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Deconstructing the Cultural Evidence Debate

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I. INTRODUCTION

The use of cultural evidence in criminal cases is a subject that has traditionally been approached with delicacy by a select group of scholars. The question of whether a male rape defendant ought to be able to mitigate his offense by offering contextual evidence of the contrasting practices and beliefs of his own culture engages both multiculturalist and feminist scholars. In many ways, the social and ethical issues have been thoroughly debated by these two groups.[1]

Yet, the descriptions offered by cultural evidence scholars of both the problems and the solutions have been narrow, and the audience for the debate has been relatively small. This Essay endeavors to step away from the debate to view the issue from a broader, criminal justice perspective. If the problems identified are not unique to cultural evidence cases, but

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1. *See* Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994) (summarizing and characterizing the views generated by the debate).

rather systemic problems inherent in the criminal justice system, then there is a greater likelihood of a larger audience that will seek to change the system.

Cultural evidence scholars identify three basic problems with the presentation of cultural evidence in criminal cases.[2] Scholars first discuss the problem of negative stereotyping of the defendant's culture, to the detriment of all members of that culture.[3] Second, many scholars argue that the use of cultural evidence largely inures to the benefit of male defendants who are accused of crimes that oppress women and children of that culture.[4] Finally, some scholars argue that the overall problem is that the acceptance of cultural evidence in the courtroom is inconsistent or rare, dependent on the cultural sensitivity of judges.[5] If there is any consistency

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2. The scholars are grouped for the purposes of description. Certainly, not all of the scholars agree on the three problems described herein, and sometimes these descriptions of the problems are inconsistent with one another. Nonetheless, these are the themes that emerge time and again, and the variations on these themes are slight.

3. *See, e.g.*, CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 105 (2003); Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. FOR SOC. JUST. 443, 443-44 (2004); Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 78-79 (2003); Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1708-09 (2001); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 132 (1997); Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in the Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 544 (1996); 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); Chiu, *supra* note 1, at 1107; Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 62 (1994).

4. *See, e.g.*, LEE, *supra* note 3, at 103; Sikora, *supra* note 3, at 1709-1711; Kim, *supra* note 3, at 111; Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1137-42 (1996); Maguigan, *supra* note 3, at 36; Chiu, *supra* note 1, at 1101, 1119-20; Alice J. Gallin, Note, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 725 (1994); Volpp, *supra* note 3, at 93-94; Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1312 (1991).

5. *See, e.g.*, ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 23 (2004); Maguigan, *supra* note 3, at 54-55; Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?* 99 DICK. L. REV. 141, 155 (1994); Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. ISLANDS L.J. 49, 53 (1993); Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 452 (1993) [hereinafter Renteln, *A Justification*]; Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1295 (1986) [hereinafter Note].

at all, it is that cultural evidence is admitted when the cultural attribute is perceived as "sameness" with the dominant culture and not "difference."[6]

Central to the scholars' critique is that these problems are unique to cultural evidence cases, largely due to the cultural and gender insensitivity of the actors in the criminal justice system. Most of the articles addressing this issue focus on the same small handful of criminal cases to demonstrate one or more of the problems,[7] and each of the scholars makes a proposal for change narrowly tailored to the issue of acceptance of cultural evidence in the courtroom. Driving the analysis of the use of culture in criminal cases is, however, a much larger concern about the treatment of cultural differences in society.[8]

This Essay makes a distinction between societal problems and courtroom problems, beginning with the premise that it is not, nor should it be, the primary goal of the criminal justice system to solve societal problems. This Essay makes no initial assumptions about what problems may or may not exist with the use of cultural evidence in the courtroom.[9] Rather, it looks at the cases previously discussed by scholars, as well as a larger group of cases,[10] and asks: Do the cases, individually and as a whole, in fact illustrate the problems identified by the scholars? If not, why not? And if so, are the problems unique to cultural defendants or endemic to the criminal justice system? If the latter, are they issues with which the criminal justice system should or can be concerned?

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6. *See, e.g.*, LEE, *supra* note 3, at 107-08; Chiu, *supra* note 1, at 1125 n.303; Levine, *supra* note 3, at 80-81.

7. Most of the scholars focus primarily on four cases: *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988); *People v. Kimura*, No. A-091133 (Cal. Super. Ct. L.A. County Nov. 21, 1985); *People v. Wu*, 286 Cal. Rptr. 868 (Cal. App. 1991); *People v. Moua*, No. 315972-0 (Fresno Cy. Super. Ct., Feb. 7, 1985). *See, e.g.*, LEE, *supra* note 3 (discussing *Chen*, *Moua*, *Kimura*); Goel, *supra* note 3 (discussing *Kimura*); Levine, *supra* note 3 (discussing *Chen*, *Wu*); Kim, *supra* note 3 (discussing *Chen*, *Kimura*, *Moua*); Coleman, *supra* note 4 (discussing *Kimura*, *Chen*, *Moua*); Gallin, *supra* note 4 (discussing *Moua*, *Chen*, *Wu*); Volpp, *supra* note 3 (discussing *Chen*, *Wu*); Chiu, *supra* note 1 (discussing *Kimura*, *Moua*, *Wu*); Renteln, *A Justification*, *supra* note 5 (discussing *Wu*, *Chen*); Lam, *supra* note 5 (discussing *Kimura*).

8. *See, e.g.*, Chiu, *supra* note 1, at 1055 ("without an historical understanding of the sociopolitical context in which the cultural defense has arisen, the debate about the defense can only replicate the traditional ways in which American society has marginalized Asian Americans.").

9. It is not difficult to believe that judges and juries, who are primarily white and male, have difficulty dealing with the cultural issues. However, the approach of this Essay is to leave that belief aside for the moment and look at the treatment of cultural evidence in the cases themselves to see whether, and how such biases are manifested.

10. Without trying to do an empirical study of all of the cases in which cultural evidence was an issue, I relied on the approximately fifty cultural evidence cases, published and unpublished, cited in the footnotes of the articles and books cited in notes 3, 4 and 5 *supra*.

From this broader perspective, the three identified problems take on a different form. Part II of this Essay discusses the negative stereotyping by actors in the criminal justice system, and finds that, although it does occur, it appears to be the result of a breakdown of the adversary process more than cultural insensitivity.[11] In addition, even if the cultural evidence can be identified as "negative" or a "stereotype," it can and should be an issue for the *courts*, as opposed to society at large, only if the evidence is unreliable or untrue.

Part III demonstrates that the oppression problem is not unique to cultural evidence cases, but is a larger criminal justice issue. For example, "heat of passion," manslaughter, and the defense of mistake of fact in rape cases have, by definition, traditionally allowed lenient treatment of male defendants who abuse, kill, and rape women, regardless of the national origin of the defendant or his cultural beliefs. The gender biases manifested in these substantive crimes and defenses are most effectively addressed as part of a larger legal agenda. Further, a study of the cultural evidence cases shows that judges and juries do not routinely allow cultural evidence to exculpate or mitigate guilt in cases of men violating women. Hence, there is a danger in seeking a solution to a problem that may not exist.

Finally, Part IV discusses the "inconsistency problem," a problem that is described as inevitably leading to injustices. The scholars making this claim choose cases for direct comparisons that are, in fact, very different. Some scholars also claim that judges by and large simply reject cultural evidence as a matter of course. Yet, case law reveals that courts are willing to admit cultural evidence when relevant. Case law further demonstrates that courts reject cultural evidence when the defense has utterly failed to advocate the relevancy, not because the judges are insensitive to cultural issues. Finally, the assumption that inconsistency itself is a problem is not necessarily correct in a criminal justice system that seeks individualized justice.

By taking the focus off of cultural sensitivity, this Essay shows that the admission of cultural evidence may not present as many problems as perceived; and to the extent the cases reveal problems, they are best addressed as systemic problems within the criminal justice system.

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11. The term "cultural insensitivity" is used throughout this Essay to describe the dominant culture's hostility to, or ignorance of, the significance of cultural differences and their relevance to the defendant's crime.

II. THE STEREOTYPING PROBLEM

The first concern of cultural evidence scholars is that the actors in the criminal justice system are insensitive to negative stereotyping when cultural evidence is proffered on behalf of a defendant. There are two aspects to an analysis of this concern. First, a closer study of *People v. Chen*,[12] the case most often cited for this problem, reveals a larger criminal justice advocacy problem. Second, the label of "negative stereotyping" is a value judgment to which the criminal justice system is neither obligated nor designed to respond.

Feminists and multiculturalists are unhappy with the proceedings and the result in *People v. Chen*. According to critics, the expert in the case engaged in the worst form of stereotyping of Chinese culture, the judge allowed and embraced the expert testimony, and a woman's life was devalued as a result.[13]

In 1987, Dong Lu Chen, a Chinese-born man living in New York, confronted his wife, Jian-Wan, about his suspicion of her infidelity.[14] After she admitted the affair, he became so enraged that he hit her eight times in the head with a claw hammer, killing her.[15] Chen was charged with second-degree murder.[16] At the bench trial, Dr. Burton Pasternak, a professor of anthropology, testified for the defense that a "normal Chinese" would have reacted similarly to Chen, and that "[i]n general terms, I think that one could expect a Chinese to react in a much more volatile, violent way to those circumstances than someone from our own society."[17] Pasternak explained that "casual sex, adultery, which is an even more extreme violation, and divorce" are deviant behavior and adultery by a woman is a "stain" upon a man, who has lost "the most minimal standard of control."[18] A Chinese cuckold would be considered a "pariah" among Chinese women.[19] While Pasternak had not heard of a woman in China being killed in such circumstances, he testified that, under the

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12. People v. Chen, No. 87-7774 (N.Y. Sup. Ct., Dec. 2, 1988).

13. *See, e.g.*, Volpp, *supra* note 3, at 74-75. *See also* LEE, *supra* note 3, at 103-05 (arguing that *Chen* demonstrates that when cultural evidence is admitted race is privileged over gender and culture is presented as one-dimensional, fixed and static, and negative stereotypes are perpetuated).

14. Volpp, *supra* note 3, at 65 nn.35-37 (quoting transcript of Record at 67, People v. Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988) [hereinafter Record]); LEE, *supra* note 3, at 96; Chiu, *supra* note 1, at 1053 n.1 (citing news article).

15. LEE, *supra* note 3, at 96.

16. *Id.*; Kim, *supra* note 3, at 120.

17. Volpp, *supra* note 3, at 65-66 n.41 (quoting Record at 74).

18. *Id.* at 68-69 n.53 (quoting Record at 55).

19. *Id.* n.57 (quoting Record at 55).

circumstances of this case, the Chinese community would have intervened before the wife was killed.[20]

Justice Edward Pincus, the trial judge, relied heavily upon Pasternak's testimony of cultural difference, stating, "were this crime committed by the defendant as someone who was born and raised in America . . . the Court would have been constrained to find the defendant guilty of manslaughter in the first degree."[21] Instead, Justice Pincus found him guilty of second-degree manslaughter and sentenced him to five years probation.[22] The judge described Chen as "a victim that fell through the cracks because society didn't know where or how to respond in time."[23]

The expert testimony and result in *Chen* are highly problematic from both a multiculturalist and a feminist perspective. Leti Volpp convincingly explains that Pasternak, a white male anthropologist who testified he was "your average American,"[24] engaged in egregious and erroneous essentialism of Chinese culture, depicting it as "static, monolithic and misogynist."[25] "This fetishization of 'difference' enabled Pasternak's creation of a 'cultural defense' for Dong Lu Chen by depicting gender relations in China as vastly different from gender relations in the United States."[26] Volpp adds that the evidence suffered from the lack of a female perspective.[27] Jian-Wan Chen would have had a different view of Chinese culture as one in which women object to violence and oppression.[28]

The critique of *Chen* holds the judge, the defense attorney, and the expert liable for insensitivity to issues of culture and negative stereotyping.[29] However, that is neither the most accurate nor the most helpful description of the problem in *Chen*, particularly if the point of describing the problem is to devise a solution. Justice Pincus would likely be confounded by accusations of cultural insensitivity. He fully credited the evidence of cultural traits that the defense offered.[30] Indeed, had Justice

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20. *Id.* n.60 (quoting Record at 106-07); *id.* n.71 (quoting Record at 302).
21. *Id.* n.70 (quoting Record at 301-02).
22. Kim, *supra* note 3, at 120; Chiu, *supra* note 1, at 1053 n.3 (citing news article).
23. Volpp, *supra* note 3, n.75 (quoting Record at 355).
24. *Id.* at 70 (quoting Record at 76).
25. *Id.* at 62.
26. *Id.* at 72.
27. *Id.*
28. *See* Volpp, *supra* note 3, at 74-76 ("But where was Jian Wan Chen in this story? The defense strategy rendered her invisible;" "a Chinese immigrant woman [] might describe divorce, adultery and male violence within 'Chinese culture' very differently").
29. *See, e.g.*, *id.* at 76 (critiquing all three in her description of the proceedings); Kim, *supra* note 3, at 124 (critiquing the expert).
30. *See* Volpp, *supra* note 3, at 72-73 (quoting Record at 301-02).

Pincus declared Chen's Chinese background irrelevant and treated him like any other American, he would have been subject to the accusation that he was a culturally-insensitive assimilationist.[31]

Unless the prosecution offers its own expert to counter the testimony of a defense expert, a judge cannot be expected to recognize inaccurate stereotyping by the defense expert.[32] For better or for worse, factfinders often take their cues from experts.[33] It was not unreasonable for Justice Pincus to assume that Pasternak knew more about Chinese culture than he did.

