others whose stories have been and are excluded from the dominant discourse are more likely to be injured by the error of noncontextual methodology.<sup>148</sup>

To eliminate any cultural evidence or any evidence of battering would result in a grave injustice: neither of the two "types" of defendants would actually have a jury of his or her peers who appreciate trifles.<sup>149</sup> Neither of the defendants would receive the punishment they *deserve*.

The problem, however, is that admitting such evidence still evokes the same problems of stereotyping and essentialism that the critics of the BWS and cultural defenses revealed. So the question becomes: given that cultural evidence and evidence of battering is relevant on a very basic theoretical level, how can the criminal justice system admit such evidence without promoting the racist, ethnocentric, and sexist consequences that the cultural and the BWS defenses currently raise?

On a theoretical level, admitting "evidence of" culture and battering, as opposed to having a specific defense, enables the attorneys to show who the defendant actually is. In the context of a black battered woman who has slain her batterer, the defense could present evidence of battering and the defendant's personal experience of being black and battered in our racist and sexist society without trying to show that she was passive, quiet or otherwise stereotypically white.<sup>150</sup> As Professor Phyllis Goldfarb eloquently commented regarding the need for evidence of battering in the same-sex couple context, "[t]he existence of intimate violence in gay and lesbian relationships does challenge the dominant theoretical accounts of intimate violence that feminists have offered. It is important to appreciate, however, that it need not challenge their vi-

---

148. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2281 (1992).

149. This expression comes from Marina Angel's article, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*. See Angel, *supra* note 2, at 229-32.

150. See Moore, *supra* note 10, at 297-304, 346-47 (challenging the legal system to break away from the rigid definitions of woman in the BWS defense).

ability-in-context, *just their generalizability*.<sup>151</sup> In other words, instead of trying to make the evidence fit into a certain stereotype of what culture is and who a battered woman is supposed to be, the defendants can provide evidence of their particular backgrounds.

On a practical level, Professor Holly Maguigan proposes that cultural evidence should be admitted to show the particular defendant's mens rea and then be subject to counterevidence, "cross-examination, rebuttal evidence, and reasoned argument."<sup>152</sup> In other words, both prosecution and defense would have to take on the burden of zealously advocating for their client by fighting inaccurate and irrelevant stereotypes. If the defense attempts to offer evidence of general cultural attitudes divorced from the reality of what the defendant actually experienced or believed, then the prosecution will have an opportunity to present the counter-argument. The idea is that both sides must accept cultural evidence only after critical reflection.<sup>153</sup>

Similarly in the context of a battered woman who kills her batterer, Professors Elizabeth Schneider and Shelby Moore both emphasize the need for lawyers to educate the jury and fight stereotypes to ensure that the defendants are getting a fair trial. Schneider argues rather generally that "every case [must be] heard on its own merits, with full deliberation and careful review of the facts, presented in a meaningful

151. Goldfarb, *supra* note 109, at 630–31 (emphasis added).

152. Maguigan, *supra* note 12, at 93.

In cases in which appropriate evidentiary rulings require the admission of cultural evidence, the burden falls on prosecutors to expose any flaws in the use of the material. Prosecutors must be held to a standard of performance in which they rebut cultural stereotypes with accurate information and reasoned argument. It is they, and not judges, who have the task of challenging the validity of defense evidence.

Maguigan, *supra* note 12, at 90–91. Professor Maguigan uses the Mike Tyson rape trial as an example of a prosecutor who effectively combatted racist and sexist stereotypes to get a conviction. Maguigan, *supra* note 12, at 92–98.

153. Cf. Volpp, *Talking Culture*, *supra* note 12, at 1611–13 ("Information about a defendant's culture should never be reduced to stereotypes about a community, but should concretely address the individual's location in her community, diaspora, and history."). Volpp and Maguigan essentially ask that:

prosecutors and community groups challenge evidence as irrelevant when it is based on stereotypes with little basis in reality, provide testimony to demonstrate how particular cultural notions are contested within communities, and present evidence that is based on accurate descriptions of the pressures that individuals face, both within their communities and without.