A critic might also assign blame or responsibility for perpetuating negative stereotypes upon the defense attorney who placed the expert on the stand.[34] However, it is both unrealistic and inappropriate to ask the defense attorney to define his or her role in this manner. The ethical duty to zealously represent a criminal defendant means a defense attorney must seek out any and all helpful witnesses, including experts.[35] Unless there is an issue of knowingly fostering perjured testimony, the defense attorney's decision to place that witness on the stand is only one of strategy, not ethics. A zealous advocate cannot discount a helpful defense expert because he or she may be disseminating negative information about the defendant's culture.

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31. *See* Chiu, *supra* note 1, at 1104-05 (arguing that those against a cultural defense are supporting coercive assimilation); Volpp, *supra* note 3, at 61 (criticizing those who have touted assimilation over cultural diversity in treatment of a cultural defense).

32. *See* Maguigan, *supra* note 3, at 78 ("One cannot know, of course, whether the outcome in *Chen* would have been different had the judge been presented with evidence to rebut the defense expert. Would he still have accepted uncritically the anthropological evidence on which he based his verdict? Given that unanswerable question, it is important not to use this case as the basis for a conclusion that the receipt of evidence of traditional patriarchal values will necessarily lead to outcomes that appear to validate those values. The *Chen* case demonstrates simply that unrebutted defense cultural evidence can operate to raise a reasonable doubt about the prosecution's proof of the *mens rea* requisite for convicting the defendant of a more serious offense.").

33. The entire purpose of the expert is to "assist the trier of fact to understand the evidence or to determine a fact in issue." Federal Rule of Evidence 702. *See also* Advisory Committee's Note to 2000 Amendment to Rule 702 (referring to "the venerable practice of using expert testimony to educate the factfinder on general principles.").

34. In her detailed description of the case, Volpp describes the defense strategy as distasteful and as the product of the collusion of the defense attorney, Stewart Orden, and the expert. *See* Volpp, *supra* note 3, at 67-68.

35. *See, e.g.*, National Legal Aid and Defender Association Performance Guideline 4.1(b)(7) ("Counsel should secure the assistance of experts where it is necessary or appropriate to: preparation of the defense; adequate understanding of the prosecution's case; rebut the prosecution's case."), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines [hereinafter NLADA Guidelines].

Contrary to this position, Rashmi Goel has suggested that a defense attorney should take into account the effect of negative stereotyping on the defendant when assessing strategy.[36] Goel ultimately concluded that using cultural evidence is a strategy choice that should be left to the defendant.[37] While there may be no quibble with this modest suggestion, the practicalities are that the defendant is going to favor the production of the evidence. Any strategy choice normally left to the defendant, such as the decision whether to testify or to plead guilty, should not be made without the advice of his or her attorney.[38] For Goel's suggestion to be triggered, the defense attorney would first have to recognize that the expert was offering a negative stereotype. If either the attorney or the defendant recognized this, the attorney would then inform the defendant whether, in his or her opinion, the chance of gaining the sympathy of the judge or jury is likely greater if the defense expert testifies than if he does not.[39]

In *People v. Kimura*,[40] for example, if the defense attorney had followed Goel's advice, the outcome of the case would likely have been the same. In *Kimura*, Fumiko Kimura walked her two children into the ocean to drown them and herself after learning that her husband had been unfaithful.[41] Bystanders pulled all three of them out of the ocean; but the two children had drowned.[42] Kimura was charged with first-degree murder.[43] According to Japanese culture, a parent commits *oja-shinku*,[44] or parent-child suicide, when the parent is so shamed and devalued by the spouse's infidelity that she sees little choice but to kill herself. The mother also kills her children because they will suffer from shame and neglect if left behind.[45]

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36. Goel, *supra* note 3, at 458.

37. *Id.*

38. *See, e.g.*, NLADA Guideline 6.3(a) ("Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement").

39. For example, in *Chen*, the defense attorney's decision to put Pasternak on the stand was a winning strategy, and, since his client received a sentence to a mere five years probation, it is unlikely Chen was unhappy with the testimony.

40. No. A-091133 (Cal. Super. Ct. L.A. County, Nov. 21, 1985).

41. Goel, *supra* note 3, at 443.

42. LEE, *supra* note 3, at 121.

43. *Id.* at 121-22.

44. This is the spelling used by Renteln. Renteln, *A Justification*, *supra* note 5, at 463. Goel spells the term *oyaku shinju*. Goel, *supra* note 3, at 443. Finally, Lee spells it *oya-ko shinju*. LEE, *supra* note 3, at 121.

45. *See* Coleman, *supra* note 4, at 1109-10. This is likely an oversimplified description of the tradition. A study of the practice in Japan showed that there was no one social or legal consensus

Goel objected to the defense strategy of pleading temporary insanity, because it painted Kimura as crazy, when she was not, "depriv[ing] her of a dignified narrative" and effectively removing her from her place in the community.[46] Following Goel's advice to let Kimura decide whether to adopt this strategy, a good defense attorney would still advise her that there was no complete defense to the charge of first-degree murder if she did not agree to a temporary insanity defense.[47] Further, if she agreed to plead to voluntary manslaughter, the prosecutor would agree to a term of probation.[48] While it is undoubtedly the rare defendant who would refuse the sole defense to the charge because it painted her culture in a negative light, the vast majority of defendants facing murder charges would likely accept this as the cost for freedom.[49]

Finally, we reach the most likely question behind the perpetuation of negative cultural stereotypes in the criminal justice system: Was the expert in *Chen* responsible? Pasternak would likely defend his testimony as an accurate portrayal of the culture *he* observed, whether negative or stereotyped.[50] It may be that Pasternak is a liar, but it is more likely that he is not a particularly perceptive or thorough anthropologist.[51] Like any profession, some of its members are better than others. The real issue in *Chen* was not whether Pasternak engaged in rank stereotyping with no empirical backing,[52] but how it came to pass that he testified at all.

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about the status of the practice. *See* Tamie L. Bryant, *Oya-ko-Shinju: Death at the Center of the Heart*, 8 U.C.L.A. PAC. BASIN L.J. 8-10 (1990).

46. Goel, *supra* note 3, at 455-56.

47. Insanity is a complete excuse, while manslaughter — the most logical description of her crime (but not discussed by Goel) — is a partial excuse, mitigating the crime of murder to a lesser charge. Goel admits that if Kimura's lawyer had argued that she was acting rationally, it would have likely resulted in a guilty verdict for first-degree murder. *Id.* at 451.

48. Goel suggests that there was another option for the defense: the attorney could have simply argued "that what Kimura did was not wrong and that our own notions of suicide, mothering, and interdependence should be reexamined." *Id.* at 456-57. However, it is unclear how that argument negates the elements of murder and how the jury could have used it except to nullify the charges.

49. I am relying upon my experiences in human motivation as a criminal defense attorney, representing hundreds of clients over the course of eight years. I am not suggesting that this is a desirable dilemma for a defendant. However, it is not at all unusual that in criminal cases the defendant must swallow some pride to put on the best defense. All excuse defenses — insanity, duress, intoxication — are built on the notion that what the defendant did was not desirable, but understandable.

50. Pasternak's source for his opinions appeared to be his own observations through fieldwork he conducted in China between the 1960s and 1988. Volpp, *supra* note 3, at 70.

51. *Id.*

52. Volpp's review of the record in the case showed that when the prosecutor pressed Pasternak for his sources for his observations of Chinese culture, he "mentioned fieldwork he did

According to prevailing evidence law, the trial judge is supposed to act as the "gatekeeper" of scientific evidence, deciding as a threshold matter whether the expertise is reliable.[53] It appears that Pasternak was qualified to testify to aspects of Chinese culture (that was his area of study and expertise).[54] The issue for critics was whether his methods and conclusions were valid.[55] The best practice is for a judge to hold a pretrial hearing to determine whether the evidence the expert will offer is reliable.[56] At such a hearing, the prosecution could have probed the bases and accuracy of Pasternak's conclusions about Chinese culture as well as offered its own expert. According to scholars like Leti Volpp, Pasternak's observations were not based in reality,[57] and so it should not have been that difficult for the prosecution to counter his testimony. It does not appear that such a pretrial hearing took place in *Chen*.[58]

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between the 1960s and 1988 (he could not remember the title of his own article), incidents he saw, such as a man chasing a woman with a cleaver, and stories he heard. He 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. . . ." *Id.*

53. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993) (interpreting the requirements for Federal Rule of Evidence 702).

54. Justice Pincus described Pasternak as "perhaps, the greatest expert in America on China and interfamilial relationships," Volpp, *supra* note 3, at 73 (quoting Record, *supra* note 14, at 301-02).

55. I am accepting Volpp's judgment of the accuracy of Pasternak's conclusions here, by assuming she is versed in Chinese culture, whereas I am not. Nonetheless, her condemnation of the expertise in *Chen* and praise for the expertise in *People v. Wu*, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991), suggests that the gender of the criminal defendant matters in the evaluation. Reading the opinion in *Wu*, the experts appear to make numerous conclusory assumptions about the motivations of Wu in killing her son. *See, e.g, id.* at 874-75, 885-86 (quoting from testimony of Dr. Chien). Volpp later reconciles her position against the cultural evidence in *Chen* and for it in *Wu* based on an "antisubordination" principle: Wu resisted subordination and Chen acted to constrain his wife's choices. Volpp, *supra* note 3, at 97. Volpp would allow essentialized, monolithic descriptions of culture if it served the "antisubordination" principle. For example, in discussing the case of Chong Sun France and how her defense would have benefited from cultural evidence, she states, "While the community's presentation of cultural information runs the risk of essentializing Korean immigrant women in the eyes of the court and of popular culture, the risk can be justified in that it was the affected community of Korean immigrant-women who made that strategic choice. . . ." *Id.* at 96-97.

56. *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

57. Volpp, *supra* note 3, at 70.

58. Volpp's search of the record in *Chen* shows some cross-examination of Pasternak at trial, which did not appear to unseat the expert, but merely entrenched his essentialist views of Chinese culture. *See, e.g.*, Volpp, *supra* note 3, at 71 ("When [the prosecutor] pressed Pasternak about [his description of the] 'average American,' Pasternak responded by positioning 'us'/'American' and 'them'/'Chinese' as 'two extremes.'"). Without a counter expert of its own, the prosecution was unable to shake Pasternak's foundations. According to Doriane Coleman, the prosecution believed that the judge would not credit the cultural evidence and therefore did not challenge the description

Judges are generally unwilling gatekeepers, because their abilities in judging science are limited.[59] In addition, as in *Chen*, any judge is going to be hard-pressed to expose the inaccuracies in an opinion by an expert without hearing from counter-experts offered by the opponent. The bases of Pasternak's opinions were apparently weak, and that would have been a reason to consider excluding his testimony,[60] but, it appears Justice Pincus did not know that.

It is important to emphasize that the valid objection to Pasternak's testimony at Chen's trial would have been its inaccuracy, and not solely that the testimony negatively stereotyped culture. It is not always the case that a negative stereotype is untrue, or insupportable. It may be labeled a "negative stereotype" by some, but still considered a valid cultural trait by anthropologists.[61] If the information conveyed by the expert has some

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or veracity of the custom. *See* Coleman, *supra* note 4, at 1109.

59. *See* Erica Beecher-Monas, *Blinded By Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 72-73 (1998); Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of* Daubert, Kumho *and the Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 325 (2000).

60. *See* Advisory Committee's Note, Federal Rule of Evidence 702 ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted"; "[t]he more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.").

61. Additionally, an accusation of stereotyping is easily leveled in social science fields such as anthropology and must be carefully scrutinized. In anthropology, the description of a "culture" depends upon shared traits. The fact that all may not share the traits, or that there are subgroups, is an important part of the study, but does not defeat the importance of identifying distinguishing features of the "culture" in order to understand it. Nor does it make studies in the field of anthropology inadmissible in criminal cases. In psychology, for example, "syndromes" have been identified for the purposes of treating persons who share the behavioral characteristics. The "battered woman syndrome" was developed as a treatment technique, and so the prototypical battered woman is given certain characteristics, like "learned helplessness." *See* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 116-25 (2d ed. 2000). The translation from treatment technique into a rigid courtroom defense has been a problem. *See, e.g.*, Volpp, *supra* note 3, at 150-53 (describing risks of creating "model battered woman" for courtroom use and citing other sources for same view). However, even those who criticize the essentializing of culture in the courtroom, such as Volpp, seem to find a place for "strategic essentialism" to describe a culture, for example, when necessary to protect against oppression. *See supra* note 55 and accompanying text. Similarly, but with less self-awareness, Goel objects to negative stereotyping, such as Japanese "submissiveness," while she engages in her own "stereotyping," describing that "the essential difference in Japanese societal mores is the deeply embedded notion of interdependence. Unlike the high degree of individualism prized and promoted in American culture, Japanese culture values relations and interdependence, where the self is submerged in the network of roles a person has in relation to others." Goel, *supra* note 3, at 448. In other words, it is difficult to even discuss a culture with some generalizing.

empirical basis, then, despite its negativity, the criminal defendant must be allowed to place it in front of the jury.[62]

There are other forces at play that counsel against rejecting expert testimony containing a negative stereotype without definitive proof of its unreliability. The intent of the U.S. Supreme Court in its landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* was to liberalize the rules of admission of scientific expertise,[63] and to leave the testing of that evidence to the machinations of the adversary process. In the words of the Court, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[64] This is particularly true when it is a criminal defendant proffering scientific evidence. The constitutional right of the defendant to present his or her defense[65] points toward admission of the evidence and reliance on the crucible of adversarial testing.[66] From both an evidentiary and a constitutional perspective, trial courts should err on the side of admitting questionable expertise offered by a criminal defendant.[67]

Hence, the real problem in *Chen* was a breakdown in the adversarial process. If Pasternak's testimony was patently unreliable, the prosecution should have exposed this to the jury through the tools at its disposal: cross-examination, experts, and jury instructions.[68] The prosecution failed to do so. The criminal justice system is equipped to handle "shaky" expert

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62. *See* Advisory Committee's Note, Federal Rule of Evidence 702 ("'the trial court's role as gatekeeper is not intended as a replacement for the adversary system.'") (citation omitted).

63. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993).

64. *Id.* at 596 (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987)).

65. *See* Washington v. Texas, 388 U.S. 14, 19 (1967) (discussing accused's constitutional "right to present a defense").

66. *Rock*, 483 U.S. at 44. The case cited by the Court in *Daubert* for this point was a case about the accused's right to present a defense. *See supra* text accompanying note 64.

67. *See generally* Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275 (making this point). Of the cultural evidence scholars, only Maguigan acknowledges this point. *See* Maguigan, *supra* note 3, at 43 ("[T]he goal of committing the criminal justice system to the effective prosecution of family violence offenses should be accomplished, not by limiting the rights of defendants to present cultural information to juries and judges, but by imposing on prosecutors the obligation to educate those juries and judges so that dispositions do not reflect acceptance of a stereotypical view of the cultural legitimacy of male dominance."). *Compare, e.g.*, Coleman, *supra* note 4, at 1097-98 (asserting criminal law's role is to protect victims over rights of defendants and discriminatory evidence as part of defendant's case-in-chief should not be allowed).

68. *See* Maguigan, *supra* note 3, at 92 ("[I]ndividual prosecutors are best positioned to counteract inclinations by juries and judges to rely on cultural data to trivialize men's violent acts.").

evidence.[69] What it cannot, and should not, handle is the mere existence of negative stereotypes and the people who perpetuate them.

III. THE OPPRESSION PROBLEM

Closely related to the objection to negative stereotyping is the objection by some cultural evidence scholars to the perpetuation, or condoning, of violence against women through the use of cultural evidence.[70] This objection short-circuits some much larger systemic problems. It is not a problem unique to cultural cases, but a substantive criminal law issue in male-on-female violence cases requiring legislative action. In addition, many cultural evidence cases do not follow the pattern decried by the cultural evidence scholars: factfinders often reject cultural excuses by defendants in male-on-female violence cases.[71]

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69. For example, in *People v. Tou Moua*, No. 328106-0 (Fresno County Super. Ct. Nov. 28, 1985), the defendant killed his allegedly unfaithful wife and pled guilty to voluntary manslaughter. He asked to receive probation, offering expert testimony that in Hmong culture "a wife's adultery is punishable by death and the husband must be the executioner." Maguigan, *supra* note 3, at 67 (describing case). The prosecution presented conflicting evidence that Tou Moua's cultural tradition in fact offered two alternatives to his course of action: doing nothing or returning his wife to her family. *Id.* at 93. With the benefit of both sides, the judge sentenced him to eight years imprisonment. *Id.* at 66.

70. A few scholars voice the concern that if it is not women who are being victimized through the use of cultural evidence, it is children. *See* Coleman, *supra* note 4, at 1143-44; Gallin, *supra* note 4, at 724. Ironically, perhaps, *People v. Kimura* and *People v. (Helen) Wu* are the two cases cited for this concern. *See, e.g.*, Coleman, *supra* note 4, at 1146. In each of these cases, a mother kills her child. It vastly oversimplifies these two cases to conclude that the child's voice was lost through the use of cultural evidence. Rather, feminist scholars claim that it is through an understanding of the nature of the tradition being practiced in these cases that the women's voices are gained, women who had been mistreated in some form by the men in their lives. *See, e.g.*, Coleman, *supra* note 4, at 1097; Volpp, *supra* note 3, at 74-76. In the handful of other cultural cases involving children as victims, either the cultural evidence did not save the defendant from a severe penalty for his violent actions, see, e.g., Gutierrez v. State, 920 P.2d 987 (Nev. 1996) (defendant sentenced to death in horrific child abuse case, despite claim of cultural motivation), Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988) (defendant sentenced to death in killing of children, where evidence of revenge was stronger than evidence of cultural motivation), or the evidence prevented an injustice by explaining a parent's touching of his child as devoid of erotic content, see, e.g, State v. Jones, No. 4FA-S84-2933 (Alaska Super. Ct. Jan. 7, 1985), *cited in* Sikora, *supra* note 3, at 1701 n.28 (Inupiat Eskimo acquitted of child molestation where cultural evidence showed his swatting at crotch and pulling down pants of grandson a tradition of teasing behavior); State v. Kargar, 679 A.2d 81, 85-86 (Me. 1996) (Afghani refugee's convictions of sexual assault vacated due to cultural evidence kissing of infant's penis commonly understood in Afghanistan as act of love, not done for sexual gratification).

71. *See infra* text accompanying notes 97-102.

The two cases relied upon most by scholars to demonstrate the oppression problem are *People v. Chen* and *People v. Moua*.[72] There is no question that the results of *Chen* and *Moua* were terrible for the female victims, and that cultural evidence was key to treating the defendants with leniency. In *Chen*, because of the use of cultural evidence, Justice Pincus reduced the charge from first-degree manslaughter to second-degree manslaughter.[73] Chen's crime was not one of mere recklessness, characteristic of second-degree manslaughter; but was clearly a first-degree manslaughter committed intentionally. Chen's crime was committed in the "heat of passion," and the reduction in charges was a deliberate choice by the judge to nullify the greater charge.[74] The judge's rationale for both the charge and a sentence of probation was explicitly based on the cultural evidence.

In *People v. Moua*, it was indisputable that the victim was forced to have intercourse against her will. Kong Moua kidnapped a Laotian woman from a college campus whom he knew and planned to marry, forcibly took her to his house and had sexual intercourse with her against her will.[75] The prosecution dropped the rape charges against him because cultural evidence of a Laotian tradition of *zij poj niam*, marriage-by-capture, would have been admitted at trial and would have made his conviction unlikely.[76] Like Chen, Kong Moua received a lenient sentence; after pleading guilty to the misdemeanor charge of false imprisonment, he was sentenced to ninety days in jail.[77]

While cultural evidence led to results that practically excused the male defendants' violence against the women, the cultural evidence was only relevant because of statutory elements and defenses for the crimes of voluntary manslaughter and rape.[78] Feminist scholars and activists have

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72. No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985), *cited in* Maguigan, *supra* note 3, at 63 n.90.

73. *See supra* text accompanying notes 21 & 22.

74. *See* Renteln, *A Justification*, *supra* note 5, at 481 (arguing that the result in *Chen* was unjust because he essentially got a complete defense, not a partial excuse).

75. *See* Rimonte, *supra* note 4, at 1311 (citing news articles).

76. According to the tradition, the victim's resistance to the rape was part of the customary marriage ritual, necessary to consummate the marriage and to demonstrate her virtue. Maguigan, *supra* note 3, at 64. *See also* Coleman, *supra* note 4, at 1106-07 (describing a Minnesota case where a Hmong man kidnapped and raped a young girl, but, after speaking with members of the Hmong community about the marriage-by-capture custom, the prosecutor decided to reduce the charges and the defendant was fined $1000 with no jail time).

77. Maguigan, *supra* note 3, at 64. Coleman writes that he was sentenced to 120 days in jail. Coleman, *supra* note 4, at 1094.

78. *See infra* note 81-85, 91-95 and accompanying text.

criticized that substantive criminal law and called for reform for at least thirty years.[79] Feminists have had some success injecting the female voice into criminal law, through the introduction of battered women's syndrome, rape trauma syndrome, and rape shield statutes. However, the substantive criminal law has not changed much.[80]

Voluntary "heat of passion" manslaughter reduces a murder charge to a manslaughter charge when the homicide is intentional but there is "adequate provocation." At common law, adultery by a man's wife committed in his presence was automatically adequate provocation.[81] Automatic categories for provocation no longer exist, and instead the jury is told to look for provocation that would cause a "reasonable man" to lose his "cool."[82] However, to this day the mitigating charge often benefits men who kill the women in their lives, when the women cheat, leave, or in some other way emasculate the traditional man.[83] Further, in some states that follow the Model Penal Code, murder can be reduced to manslaughter without provocation, but upon "extreme emotional or mental disturbance" caused by a "reasonable explanation or excuse."[84] In such states, it is even easier for a jury to deliver the verdict mitigating murder to manslaughter for men who kill the offending women in their lives.[85]

There is nothing unlawful about the use of the voluntary manslaughter charge to excuse men who kill women in the heat of passion, as long as the

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79. *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 79-80 (1991); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 75 (1992).

80. *See, e.g.*, Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 41 (1993) ("two decades of feminist law reform efforts to hold men responsible for raping women have yielded disappointing results. . . . [T]he criminal law's continued failure to deter and punish rape [is] horrifying.").

81. Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?* 51 MOD. L. REV. 467, 474 (1988) (describing categories).

82. *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1341-42 (1997) (describing "reasonable man" requirement).

83. *See* Coker, *supra* note 79, at 75-76; *see* Myrna Raeder, *The Admissibility of Prior Acts of Domestic Violence:* Simpson *and Beyond*, 69 S. CAL. L. REV. 1463, 1477 (1996) (citing 1995 Department of Justice study showing that, of the 68% of husbands who killed their wives charged with first-degree murder, only 37% were convicted of that charge, while 32% were convicted of manslaughter; all told, including pleas, only 21% of husbands who killed their wives were convicted of first-degree murder).

84. MODEL PENAL CODE § 210.3 (1985).

85. *See* Nourse, *supra* note 82, at 1339-42 (studying cases from Model Penal Code jurisdictions and coming to this conclusion). The Pace University Battered Women's Justice Center documented the uneven application of the law, reporting that "[T]he average sentence for a woman who kills her partner is 15 to 20 years," while for a man, "it is two to six." Volpp, *supra* note 3, at 74 n.76 (citing 1993 *Time* article).

jury finds the prosecution has met its burden of proving the elements of the offense. Voluntary manslaughter statutes allow jurists and jurors to impose their majoritarian traditional views of relationships between men and women. *Chen* is nothing more than a typical heat of passion manslaughter case.[86] If we want to change the outcome in these cases, there are two options. The first is to instruct jurors that certain types of provocation — such as a woman leaving a man or being unfaithful to him — are *per se* unreasonable. The danger in doing so, of course, is that *per se* categories risk unjust applications, as they did in the past.[87] Lessons of real, messy and complicated life suggest that we leave it to those who hear the facts of the individual case, and not policy makers, to decide what is "reasonable." The domestic violence issue here is real, but must be attacked at its roots. Only upon the education of society will judges and jurors begin to limit their sympathy for such defendants.

The second option for change is to abandon the long-held belief that a homicide committed under a "heat of passion" decreases, rather than increases, culpability. The criminal justice system should either eliminate the offense from the criminal code, or increase the punishment to that of murder. However, voluntary manslaughter is a nod to the weaknesses in all men and women, and there are many other cases that feminists and multiculturalists would concede deserve the partial excuse. For example, it is an invaluable option for women who kill their abusers but cannot perfect a self-defense claim.[88]

In fact, Fumiko Kimura's case is a perfect example of the need for an expanded application of voluntary manslaughter in cultural evidence cases. Judges, juries, and litigants too often think the only "passion" meriting the mitigation is a man's anger and rage.[89] However, passion leading to violence may be the kind of grief, despair, and shame that led Fumiko Kimura to kill her own children. While she intended to kill them, a jury

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86. *See* Chiu, *supra* note 1, at 1114 (stating that *Chen* was that of the "classic Anglo-American paradigm of the husband catching his wife in flagrante delicto and killing her, or her lover, or both."). However, the judge reduced the charges even further to involuntary manslaughter based on the expert testimony, finding that this case was out of the ordinary. As already discussed, the problem in this case was that there was no counterweight to the expert testimony. Chen's motivations were no different than those of men born and raised in American culture.

87. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. 2003) § 15.2, at 779-80 (stating that juries composed mostly of men excused men from murder *entirely* when justification for killing wife's lover was rage) (emphasis added).

88. *See* Renteln, *A Justification*, *supra* note 5, at 440, 503-04 (noting that, despite feminist fears, sometimes women and children are beneficiaries of defense).