Volpp, *Talking Culture*, *supra* note 12, at 1612–13 (citing Maguigan, *supra* note 12, at 90–97).



process of individualization.”<sup>154</sup> She argues that not only must the jury hear all the facts through the appropriate challenging of inaccurate and irrelevant stereotypical evidence, but that lawyers, judges, and legal scholars themselves must engage in a self-reflective challenge of the biases and misinformation they harbor.<sup>155</sup> Only if the lawyers are themselves “sensitive to the problem of gender construction in [their] interpretation of [battered women’s] experiences, consideration of their legal implications, and translation of these experiences into law” will the lawyers be able to present evidence to the jury in a nonstereotypical way.<sup>156</sup> Moore further comments that for African American women’s stories to be heard, “jurors and judges must recognize differences on several levels.”<sup>157</sup> Gender and racial stereotypes and considerations must both be taken into account. For this to happen, all participants in the criminal justice system, from jurors to judges and lawyers, must learn about the varied realities of different women and cultures and self-reflect on the biases they themselves hold.

Unfortunately, the task of education is extremely difficult to accomplish. As Moore states, “[t]he burden of recognizing and discounting the negative images of African American women often does not permit judges and jurors to do so.”<sup>158</sup> However, to eliminate the opportunity for defendants to offer cultural evidence and evidence of battering would only lead to the omission of contextual information, thus enabling the perpetual miscarriage of justice. The education proposal is tough but necessary. It cannot be the only way however, and it is incumbent upon all of us to keep searching for a solution to the problems that relevant information of culture and battering present.

### CONCLUSION

The admissibility of the cultural and BWS defenses has stirred an extraordinary amount of scholarly debate. Each defense has benefited some defendants by allowing them to tell their story and show how their culture or the domestic violence they endured led them to commit the crime charged. The defenses have allowed both men and women to receive lighter sentences than would have been possible without the evidence. The problem lies in the cost to society, to the victims, and to the

---

154. Schneider, *supra* note 15, at 523.

155. See Schneider, *supra* note 15, at 523–24.

156. Schneider, *supra* note 15, at 524.

157. Moore, *supra* note 10, at 343.

158. Moore, *supra* note 10, at 344.

defendants themselves when these two defenses are used without critical reflection.

Many scholars, especially feminist scholars, have tried to distinguish between the cultural and the BWS defenses in support of eliminating the cultural defense. They argue, *inter alia*, that the cultural defense promotes racist and sexist stereotypes, uses an essentialist definition of culture, and perpetuates violence against women. What they often fail to realize is that the BWS defense is riddled with similar problems. This Article has shown that the BWS defense also promotes racist and sexist stereotypes because the defense presumes a weak, passive, stereotypically white heterosexual woman. The BWS defense in this way discriminates against African American women who are stereotypically viewed as loud, lascivious, angry and at times violent. The BWS defense also uses an essentialist definition of woman, which harms all women. Indeed, this Article reveals that the cultural and the BWS defenses have not only the same purpose, but also the same harmful consequences. Distinguishing between the two defenses therefore, is theoretically inconsistent.

Just because the defenses are materially indistinguishable, however, does not mean that cultural evidence and evidence of battering must be excluded at trial, at negotiations, or at sentencing. Rather, individualized justice, a focus on mens rea in criminal law, and the right to a fair trial all dictate that this evidence must be admitted. Thus, feminist scholars and all participants in the criminal justice system have a new challenge, a new question to answer: how to admit cultural evidence and evidence of battering without promoting the stereotypes and without allowing our racist and sexist society to abuse the information? Some suggest that educating all parties is necessary. They are probably right, but education alone is insufficient. This Article therefore, challenges all lawyers, judges, jurors, and legal scholars to search for a better solution—a solution that permits the evidence to come in as relevant, but eliminates the attendant risks. ❀