89. *See* Nourse, *supra* note 82, at 1344-45 (describing the traditional male view of "passion").

should have the opportunity to mitigate her offense to voluntary manslaughter.[90]

Rape statutes, like voluntary manslaughter statutes, also have certain elements that allow problematic outcomes like the one in *People v. Moua*. Again, rather than a cultural evidence problem, it is a substantive criminal law problem. While Kong Moua clearly raped his victim, the prosecutor feared an acquittal because, in his jurisdiction and many jurisdictions, it is a complete defense to rape when the defendant makes a reasonable mistake of fact as to the victim's consent.[91] Whether morally palatable or not, the cultural evidence of the marriage-by-capture ritual would have allowed experts to testify that Moua's belief that the victim was consenting despite her protests was reasonable under the circumstances. Given that Moua planned to marry his victim and the Hmong cultural tradition was that, upon "kidnapping," the woman to be betrothed puts up a mock struggle to show her virtue,[92] Moua's mistake may well have been reasonable. The issue here, as with the crime of manslaughter, is whether there should be any such defense to rape. On one hand, such a defense allows the operation of very conservative and traditional views of how men and women act and may allow a jury to excuse otherwise inexcusable behavior. Utilitarian theories of justice might advocate punishing the man who makes such a mistake to encourage careful behavior. On the other hand, crimes require proof of the mental state of the defendant, and, if he honestly and reasonably believed she was consenting, retributive theories of justice would counsel against punishing him.[93] For example, the reasonable mistake of fact defense operates in a date rape context to protect men who reasonably believe, in the face of silence or lack of protests, that the woman has consented.[94] The mistake of fact defense

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90. Her guilty plea to voluntary manslaughter reflects this compromise between murder and acquittal. Even in Japan, she would not have been exonerated, but would have been convicted of involuntary manslaughter and received a sentence of probation, much like the one she received in this case. *See* Kim, *supra* note 3, at 117.

91. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 637-38 (4th ed. 2006) (stating that the general rule is that a person is not guilty of rape if he genuinely and reasonably believed that the female voluntarily consented to the intercourse with him). *See also* Catherine A. MacKinnon, *Feminism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 654 (1983) (arguing that the "reasonable mistake defense" means that "a woman [was] raped but not by a rapist."); Renteln, *A Justificiation*, *supra* note 5, at 485 (describing the often erroneously-held belief that *Moua* was a mistake of law case as opposed to a mistake of fact case).

92. *See supra* note 76.

93. *See* DRESSLER, *supra* note 91, at 638 ("If a male genuinely *and reasonably* believes that the female is consenting, then he is acting without moral culpability.") (emphasis in original).

94. *Id.* (arguing that "the expansion of rape law to include intercourse secured in the absence of grave force or resistance, particularly in the acquaintance rape context" calls for consideration

depends upon an understanding of the cultural beliefs of the defendant, whether American or not. It may well be, as many feminists argue, that there is no place in rape law for such a defense. That is a valid debate for a state legislature. In the meantime, however, the only reason cultural evidence would have been admitted in *Moua* was because of the substantive law of rape.[95]

The larger claim cultural evidence scholars make is that *Chen* and *Moua* are *typical* of how cultural evidence is used — namely, in a manner that oppresses women.[96] However, a review of fifty cultural evidence cases paints a different picture. Out of the fifty cases, twenty-two of them involved offers of cultural evidence in cases that did not involve violence against women or children.[97] Hence, cultural evidence cases do not illustrate oppression as a whole. Of the eighteen that did involve an offer of cultural evidence in defense of men harming women,[98] the court denied

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of a mistake of fact defense).

95. By contrast, Coleman argues that in *Moua* and *Chen*, the substantive law was forsaken in the face of cultural evidence, as the substantive law would have shown the defendants to have the requisite mens rea. Coleman, *supra* note 4, at 1098, 1106-09. Clearly, this Essay finds the opposite: the substantive law's mens rea requirements drove the admission of the evidence.

96. *See, e.g.*, Gallin, *supra* note 4, at 724 (stating the cultural defense has been primarily used in cases of domestic violence against women and children, citing *Moua*, *Chen*, and *Wu*); Coleman, *supra* note 4, at 1095 ("the use of cultural defenses is anathema to another fundamental goal of the progressive agenda, namely the expansion of legal protections for . . . women and children."); Goldstein, *supra* note 5, at 144 (arguing that a cultural defense would demonstrate that the United States tacitly consents to violence toward women).

97. *See* People v. Odinga, 531 N.Y.S.2d 818 (App. Div. 1998); Mull v. United States, 402 F.2d 571 (9th Cir. 1969); Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1995); United States v. Kills Crow, 527 F.2d 158 (8th Cir. 1975); United States v. Yu, 954 F.2d 951 (3d Cir. 1992); Trujillo-Garcia v. Rowland, 9 F.3d 1553, 1993 WL 460961 (9th Cir. 1993) (unpublished); People v. Estep, 583 P.2d 927 (Colo. 1978); United States v. Natal-Rivera, 879 F.2d 391 (8th Cir. 1989); Jenkins v. State, 261 S.W.2d 784 (Ark. 1953); State v. Wanrow, 538 P.2d 849 (Wash. Ct. App. 1975); People v. Metallides, Case No. 73-5270 (Fla. 1988) (unpublished); State v. Ganal, 917 P.2d 370 (Haw. 1996); case of Korean missionaries performing exorcism (cited in Levine, *supra* note 3, at 51); People v. Croy, 710 P.2d 392 (Cal. 1985); People v. Chou (unpublished, cited in Levine, *supra* note 3, at 59); State v. Rodriguez, 204 A.2d 37 (Conn. Super. Ct. 1964); United States v. Carbonell, 737 F. Supp. 186 (E.D.N.Y. 1990); State v. Butler, No. 44496 (Lincoln County (Oregon) Cir. Ct., Mar. 11, 1981) (unpublished); Nguyen v. State, 520 S.E.2d 907 (Ga. 1999).

98. People v. Rhines, 182 Cal. Rptr. 478 (Cal. Ct. App. 1982); State v. Haque, 726 A.2d 205 (Me. 1999); State v. Girmay, 652 A.2d 150 (N.H. 1994); People v. Poddar, 103 Cal. Rptr. 84 (Cal. Ct. App. 1972); People v. Galicia, 659 N.E.2d 398 (Ill. App. Ct. 1994) (unpublished decision) (described in Sikora, *supra* note 3, at 1717); People v. Chen, No. 87-7774 (N.Y. Sup. Ct., Dec. 2, 1988) (unpublished); People v. (Kong) Moua, No. 315972-0 (Fresno County Super. Ct., Feb. 7, 1985) (unpublished); People v. Tou Moua, No. 328106-0 (Fresno Cy. Super. Ct. Nov. 28, 1985) (unpublished); State v. Her, 510 N.W.2d 218 (Minn. Ct. App. 1994); People v. Aphaylath, 68 N.Y.S.2d 945, 502 N.E.2d 998 (N.Y. 1986); People v. Gebreamlak, No. 80276 (Alameda Cy. Super

admission of such evidence in five of those cases;[99] in six, the trier of fact rejected the defendant's explanation, in whole or in part;[100] and in two, the defendant was convicted and received only a somewhat mitigated sentence.[101] Of the five cases remaining, the use of cultural evidence to explain or justify a male defendant's violence against a woman was effective in drastically reducing the charge and sentence in only *three* cases, less than ten percent of the fifty cases, of which *Chen* and *Moua* are two.[102]

The male-on-female violence cases where the factfinder rejected the implications of the cultural evidence used by the defense demonstrate that there is not a knee-jerk dominant culture reaction to acquit or go easy on the men. Looking at four of these cases, it appears that the factfinder used common sense and legal judgment, and not cultural bias, to reject evidence that was weak, marginally relevant, or unpersuasive.

For example, in contrast to the outcome in *Moua*, evidence of Hmong cultural traditions was admitted in two other Hmong rape trials and the jury convicted both men of rape. In *State v. Her*,[103] a Hmong defendant charged with a forcible rape testified on cross-examination that rape as it is understood in the United States does not exist in Hmong culture.[104] Unlike Kong Moua, Her did not get the benefit of a bargain before trial. Rather, he went to trial with the only cultural evidence being his weak protestation on cross-examination, and there is no indication his attorney

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Ct. 1985) (unpublished opinion), *cited in* Goldstein, *supra* note 5, at 156 n.145; Commonwealth v. Reid, *cited in* Levine, *supra* note 3, at 51; People v. Curbello-Rodriguez, 351 N.W.2d 758 (Wis. 1984); People v. Farrokhi, 414 N.E.2d 921 (Ill. App. Ct. 1980); the case of Iraqi father arranging marriage of underage daughters, *cited in* Sikora, *supra* note 3, at 1696-97); the case of Moosa Hanouki, *cited in* Levine, *supra* note 3, at 57-58; State v. Lee, 494 N.W.2d 475 (Minn. 1992); the case of Kiet Vi Giang, *cited in* Maguigan, *supra* note 3, at 68 (describing unpublished case from news sources).

99. *Rhines*, 182 Cal. Rptr. at 483-84; *Haque*, 726 A.2d at 207; *Girmay*, 652 A.2d at 151; *Poddar*, 103 Cal. Rptr. at 88; *Galicia*, 659 N.E.2d at 398.

100. *Gebreamlak*, *cited in* Goldstein, *supra* note 5, at 156 n.145; *Curbello-Rodriguez*, 351 N.W.2d at 758; *Farrokhi*, 414 N.E.2d at 921; *Her*, 510 N.W.2d at 218; *Kiet Vi Giang*, *cited in* Maguigan, *supra* note 3, at 68.

101. *Tou Moua*, No. 328106-O (Fresno County Super. Ct. Nov. 28, 1985) (8 years); *Aphaylath*, 502 N.E.2d at 998 (8 1/3 to 25 years).

102. The other is the case of the Iraqi father, who received a sentence to parenting classes. In the other two cases remaining, *Moosa Hanouki* (cited in Levine, *supra* note 3, at 57-58) and Commonwealth v. Reid (cited in Levine, *supra* note 3, at 51, 57-58), the murder charges were reduced to manslaughter charges, but the sentence is unknown.

103. 510 N.W.2d 218 (Minn. Ct. App. 1994).

104. *Id.* at 220 ("In my culture there is no such thing as rape.").

marshaled this evidence in pursuit of a mistake of fact defense as in *Moua*.[105]

In *State v. Lee*, the Hmong defendant was convicted after a jury trial of the forcible rape of two Hmong women.[106] The court allowed defense testimony by the leader of the Hmong cult as to what Hmong men and women do when there is an accusation of rape, in an attempt to show that the women accusing Lee did not behave as if they had been raped.[107] The prosecution presented conflicting rebuttal evidence.[108] Having the benefit of both sides of this credibility debate, the jury rejected the implications of the defendant's expert witness and found Lee guilty.[109]

In *People v. Farrokhi*,[110] Medhi Farrokhi, an Iranian national, was charged with having sexual relations with a female so mentally deranged or deficient that she could not give effective consent to intercourse.[111] The state was required to prove the defendant's knowledge of the victim's deficiency.[112] The victim in this case was a mentally retarded nineteen-year-old girl with an I.Q. of 35, and a mental age between four and six years old.[113] Farrokhi's defense was that, due to his difficulty speaking English and his lack of familiarity with American social customs, he did not perceive her mental condition.[114] The trial judge rejected this explanation in light of the evidence that Farrokhi had lived in the United States for two years, socialized and interacted with American students, had studied English for six years while living in Iran, studied from textbooks written in English at Texas Southwest College, and conversed with his coworkers in English.[115] Therefore, the judge's decision to find the defendant guilty as charged was not one of cultural insensitivity or bias, but a rational and defensible credibility decision.

Similarly, in *State v. Curbello-Rodriguez*,[116] the cultural evidence proffered by the defendant was allowed, but was weak and logically rejected.[117] Lazaro Curbello-Rodriguez and his codefendants raped a

105. *See id.* at 218.
106. State v. Lee, 494 N.W.2d 475 (Minn. 1993).
107. *Id.* at 480.
108. *Id.*
109. *Id.* at 482.
110. 414 N.E.2d 921 (Ill. App. Ct. 1980).
111. *Id.* at 922.
112. *Id.* at 923.
113. *Id.* at 926.
114. *Id.* at 925.
115. *Farrokhi*, 414 N.E.2d at 923-25.
116. 351 N.W.2d 758 (Wis. Ct. App. 1984).
117. *Id.* at 770 (Bablitch, J. Concurring).

sixteen-year-old girl multiple times at knifepoint.[118] The jury found him guilty, and the judge sentenced him to eighty years in jail.[119] According to the concurring appellate opinion, the defendant, a recent immigrant from Cuba, testified that he thought the "women" were "available" when the victim and her friend appeared at the apartment voluntarily asking for a dollar and smoking a joint with men whose language they did not share.[120] However, the defendant forced the victim to take off her clothes by brandishing a knife and intimated that if the victims told anyone what had occurred, he would hurt them or their families.[121] Obviously, these facts made it difficult for any jury to believe Curbella-Rodriguez reasonably thought the victim was consenting.

In the five male-on-female violence cases in which cultural evidence was not admitted at trial, cultural evidence scholars question whether this complete exclusion was due to cultural insensitivity.[122] However, a close look at the courts' reasoning in four of those cases reveals very basic relevancy problems.[123] Whether or not the presiding judge may have had a hidden agenda with a gender bias or a cultural bias, the evidence as proffered was simply irrelevant.

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118. *Id.* at 762.

119. In the remaining two of the six cases, it is less clear why the factfinder rejected the import of the cultural evidence. However, the most logical explanation is that a court was simply not accepting of the "witchcraft" excuse. If this is the case, then these two cases do reflect a degree of cultural insensitivity. Kiet Vi Giang, an ethnic Chinese from Vietnam, pleaded guilty to second-degree murder in the stabbing death of his wife. Maguigan, *supra* note 3, at 68 (describing case). At sentencing, he presented cultural information as to the origins and context of his belief that she was possessed by an evil spirit. *Id.* The judge sentenced him to fifteen years in prison, the maximum sentence for voluntary manslaughter and half the maximum for second-degree murder. *Id.* Hagos Gebreamlak attempted to kill a woman through witchcraft, cultural testimony was allowed, and the jury convicted him of a lesser charge. The trial judge disagreed with the "voodoo" defense and imposed the maximum sentence. *See id.* at 76 n.150.

120. *Id.* at 770 (Bablitch, J., concurring). It is unclear whether cultural evidence was directly offered to make this point, but Judge Bablitch's concurring opinion on appeal, where he opines that the 80-year sentence was excessive, states "Perhaps, in his culture, such conduct at such an hour would be widely interpreted as an invitation to sexual games by willing players familiar with the possible consequences." *Id.*

121. *Id.* at 762.

122. It is this grouping of cases that splits the feminist scholars and the multiculturalist scholars. *See generally* Maguigan, *supra* note 3. The former is satisfied by the exclusion of the evidence and the latter is concerned about what the exclusion means for cultural minorities.

123. The fifth case is *People v. Galicia*, 659 N.E.2d 398 (Ill. App. Ct. 1994) (described in Sikora, *supra* note 3, at 1717), an unpublished decision where it is less clear why the judge rejected the evidence of witchcraft.

In three of the cases cited by scholars as completely excluding cultural evidence,[124] that description is not accurate. Rather, the trial court in each case made a ruling determining under what circumstances the evidence would be relevant and admissible. In *People v. Poddar*,[125] *State v. Haque*,[126] and *State v. Girmay*,[127] the defendant had moved to the United States (Poddar and Haque from India, and Girmay from Ethiopia) to attend school and each killed a woman who had rejected him. In each case, the defense proffered an expert to demonstrate the effect of cultural stresses on the defendant, and in each case, the court ruled the evidence inadmissible as proffered, but admissible in a different form.

In *Poddar*, the main defense to the murder charges was that Prosenjit Poddar was mentally ill when he killed his victim.[128] There was ample evidence of his mental instability.[129] The defense also made a much less significant argument that Poddar was suffering from cultural stresses.[130] The trial judge ruled that the cultural anthropologist was not qualified to testify as to how the cultural stresses affected Poddar.[131] However, the judge also ruled that the witness could testify about the cultural stresses generally, and that the defense's psychiatric experts could answer hypothetical questions based on facts testified to by the anthropologist.[132] This offer put the defense in essentially the same position. The defense attorney inexplicably refused this limitation by the court and did not have the anthropologist testify at all.[133] Despite the defense attorney's strategy, it is unlikely that the exclusion of the expert had much determination on

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124. *See* Renteln, *A Justification*, *supra* note 5, at 470 (citing *Poddar* as a case where the judge excluded the cultural evidence); LEE, *supra* note 3, at 100 n.19 (citing *Girmay* and *Haque* as cases excluding cultural evidence).

125. 103 Cal. Rptr. 84 (Cal. Ct. App. 1972).

126. 726 A.2d 205 (Me. 1999).

127. 652 A.2d 150 (N.H. 1994).

128. *Poddar*, 103 Cal. Rptr. at 86, 103.

129. *Id.* at 86, 87.

130. *Id.* at 88.

131. *Id.*

132. *Id.* It is not unusual for courts to draw this line when allowing expert testimony. For example, an expert in the unreliability of eyewitness testimony explains the vagaries of eyewitness testimony to the jury but does not testify as to what effect the variables had on the particular eyewitness in the case. *See* Hoeffel, *supra* note 67, at 1333. For the most part, this partial rejection of the expert testimony is inconsequential because the jury still hears the expert's explanation of the various factors and can apply them itself to the witness or defendant in the case.

133. *Poddar*, 103 Cal. Rptr. at 88 (citing an incomprehensible explanation by defendant's counsel).

the outcome in *Poddar*, because the critical evidence offered to mitigate the defendant's acts was his demonstrable mental illness.[134]

Nadim Haque's defense theory, like Poddar's, was both mental illness and extreme stress from cultural differences.[135] While the trial court denied all testimony by a cultural anthropologist as to the differences between the defendant's and the complainant's cultures, it did allow the medical expert to testify as to the role that Haque's cultural background would have played.[136] As in *Poddar*, the court understood the relevancy of the cultural background to the defendant's mental state, and so the court allowed for its admission in a certain format. However, a troubling feature of the exclusion of the cultural anthropologist's testimony was the conclusion by the appellate court that, as a matter of law, his testimony would not have established adequate provocation to mitigate murder to manslaughter.[137] According to the appellate court, the provocation in this case was the victim's refusal to marry Haque, her desire to end the relationship and her statement, "we [are] just too different."[138] The appellate court boils this provocation down to "mere words," which are not legally adequate provocation in Maine.[139] This description by the court is a stretch; the provocation was not simply the words but the entire state of affairs, which a reasonable juror may have found sufficient for adequate provocation. The court makes short order of the cultural expert in this manner and it would in fact seem to be most easily explained by cultural insensitivity.

In *Girmay*,[140] the proffered expert testimony on culture was less relevant than in *Poddar* and *Haque*. The defendant pleaded insanity, and the experts proffered by the defense included two psychiatrists and a professor of history who was the director of an African studies program.[141] The history professor would have testified to "general cultural, political, and historical background of Ethiopia during the defendant's life; the social and political dynamics of the Ethiopian civil war; and social customs regarding marriage, gender relationships, and attitudes toward

134. Poddar was convicted of second-degree murder and sentenced to five years to life. The conviction was overturned on appeal because of an unrelated instructional error. People v. Poddar, 518 P.2d 342 (Cal. 1974) (en banc). Instead of a new trial, however, the judge agreed to release him as long as he returned to India, which he did. Renteln, *A Justification*, *supra* note 5, at 470 (citing DEBORAH BLUM, BAD KARMA: A TRUE STORY OF OBSESSION AND MURDER (1986)).

135. State v. Haque, 726 A.2d 205 (Me. 1999).

136. *Id.* at 207 n.1.

137. *Id.* at 209.

138. *Id.*

139. *Id.*

140. 652 A.2d 150 (N.H. 1994).

141. *Id.* at 151.

insanity in Ethiopia."[142] The trial court did not simply rule the evidence irrelevant, however, but decided (similar to the judges in *Poddar* and *Haque*) that it could be admitted to the extent that either of the medical experts relied upon it for their conclusions about the defendant's sanity.[143] After neither psychiatrist relied on such features, the trial court ruled the testimony irrelevant.[144] The defense attorney did not help the trial court to make any other link between the evidence and the insanity defense and submitted only that it was necessary to understand the defendant's background.[145] Further, the defendant's background was admitted through the medical experts.[146] An Ethiopian psychiatrist testified concerning Ethiopian marriage customs, the Ethiopian political situation since 1977, Ethiopians' attitudes toward mental illness, and how mental illness is manifested in Ethiopia.[147] It is difficult to see how this can be characterized as a case of cultural insensitivity.

In *People v. Rhines*,[148] another of the five male-on-female violence cases in which the judge denied admission of the cultural evidence,[149] the

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142. *Id.* This testimony would have amounted to a freestanding cultural defense, as it did not negate any elements of first-degree murder, but merely gave contextual evidence that a jury might find somehow excused his actions. Had the defense chosen a strategy of the lesser offense of heat of passion manslaughter, then cultural evidence might have helped to explain provocation. However, manslaughter is only a partial excuse, while insanity is a complete defense.

143. *Id.*

144. *Id.*

145. *Girmay*, 652 A.2d at 151.

> The defendant argues that the excluded testimony was relevant to educate the jury as to the social, cultural, and political world in which he had lived virtually all his life. The defendant failed to show, however, the relevance of that world to the issue of his state of mind at the time of the murders. In his offer of proof, defense counsel stated that [the expert] "'would not render any opinion regarding the mental state of [the defendant] at any point.'" The defendant conceded that none of [the expert's] testimony would relate to him specifically because [the expert] did not know him. Counsel further conceded that his defense was not based upon his culture: "[W]e are not raising a cultural defense here, because I am submitting to the court that it's no more likely that someone in Ethiopia is going to commit the acts that [the defendant] allegedly committed than it is here."

Id. at 152.

146. *Id.*

147. *Id.*

148. People v. Rhines, 182 Cal. Rptr. 478 (Cal. Ct. App. 1982).

149. *Rhines* is a case concerning African American "culture." Although scholars raise the question of whether subcultures within the United States ought to be included in the discussion about cultural defenses, this Essay makes no such distinction and merely discusses the cases covered in the existing scholarly work.

defense attorney utterly failed to make the relevancy link. Jacinto Rhines was convicted of raping a woman he had just met.[150] On appeal, he argued that the trial judge erred in rejecting as irrelevant his proffer of an expert witness to testify that black people speak to each other very loudly.[151] The expert testimony was supposed to show that he had no reason to believe that raising his voice would have coerced the complainant to consent to sex.[152] This point was irrelevant because the complainant never contended that she submitted because of his loud voice. Instead the victim claimed she submitted because of his use of force — he grabbed her wrist, pushed her into the bedroom, took her pants off by force, pushed her onto the bed and raped her.[153]

Hence, a more detailed accounting of some of the cases involving cultural evidence belies a pattern of either cultural insensitivity or a gender bias. Since the judiciary is made up primarily of white men from middle to upper-class backgrounds,[154] it is not difficult to imagine that such biases exist. However, it is not helpful to assume that such biases are driving the decisions and outcomes in criminal cases and to suggest solutions to a problem that may not be manifesting itself in the way described by some scholars. In most cases, the cultural evidence was entirely unpersuasive, irrelevant, or not properly pursued by the defense attorney in order to make the relevancy and the admissibility clear to the court.

IV. THE CONSISTENCY PROBLEM

The final problem pointed out by scholars is inconsistency in the courts' handling of cultural evidence from case to case. In essence, the argument is that similar cases are treated differently.[155] There are two points to the inconsistency argument: first, that minority culture defendants are being treated inconsistently with the dominant culture

150. *Rhines*, 182 Cal. Rptr. at 479-80.

151. *Id.* at 483.

152. *Id.*

153. *Id.*

154. *See* Sherrily A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 n.3 (2000).

155. *See, e.g.*, Note, *supra* note 5, at 1297 (arguing that the "absence of procedural safeguards and guidelines leads to inconsistency in the treatment of cultural factors from case to case"); Renteln, *A Justification*, *supra* note 5, at 439 ("in the absence of any official policy guidelines, the cultural evidence is treated differently from one case to the next, and from one court to the next. This can lead to gross injustices, in which one defendant who commits murder goes free, while another defendant who commits a less serious offense receives too harsh a punishment").

defendants; second, that the cultural evidence cases are treated inconsistently with one another. This section analyzes each of those claims and finds them wanting. It then asks whether, in any event, consistency is an appropriate focus of the criminal justice system.

The first overall claim of inconsistency is that judges are treating cultural cases inconsistently with their dominant culture counterparts. There is very little evidence supporting this point, but it is simply stated that judges, due to their cultural insensitivity, find cultural evidence irrelevant.[156] The cases just discussed in the previous section show that is not necessarily the case.[157] A study of the remainder of the cultural evidence cases not covered in the previous section — the twenty-two cases not involving oppression of women or children[158] — also point in the other direction. In twelve of those cases, the court did not allow admission of the evidence, but here again, close scrutiny of the courts' rationale shows serious problems in most cases with the relevancy of the evidence, or with the advocacy by the defense attorney to make the connection.[159] In the

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156. *See, e.g.*, LEE, *supra* note 3, at 100 ("it appears that most attempts to use culture to exonerate or mitigate are not successful," either because "judges and jurors have difficulty placing themselves in the shoes of the other" or "[j]udges may also exclude cultural evidence because they believe it is irrelevant."); Renteln, *A Justification*, *supra* note 5, at 503 ("Instead of ruling that the cultural evidence is admissible and then rejecting the argument based on it, courts pretend that the evidence is simply not relevant"); Lam, *supra* note 5, at 61 (arguing that judicial bias will prevent cultural evidence from being heard); Note, *supra* note 5, at 1297-98 (positing that absence of procedural guidelines gives opportunity for officials to exercise prejudice against cultural minorities); Maguigan, *supra* note 3, at 61 ("Judicial treatment of cultural information generally falls into one of two extremes. Courts either fail to find any accommodation at all between cultural information and existing mechanisms or receive cultural information in an unquestioning fashion that sends a message that violence by men against women is tolerable.").

157. *See also* Maguigan, *supra* note 3, at 86 (stating that judges have the capacity to recognize the relevance of cultural evidence and to craft jury instructions on the relevance and prosecutors have the ability of effective cross-examination and identifying lay and expert witnesses in rebuttal, but "motivation to exercise those capabilities is distributed unevenly").

158. *See supra* text accompanying note 97.

159. Ha v. State, 892 P.2d 184 (Alaska Ct. App. 1985). The victim and Ha were both Vietnamese. The victim, known by Ha to be a violent man, beat Ha severely the day before and threatened to kill him. Worried that he would be killed if he did not kill first, Ha found him the next day while the victim was grocery shopping and shot him in the back thirteen times. The trial court denied a self-defense instruction to Ha. Ha argued that he should have received the instruction because he felt he had no alternative since the police would not help him, both because they would not understand him, and because Vietnamese culture teaches that police are corrupt and one must take the law into their own hands. However, the appellate court found this argument unpersuasive because there was simply no evidence that Ha was in imminent danger, even if he did have good reason to fear future harm from the victim. The trial judge agreed with the defense attorney that Ha's cultural background was relevant to assess his reasonableness, both in a self-defense claim and in arguing for a lesser charge of "voluntary manslaughter." *Id.* at 197. Nguyen v. State, 520

S.E.2d 907 (Ga. 1999). Thu Ha Nguyen shot her husband and stepdaughter and was convicted of two counts of aggravated assault. *Id.* at 908. To support her defense, her attorney proffered an expert who would testify the loss of status, humiliation, and possible adverse spiritual consequences to defendant and her family from the pending divorce. *Id.* at 909. However, her defense was one of self-defense, requiring her to allege a fear of physical attack, and there was nothing in the cultural evidence that linked this loss of status and disrespect to fear of physical abuse. *Id.* at 908-09.

United States v. Kills Crow, 527 F.2d 158 (8th Cir. 1975). Whitney Paul Kills Crow called Rudolph Vargas out of his home and shot him in the leg. Both were Native Americans. In support of his actions, Kills Crow wanted to call an expert to explain the concept of "Toka," which "results in Indians of one reservation treating Indians from a different reservation as outcasts and enemies simply because of the fact that they are 'foreigners.'" *Id.* at 159 (citing defendant's own explanation). The theory was that Kills Crow's family members were outcasts and Vargas' family was harassing them, but there was no evidence of this. The trial judge struggled mightily with this evidence, but could not see his way clear to allowing it in unless he first heard some evidence that there actually was some bad blood between the families. *Id.* at 159-60.

United States v. Yu, 954 F.2d 951 (3d Cir. 1992). Here, the Third Circuit upheld the district court's decision not to take defendant's cultural background into account in sentencing. Jong Yul Yu pled guilty to bribing a federal tax agent, and offered to the sentencing court that, based on his Korean experience, he considered the bribe as an honorarium and that it could be viewed as an insult not to offer the payment. The trial court rejected the evidence due to the Federal Sentencing Guidelines' provision that "national origin" is not relevant. The appellate court ruled, even if the cultural evidence was not evidence of "national origin," it could not mitigate his sentence. Yu had been in this country 12 years and was a naturalized citizen, and he was also a professional tax preparer. Yu knew the law and knew his error as he himself admitted the bribe was a single act "of aberrant behavior." *Id.* at 955.

Trujillo-Garcia v. Rowland, 1993 WL 460961 (9th Cir. 1993) (unpublished opinion). Eduardo Trujillo-Garcia argued that the trial court erred in applying a reasonable person standard rather than a reasonable Mexican male standard when it rejected his provocation defense. The appellate court assumed without deciding that refusing to consider his cultural background was error, but found the error harmless since the state appellate court had found that the "evidence established that the petitioner was immature, quiet, moody, and vulnerable — more sensitive than the average Mexican male." *Id.* at 2. Therefore, although the comments made to him would have been emotionally provocative to a member of the Mexican culture, it would not have led the reasonable person to act violently. *Id.*

People v. Estep, 583 P.2d 927 (Colo. 1978). The trial court in this case excluded defense expert testimony concerning the cultural significance of facial hair to Koreans and the Supreme Court of Colorado upheld this decision. The defendant's argument was that the Korean eyewitness did not mention facial hair, which the defendant had, and she would have if she had seen it. *Id.* at 345-46. The trial court's decision was purely one of evidence law — the proper foundation had not been laid for the expert because the eyewitness had never been asked about her views on the cultural significance of facial hair first.

United States v. Natal-Rivera, 879 F.2d 391 (8th Cir. 1989). The Eighth Circuit decided that it was not a violation of due process that the Federal Sentencing Guidelines do not allow a sentencing court to consider the defendant's cultural background when imposing sentence — here that the defendant was socialized since childhood to follow her husband's every command, even if it involves criminal activity. This is cultural insensitivity on the part of the sentencing court, since the Guideline's limitations are easy to avoid.

other ten cases, the judge allowed the cultural evidence.[160]

Critics argue further that, even where the judges find the evidence relevant, this relevancy is only found when the cultural evidence mimics the values of the dominant culture.[161] Hence, it is posited, Chen is given lenient treatment because his case represents a standard "heat of passion" case.[162] This is true to a certain extent, but recall that Justice Pincus

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United States v. Carbonnell, 737 F. Supp. 186 (E.D.N.Y.) (in order to take into account factors of defendant's Columbian heritage for a downward departure, the factors were categorized as "the personal characteristics" of the offender).

Jenkins v. State, 261 S.W. 2d 784 (Ark. 1953). It is difficult to know what happened at the trial level in this murder case, but on appeal, appellant's lawyer urged, "consider the fact that appellant is a 'Mississippi Choctaw' Indian with an enigmatic personality and a cultural background into which he and his ancestors have been forced over the years." *Id.* at 517. The *Jenkins* Court stated that this information had been presented in a "convincing manner" but was better presented to the executive of the State. Without more information, we do not know the link that might have been made at trial or on appeal to his culture and his crime. There does not appear to be any discernible link. The facts of the murder do not appear on their face to be culture-sensitive: appellant was drinking, argued with some people over some trivia and then shot them. *Id.* at 512-14.

Mull v. United States, 402 F.2d 571 (9th Cir. 1968). Charles Mull, a Native American, was convicted of assaulting another Native American. Charles Mull testified that he had "quite a lot of beer" during the event. Mull's attorney proffered two experts in his defense, and the judge denied both. The first was a cultural anthropologist who was going to testify to the low tolerance level of Indians to alcohol and, on the basis of a hypothetical question, that the defendant was incapable of forming the intent necessary for the crime. The trial judge objected to the anthropologist forming an opinion about the defendant's intent, since it was neither in his expertise, nor did he have the basis for such a conclusion. *Id.* at 574. The defense attorney did not pursue, as he should have, allowing the expert to simply testify more generally about Indians and alcohol, allowing the jury to reach its own conclusions about the defendant's ability to form the requisite intent. A second expert was another cultural anthropologist who would have testified based upon the expected testimony of Mull and his brother that the victim of the assault was exercising evil powers over Mull. The expert would have then testified "that there is a state of mind subjectively within the mind, or capable of being within the mind of an Apache Indian . . . which would cause him to feel a justification for doing what ought to or had to be done in a given circumstance to rid himself of the evil influence of this particular power over him." *Id.* at 575. The judge reiterated similar reasoning in rejecting this testimony: "'The defendant may testify as to what was on his mind and what he was thinking of, but the experts cannot say he was incapable of entertaining the specific intent to do some bodily injury.'" *Id.* Once again, the defense attorney failed to advocate that the expert would only speak to witchcraft beliefs generally in order to educate the jury, and then the jury could draw its own conclusions. As it was, the appellate court explained that neither Mull nor his brother said a word about belief in evil powers on the witness stand.

160. *See supra* text accompanying note 97.

161. *See* Chiu, *supra* note 1, at 1113-14 (arguing that cases allowing cultural evidence to negate defendant's state of mind, mitigate sentence, or reduce charges only recognize "cultural sameness"); LEE, *supra* note 3, at 112 (arguing that cultural evidence is allowed only in cases with "interest convergence" with dominant culture).

162. *See* LEE, *supra* note 3, at 114 (arguing that the claims of Asian immigrant men like Chen who kill Asian immigrant wives for infidelity are the same as claims made by American men who

reduced Chen's crime even further than he would have for the "average American" because of the cultural evidence.[163] Scholars also cite *Moua* for this proposition. They argue that Kong Moua is treated with leniency because his misunderstanding of the consent of his victim is reflective of the dominant culture's rejection of date rape claims, where the defendant also often misunderstands the consent of the complainant.[164] While the two kinds of claims share a mistake of fact defense, the facts of *Moua* are unique and foreign to a typical jury. Kong Moua's perpetration of a forceful rape through a marriage-by-capture ritual has no dominant culture comparison.

Also, Daina Chiu argues that the lenient treatment of Fumiko Kimura reflects sameness with dominant culture:

> The favorable legal treatment of Fumiko Kimura derives from the Anglo-American cultural view that women who kill their children are 'victims in need of sympathy, support and psychiatric treatment.' Women are 'assumed to be inherently passive, gentle, and tolerant; and mothers are assumed to be nurturing, caring and altruistic. It is an easy step, therefore, to assume that a 'normal' woman could surely not have acted in such a way. She must have been 'mad' to kill her own child.[165]

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kill wives); Chiu, *supra* note 1, at 1113-14 (stating that *Chen* only recognizes cultural sameness: in both American and Chinese cultures, "a wife's adultery is a stain on the husband's honor as a man. . . . The subordination of women and the privileging of the male sex-right are common to both cultures.").

163. *See supra* text accompanying notes 17-23.

164. *See* LEE, *supra* note 3, at 120 (arguing interest convergence between *Moua* and date rape cases). *See also* Chiu, *supra* note 1, at 1115:

> The organizing principles of sex and rape are similar in both cultures, although the Hmong version is much more straightforward and explicit. . . . [T]he judge based his determination on a consideration of 'normal' male sexual behavior, not on whether the Hmong woman believed she had been violated. The prosecutor and the judge both believed that the woman did not genuinely consent, but they also believed that the defendant genuinely thought that the woman was consenting to the marriage ritual.

165. Chiu, *supra* note 1, at 1117. *See also* LEE, *supra* note 3 (stating that Kimura was treated the same as most women who kill their young children). To make her point, Chiu contrasts *Bui*, a case where a father killed his children and tried to kill himself and received a death sentence: "Unlike women, men in Anglo-American culture who kill their children are perceived as 'wicked' and in need of punishment." Chiu, *supra* note 1, at 1118. In *Chen*, *Kimura*, *Moua*, and *Bui*, then, "difference collapses into sameness, as influenced by the dominant culture's perception of appropriate gender roles." *Id.* at 1119.

This is a strange observation, considering that American culture has no accepted tradition of mother-child suicide, and, in fact, American culture often treats mothers who harm their children very harshly.[166] Pregnant women who abuse drugs are jailed, not treated.[167] Notorious cases of deeply troubled mothers killing their children have led to harsh results. For example, Susan Smith and Andrea Yates both drowned their children, and both were convicted of capital murder and sentenced to life in prison.[168] Therefore, an equally likely interpretation of the result in *Kimura* is that the leniency was due to acquiescence to cultural difference.

The second inconsistency argument is that the judges' treatment of cultural evidence is inconsistent from case to case, due to the lack of guidelines, sensitivity, or a formalized defense. Several comparisons are used to make this point. A first grouping is the parent-child suicide cases: *People v. Kimura*[169] is compared with *People v. Wu*,[170] and both are compared with *People v. Bui*.[171] Second, two cases of women killing men, *State v. Wanrow*[172] and the case of Kathryn Charliaga, are compared. A close look at the facts of these cases shows that they are *not* alike and their differences are reflected in the individualized outcomes.

A. Kimura *Versus* Wu

Both Fumika Kimura and Helen Wu claimed to engage in a similar practice of parent-child suicide (where neither of them succeeded in killing herself). Yet, Fumiko Kimura received a sentence of five years probation after an involuntary manslaughter plea,[173] and Helen Wu ultimately, upon retrial, was convicted of voluntary manslaughter and sentenced to the

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166. *See* Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 54 AM. CRIM. L. REV. 1, 42-49 (1996) (stating that most women who kill their children are charged with first-degree murder, and, while there is a pattern of lenience in sentencing, the perceived "bad" mothers receive harsh outcomes).

167. *See* Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 689-90 (2006) (chronicling the criminalization of pregnant women for "prenatal abuse," including drug use).

168. *See* Coleman, *supra* note 4, at 1142-43 (arguing that the facts of *Smith* were, "in all relevant aspects other than culture, the same as those in Kimura" and that the child victims of immigrant crimes should get the same protection of the laws); *see* Yates v. State, 171 S.W.3d 215 (Tex. App. 2005) (describing facts of case and overturning conviction due to prosecutorial misconduct).

169. No. A-091133 (Cal. Super. Ct. L.A. County Nov. 21, 1985).

170. 286 Cal. Rptr. 868 (Cal. App. 1991).

171. 551 So. 2d 1094 (Ala. App. 1988).

172. 538 P.2d 849 (Wash. App. 1975).

173. *See* Goel, *supra* note 3, at 443-44.

maximum prison term of eleven years.[174] Leti Volpp objects that this shows inconsistency in the treatment of culture in the courtroom.[175] However, the facts of *Wu* show Wu's actions to be far more motivationally complex than what we know about Kimura's motivations.

Helen Wu was born in Saigon, China and eventually moved to Macau as a teenager.[176] She met Gary Wu in 1963, who then left for the United States and married another woman. Fifteen years later, after Helen had been married, had a daughter, and was divorced, Gary Wu contacted her and urged her to come to the United States.[177] He told her that he was going to divorce his wife, who was infertile, and marry Helen.[178] Helen moved to the United States in 1979 and bore a son fathered by Gary, named Sidney.[179] When Gary did not marry her, she returned to Macau, depressed, and without Sidney, since having a child out of wedlock would have been considered shameful and she and Sidney would have been humiliated in China.[180] For the next seven years, she tried to persuade Gary to bring Sidney to Macau to visit.[181] He finally came after she promised to give him money for his restaurant business in return.[182] Gary proposed marriage, but Helen refused because she thought it was only because of the money. Helen was so discouraged that she attempted to throw herself out a window, but was restrained by a friend.[183]

Finally, in 1989, Helen returned to the United States to visit Gary's sick mother, who told her that she had better take care of Sidney after she died, because Gary did not take good care of him.[184] Gary then took Helen to Las Vegas to get married.[185] On the drive back from the wedding, Helen asked him if he only married her for her money.[186] Gary told her she had no right to speak until she produced the money.[187] A few days later, Helen

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174. Renteln, *A Justification*, *supra* note 5, at 474 n.141 (citing news articles and interview with Wu's attorney).

175. *See* Volpp, *supra* note 3, at 90-91.

176. The facts of the case are taken from the appellate opinion. *Wu*, 286 Cal. Rptr. 868 (Cal. App. 1991), *rev'g* No. ICR 12873 (Super. Ct. Riverside Co. 1990), *review denied* Jan. 23, 1992 (unpublished opinion).

177. *Wu*, 286 Cal. Rptr. at 870.

178. *Id.*

179. *Id.* at 871.

180. *Id.*

181. *Id.*

182. *Wu*, 286 Cal. Rptr. at 871.

183. *Id.*

184. *Id.* at 871-72.

185. *Id.* at 872.

186. *Id.*

187. *Wu*, 286 Cal. Rptr. at 872.

witnessed Gary hit eight-year-old Sidney before leaving the house to host a party for a friend named Rosemary.[188] Sidney then told her that Gary beat him regularly, that Gary called Helen "psychotic," and that the house they were in belonged to Rosemary, who was Gary's girlfriend.[189] Sidney said he thought Gary loved Rosemary more than him.[190]

Helen began to experience heart palpitations and trouble breathing.[191] She told Sidney she wanted to die and asked if he wanted to come with her.[192] He clung to her and cried.[193] She then left the bedroom to cut the cord off a window blind, returned, and strangled him.[194] After thinking how easily Sidney had died, she wrote Gary a note saying that he had bullied her too much and "now this air is vented. I can die with no regret."[195] She did not mention killing Sidney in the note.[196] After failing to strangle herself with the cord, she cut her wrist with a knife and lay down next to Sidney.[197] Several hours later, when Gary returned, Helen was in a semi-conscious state.[198] She was rushed to the emergency room and revived.[199]

At the jury trial, the prosecution's theory was that Helen killed Sidney because of anger at Gary, and to get revenge.[200] The defense theory was two-fold. First, that Helen was incapable of forming the necessary intent for murder because she was essentially unconscious at the time of the crimes.[201] She testified she did not remember strangling Sidney[202] and a psychiatric expert testified she was in a "fugue" state, or "a kind of automatic mechanism that change[s] the mentality into a different state. Like dreaming state or different state that usually don't retain the memory."[203] Acceptance of this theory would have supported either a heat of passion manslaughter conviction[204] or an acquittal.[205] Second, the

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Wu*, 286 Cal. Rptr. at 872.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Wu*, 286 Cal. Rptr. at 872.
198. *Id.*
199. *Id.* at 873.
200. *Id.* at 870.
201. *Id.* at 873.
202. *Wu*, 286 Cal. Rptr. at 876.
203. *Id.* at 874 (testimony of Dr. Ching-Piao Chien, M.D.).
204. *See id.* at 875 (quoting Dr. Chien's testimony that "she was under a kind of heat of

defense claimed that Helen was not acting with malice, but out of an intense emotional upheaval where she killed Sidney, and attempted to kill herself, in order to take care of Sidney in the afterlife.[206] Acceptance of this theory would have supported a reduction to heat of passion manslaughter. To support the latter theory, the defendant called experts on transcultural psychology to explain the cultural stresses Helen experienced, including issues of Sidney's illegitimacy, and that no one would be able to care for him after the grandmother's death.[207] Dr. Chien described the Chinese belief in an afterlife and then offered that, because of her depression, Helen "would feel that she couldn't really do the duty to the son, so the only way to fulfill her duty when she realized her son was neglected and not to be cared [for] by anybody in the future, she thought the way to go is to the heaven."[208] He testified she acted out of love and responsibility.[209] Dr. Terry Gock testified that the alternatives she saw were culturally determined and her purpose was a "benevolent one"[210]: "in her culture, in her own mind, there are no other options but to kill herself and take the son along with her so that they could sort of step over to the next world where she could devote herself, all of herself to the caring of the son, caring of Sidney."[211]

The jury convicted Helen of second-degree murder, and the judge sentenced her to fifteen years to life, the maximum prison term for second-degree murder.[212] While the jury had the opportunity to hear all of the cultural evidence in the case, the trial court erroneously refused to instruct the jury on the automatism defense or that it could take into account her cultural background in deciding whether she was acting out of malice or heat of passion.[213] The court of appeals reversed, and on retrial, the instructions were read and the jury convicted her of voluntary manslaughter.[214] Her final sentence was eleven years in prison.

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emotion or I call it a heat of passion that went out like a dreamy state.").

205. *Id.* at 877 (explaining unconsciousness as a complete defense because "to support a conviction for a criminal act there must be 'a joint operation of act and intent.'") (citation omitted).

206. *Id.* at 870.

207. *Wu*, 286 Cal. Rptr. at 884-85.

208. *Id.* at 885 (quoting testimony of Chien).

209. *Id.*

210. *Id.* at 886 (quoting testimony of Gock).

211. *Id.* at 887.

212. *Wu*, 286 Cal. Rptr. at 887.

213. *Id.*

214. *Id.* Maguigan points out that this result upon retrial demonstrates the danger that in the absence of jury instructions factfinders will not recognize the relevance of their cultural evidence to existing defenses. Maguigan, *supra* note 3, at 79.

Both Kimura and Wu committed crimes equivalent to voluntary manslaughter. However, Fumiko Kimura received the benefit of an involuntary manslaughter plea and the judge's sympathy, and Helen Wu did not. Why? Little is known about Kimura's motivations, and the cultural explanation which was offered at her plea through 4000 letters from members of the Japanese-Americans, was accepted.[215] One of the benefits of a plea bargain is that no one ever hears the intimate details of the crime. However, Wu's actions seemed to revolve around her obsession with Gary, right down to her final note to him, which did not mention Sidney. While the defense proffered a theory of undying devotion to her child, the prosecution proffered a theory of revenge.[216] The reality is likely somewhere between the two.

Volpp claims that *Wu* demonstrates the point that "if a defendant's behavior does not sufficiently match what experts describe as 'traditional' cultural behavior, she may lose the opportunity to offer testimony as to her cultural background."[217] This did not happen in Wu's case. Although the trial judge denied a requested instruction in the first trial, the cultural evidence was in fact presented, and the jury was not told it could *not* take such evidence into account.[218] Also, the argument that Wu did not get the benefit of the cultural defense (as Kimura did) because she was a non-traditional mother denies the fact that the cultural practice depends upon tradition. Wu had not lived with her son for seven years, and it would not be irrational for a juror to find she did not have the same intensity of bonds as a mother who has raised and lives with her children.[219] Perhaps the two cases are not so different as to merit the difference between probation and

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215. During the pendency of the case, 4000 letters signed by Japanese-Americans were received stating that Kimura's act was common in Japan and that, while criminalized, would be treated as no more than manslaughter. The *Kimura* court expressly considered the punishment she would have received in Japan. *See* Coleman, *supra* note 4, at 1110 nn. 85-88.

216. *Wu*, 286 Cal. Rptr. at 870.

217. Volpp, *supra* note 3, at 63. *See also* Volpp, *supra* note 3, at 90:

> The particular threshold test that the trial court applied to Wu relied on a stereotype of Asian women as the self-sacrificing woman/mother. We can speculate that the trial court felt persuaded that Helen Wu should not benefit from such a defense because she gave birth to Sidney out of wedlock and was thus not a "traditional Chinese woman."

218. *See* Volpp, *supra* note 3, at 86 n.133 (stating that, despite a specific instruction, the California jury instructions left a lot of leeway for the jury to consider the cultural differences).

219. *See* Goel, *supra* note 3, at 447-48 (describing Kimura's close bond with her children, "consistent with the Japanese views of motherhood as a transcendent state of being that surpasses all other life roles.").

eleven years in jail, but the two cases are also not so alike that Kimura and Wu must have received the same treatment.

B. Kimura *and* Wu *Versus* Bui

In *Bui v. State*,[220] Quang Ngoc Bui received a death sentence for killing his three children despite an appearance of a parent-child suicide attempt.[221] His sentence is obviously far more severe than Kimura's or Wu's. Is this a blatant inconsistency due to cultural insensitivity, a gender bias, or are the cases actually different? Again, a closer look at the presentation of Bui's defense shows his cultural explanation of his actions to be the weakest of all three defendants.

At the time of the murders, Bui's wife had been away from home for two days and was in the company of a male friend.[222] She refused to come home, despite her husband's urgings.[223] In a final phone call, he told her she would have to get home in fifteen minutes if she ever wanted to see the children alive again.[224] After fifteen minutes, he said he "lost his temper" and cut the jugular veins of his three children.[225] Blood stains on the knees of his pants suggested that he restrained them by kneeling on them while he cut them.[226] Medical evidence suggested it took the children as long as five minutes to lose consciousness, during which time they said to the defendant "it hurts."[227] He then made non life-threatening cuts into his own neck.[228] At the hospital, Bui told the police, "I cut my kids. I didn't want her to get them."[229] At the police station, Bui admitted he killed the children because he was mad at his wife, and did not want her to have them.[230]

At trial, the defense called an expert in "cross cultural counseling" who interviewed Bui to determine to what extent his actions were "dictated by cultural misunderstanding."[231] He concluded that the defendant had been depressed and was concerned about "loss of face" from the conduct of his

220. 551 So. 2d 1094 (Ala. Crim. App. 1988).
221. *Id.* at 1098.
222. *Id.* at 1099.
223. *Id.*
224. *Id.*
225. *Bui*, 551 So. 2d at 1099.
226. *Id.* at 1109.
227. *Id.*
228. *Id.* at 1098.
229. *Id.* at 1099.
230. *Bui*, 551 So. 2d at 1099.
231. *Id.* at 1101-02.

wife, and the attempted suicide was a "face saving measure" which was understandable in Asia, and not an irrational act.[232] This expert testimony was at odds with the testimony of a defense psychiatrist who testified that Bui suffered from an acute psychotic reaction at the time of the killings.[233]

Ann Lam speculates the reason for a different outcome in *Bui* than *Wu* and *Kimura* is "blatant sexual and racial bias on the part of the Alabama courts," and that if cultural evidence had been seriously considered, it could have mitigated his sentence.[234] Daina Chiu argues that the contrast between the sentence in *Kimura* and *Bui* demonstrates the point that cultural evidence is only relevant when it enforces notions of "sameness" with the dominant culture — here, that women who kill their children are victims, while men who kill their children are evil.[235] Despite these protestations, and to whatever extent they may be right, the facts of *Bui* do not tend to show a parent acting out of a cultural tradition, but a man trying to manipulate his wife through her children. His words and actions made this fairly explicit. While Helen Wu also may have been manipulating Gary by harming Sidney, her lighter sentence reflects the ambiguity in the evidence: it was simply less clear what motivated her.

C. Wanrow *Versus* Charliaga

The final comparison in the search for uneven treatment of cultural cases is *State v. Wanrow*,[236] and the unpublished case of Kathryn Charliaga. Although Holly Maguigan finds these cases demonstrate a harmful inconsistency,[237] the facts of the two cases are simply not comparable.

Yvonne Wanrow was convicted of second-degree murder in the killing of a man who had allegedly molested her friend's daughter.[238] Wanrow's friend learned that the decedent had molested her children and was afraid he might break into her house.[239] She called Wanrow to come stay with her, and Wanrow came over with a pistol.[240] Unbeknownst to Wanrow, during the night the decedent was invited into the house to discuss the

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232. *Id.* at 1102.
233. *Id.* at 1104.
234. Lam, *supra* note 5, at 60.
235. Chiu, *supra* note 1, at 1118-19.
236. 559 P.2d 548 (Wash. 1977) (en banc).
237. *See* Maguigan, *supra* note 3, at 82-83.
238. 538 P.2d 849, 850 (Wash. App. 1975).
239. *Wanrow*, 559 P.2d at 550-51.
240. *Id.* at 551.

situation.[241] Wanrow suddenly found herself confronted with the decedent and fired the pistol, killing him.[242]

Wanrow claimed self-defense at trial.[243] She proposed calling an expert witness on Indian culture to testify that:

> Indians are very family oriented; they maintain a strong feeling of respect for their elders; and unnatural sex acts are not accepted by Indian culture. Specifically, defendant's expert witness would have testified that an Indian, confronted by an older person attempting to perform an unnatural sex act on a young child, would undergo a more traumatic emotional experience than would a member of the Anglo-Saxon culture because of the highly respected position an older person possesses in the Indian culture."[244]

The trial court did not entirely exclude the evidence, but rather, excluded it as a form of a freestanding cultural defense.[245] The judge ruled that a psychiatric expert could testify to the effect that the Indian culture might have had on Wanrow's state of mind.[246] The court was clearly searching for the missing relevancy link between the proffered evidence and Wanrow's state of mind. At issue was the reasonableness of her fear of serious bodily harm or death.[247] Evidence that she would have experienced a "traumatic emotional experience" would demonstrate a "heat of passion," but not a reasonable fear of serious bodily harm. Further, according to the expert, the emotional upheaval would have come from confronting him while he was molesting a child, which did not happen here. While critics of the case argue that the trial court deprived Wanrow of crucial cultural evidence,[248] such evidence was not only irrelevant, but likely not necessary to persuade the jurors to be sympathetic to a woman confronted with a child molester — even the "average Anglo-Saxon" would be so moved.

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241. *Id.*

242. *Id.*

243. *Id.* at 555.

244. State v. Wanrow, 538 P.2d 849, 853 (Wash. App. 1975).

245. *Id.*

246. *Id.* at 853.

247. *Id.* (describing issue as link between preferred evidence and her "state of mind"). *See* DRESSLER, *supra* note 91, at 237 (describing the elements of self-defense, that "deadly force is only justified in self-protection if the actor reasonably believes that its use is necessary to prevent imminent and unlawful use of deadly force by the aggressor.").

248. *See* Maguigan, *supra* note 3.

In the comparison case, Kathryn Charliaga was charged with killing her husband. Charliaga claimed that she acted in self-defense after years of abuse.[249] She called two expert witnesses: one on battered woman's syndrome, to explain how the abuse led her to reasonably believe she was in imminent danger; and one on women's subservient roles in Aleut villages, to describe a culture that tolerated domestic abuse and had no means of supporting a woman's attempt to leave the relationship.[250] Both witnesses testified, and Charliaga was acquitted.[251] Holly Maguigan argues that the contrasting outcomes in *Wanrow* and *Charliaga* "illustrate the necessity of admitting cultural evidence at trials in order to avoid silencing or distorting women's voices."[252]

These two cases cannot be compared to illustrate Maguigan's point. Wanrow was faced with an unarmed man who had not directly harmed her, but had molested a child. The link between the cultural evidence and her defense was far from clear. On the other hand, Charliaga was facing further physical abuse from a man who had abused her in the past, and both experts' testimony was relevant to establish her reasonable fear of imminent serious bodily harm or death, the necessary ingredient to a self-defense claim.

In all of these comparisons, we should ask the basic, preliminary question: Is consistency in outcomes a goal of the criminal justice system? If "consistency" means the same outcome or punishment for the same class of crime, then our system of justice violates that principle every day through individualized treatment of defendants. It is not enough to say that an injustice is done when a murderer goes free in one case, while someone who commits a lesser offense gets a harder sentence.[253] Individualized justice demands a study of individual facts and circumstances and leads to different outcomes. Individualized treatment means that, while Kimura and Bui both killed their children over anguish from a spouse's infidelity, they do not necessarily deserve the same sentence.

Additionally, consistency is not a realistic goal if we also prize the right to a trial by jury. For better or for worse, we value our system of judgment by a jury of one's peers and not professional factfinders. Every day in courtrooms across America, jurors hand out inconsistent verdicts, despite

249. *See id.* at 82.

250. Maguigan, *supra* note 3, at 82 (describing the case from news sources).

251. *Id.*

252. *Id.* at 82-83.

253. *See* Renteln, *A Justification*, *supra* note 5, at 439 (arguing this). At the same time, Renteln promotes considering culture in order to get "individualized justice." *Id.* at 444.

similar facts and law. We value their judgment, messy humanity, and mercy.

While consistency is assured to the point that we define classes of crimes so that like crimes are grouped together, juries still use their own judgment to classify the crime before them, and judges are given discretion to decide the punishment within a given range. There is no doubt that this discretion leads to injustices — minorities and cultural defendants may receive harsher sentences due to the judge's own biases. However, the fix for this is not to take the discretion out of sentencing. Rigidity promotes its own injustices. Indeed, the Federal Sentencing Guidelines stated that federal judges could not take into account "national origin" at all. This rule was an attempt to tame bias, but led to the exclusion of cultural evidence in sentencing.[254] As with most intractable issues of race, class, and gender, this is a problem that legislation cannot fix. Unsympathetic judges must be educated and held publicly responsible, and sympathetic judges must be placed on the bench.

V. THE SUGGESTED CULTURAL "FIXES"

Cultural evidence scholars offer two basic "fixes" for the three problems discussed in this Essay: 1) either establish a freestanding cultural defense; or 2) allow the evidence if it is relevant to mens rea, but not if it oppresses or stereotypes women or cultural minorities. Both strategies are unnecessary, and both would lead to more problems than solutions.

Only a few scholars have advocated a freestanding cultural defense.[255] The admissibility of cultural evidence under this defense would not depend upon whether the evidence is relevant to an element of the crime or to an established defense. The formulations of the defense by at least three authors demonstrate the intractability of a definition; their suggestions involve subjective evaluations that would lead to no more consistency than at present.[256]

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254. *See supra* text accompanying note 159 (discussing Guidelines' limitation).

255. *See infra* note 256 (citing three authors).

256. *See* Note, *supra* note 5, at 1308-09 (suggesting the court evaluate "factors such as the probability of recurrence and severity of the crime"; "identifiability, degree of self-containment, and size of the defendant's cultural group;" "inquiry into the influence of the defendant's culture on her behavior"); *id.* at 1310-11 ("The precise way in which courts will balance these factors will, of course, vary from case to case."); Lam, *supra* note 5, at 51 (giving four criteria for when a cultural defense should apply: (1) prior life in home country must distinguish defendant from mainstream society; (2) defendant's current attitudes about being a minority in U.S. culture must create problems in mainstream culture; (3) degree of assimilation must be so low unfair to punish; (4) criminal act must reflect values of sufficient importance to the accused's culture); Renteln, *A*

Other authors have perceived the basic problems with the establishment of a cultural defense.[257] Who can claim it? What degree of non-assimilation must be shown? Must everyone agree on the cultural tradition, or just some members of the culture?[258] As Holly Maguigan says, "[J]udges are no better trained than the legal and anthropological experts and scholars who have failed to come to agreement to define culture, to choose among competing and inconsistent voices purporting to speak for a culture, to decide which characteristics of a culture merit recognition of a separate defense."[259]

One premise for the need for such a defense is that judges are either finding the evidence irrelevant due to insensitivity to cultural issues, or they are treating the cases inconsistently. Hopefully, the review of cases in this Essay has shown that this premise may be inaccurate. In addition, those who advocate for a separate defense say one is needed for the cases that simply do not fit the traditional defenses.[260] Daina Chiu posits *Kimura*, *Kong Moua* and *Wu* are all cases that are uniquely cultural, and cannot be accommodated by traditional criminal law defenses.[261] However, the cultural situations of Kimura and Wu are both accommodated by the partial excuse of voluntary manslaughter. Kong Moua was accommodated with a mistake of fact defense, which allowed for evidence of his lack of mens rea.

The more prevalent suggestion for a cultural fix has two parts. The first is a suggestion for "limited use" of the cultural evidence, only as relevant to mens rea. That suggestion is unnecessary because that is what the courts are already doing: that is simply business as usual. This Essay has shown

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Justification, *supra* note 5, at 440 (leaving it to juries to "decide whether cultural factors were determinative in a defendant's behavior, and, if so, whether that is sufficient to warrant either a lesser charge or complete acquittal.").

257. Maguigan, *supra* note 3, at 44 ("[T]here is not and will not be a separate cultural defense because as a practical matter such a defense can be neither defined nor implemented."); Chiu, *supra* note 1, at 1103 ("it is extremely unlikely as a practical matter that any jurisdiction will create or adopt the defense as an excuse for criminal acts.").

258. *See* Maguigan, *supra* note 3, at 56 ("Most advocates have failed to contend with the definitional questions essential to establishing a workable defense, while most opponents have not responded to the reality that courts are examining cultural information in a variety of contexts without establishing a freestanding defense."); Chiu, *supra* note 1, at 1101-02 (describing problematic issues of defining the culture defense and who could raise it); Coleman, *supra* note 4, at 1162-63 (also noting the practical problems in identifying culture: culture is not permanent; multiculturalists are not willing to extend it to non-immigrant Americans; some segments of a culture accept a practice and some reject).

259. Maguigan, *supra* note 3, at 54.

260. *See* Renteln, *A Justification*, *supra* note 5, at 446, 487.

261. Chiu, *supra* note 1, at 1106-07.

that when the evidence was relevant to mens rea, it was generally allowed, and when the relevancy link was not made, it was generally rejected. Courts have considered the cultural evidence relevant in crimes and defenses involving issues of the defendant's "reasonableness" in acting as he or she did. Nonetheless, some scholars' suggestion that this should be made clear, by instructing the jurors that the "reasonable person in the defendant's situation" includes a "situation" of coming from a different culture with different cultural beliefs,[262] is an excellent one. While judges have generally found this to be the case, this will ensure the admission of the cultural evidence to assess "reasonableness."

The second part of the "limited use" suggestion is a caveat that some scholars add: the evidence cannot be used if it oppresses women or children or stereotypes a culture.[263] Some call for the judge to engage in a nuanced balancing test to determine whether the evidence is oppressive or stereotyped.[264] Leti Volpp suggests the admissibility of cultural evidence should be decided through a lens of "antisubordination."[265] The judge would have to "examine whether the defendant acted with a consciousness of her position within the social structure of her community."[266] Hence, cultural evidence would be admissible in *Wu* because "Helen Wu resisted what she perceived as subordination out of a set of narrowly defined

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262. *See* Renteln, *A Justification*, *supra* note 5, at 476-77 (arguing that the reasonable person is standard problematic if cultural evidence is not considered); Lam, *supra* note 5, at 54 (suggesting "reasonable cultural minority" standard in using the provocation defense).

263. *See* Sacks, *supra* note 3, at 548 (suggesting courts should admit cultural information with care and avoid characterizing defendants as "compelled" to act in a certain way because of their cultural beliefs, defense attorneys should not promote racist stereotypes); Levine, *supra* note 3, at 41, 74 (arguing cultural evidence should not be allowed in cases where defendant intended harm, such as *Chen*, because it will promote disdain for minority groups); Kim, *supra* note 3, at 116 (arguing problem with the limited use approach in practice has been courts enforcing harmful stereotypes and encouraging oppressive practices against subordinated groups and suggesting new test).

264. *See, e.g.*, Kim, *supra* note 3, at 133 (arguing a judge should weigh four factors in determining whether the probative value of the evidence is outweighed by its potential to mislead jury members or confuse the issues: (1) whether the purpose of the cultural practice is to perpetuate the subordination of a particular group, such as women; (2) the moral culpability associated with the cultural practice; (3) the deterrence/education value of prohibiting the practice; and (4) the availability of alternative forms of sentencing); Coleman, *supra* note 4 (calling for balancing of victims' rights versus defendant's rights and deciding victims' rights trump presentation of cultural evidence that discriminates against the victims).

265. Volpp, *supra* note 3, at 99 ("Antisubordination, as premised on the vastness of oppression along international lines, such as male oppression of women, and xenophobic oppression of immigrants, must be the value of whether to support the use of cultural evidence in a defense and what information should be presented.").

266. *Id.* at 98.

choices"[267] and inadmissible in *Chen* because "Dong Lu Chen acted to constrain his wife's choices further."[268] Further, the evidence should only be "articulated by community members who are sensitive to the dynamics of power and subordination within the community of the defendant. So, in cases involving women who are abused, such as Jian Wan Chen or Helen Wu, input from organizations that work with battered Asian women is imperative."[269]

Volpp's more detailed suggestion demonstrates the problems of valuing antisubordination over relevancy in criminal cases. Judges would now have to decide who is oppressed and who is the oppressor, a deeply complicated, sociological, and cultural issue. Consider, for example, the view that Helen Wu acted because she was resisting oppression. That would depend upon a flexible definition of oppression as well as causation. Why did she kill Sidney? Couldn't one say she was the oppressor? And, if she was constrained by social norms to act in the manner she did, is that not also true for Dong Lu Chen? Was he at all oppressed by his wife's refusal of him, her taunts, and her alleged beatings of him?[270] To the extent these are sociological issues, they are best left outside the hands of judges, and to the extent these are issues of fact, they belong to the jury.

Ridding society of gender and cultural oppression is a goal of the utmost importance. However, asking the criminal justice system to take the lead is highly problematic. Until and unless there is a consensus on the meaning of "oppression," "culture," or other sociological terms, the cultural evidence should be presented to the jury whenever it is relevant.

VI. CONCLUSION

Cultural evidence cases are a magnet for scrutiny. Scholars who have studied a small group of those cases have been uniformly displeased with the treatment of culture in the courtroom. This Essay has endeavored to unpack those concerns and determine where the trouble lies. Far from concluding there are no problems in the presentation of the evidence, this Essay has determined problems do exist, but they do not appear to stem

267. *Id.*

268. *Id.*

269. *Id.* at 100.

270. Dong Lu Chen testified that his wife became abusive toward him during their period of separation, including beating him. Volpp, *supra* note 3, at 64 n.30 (quoting Record, *supra* note 14, at 183-84, 213, 217, 219). According to him, she became "increasingly more brutal . . . she was hitting him, telling him to drop dead[.]" *Id.* at 65 n.32 (quoting Record, *supra* note 14, at 66).

from the cultural insensitivity assumed by the scholars. Rather, they are failures of advocacy and of the substantive criminal law.

By and large, judges have followed the law in deciding admissibility of cultural evidence.[271] In some cases, their rulings were handicapped by prosecutors and defense attorneys who failed to properly present or counter the cultural evidence. Additionally, the limits of the substantive criminal law have prevented better treatment of women as victims of cultural violence. These problems are not culture-specific and do not require a culture-specific solution. They are overriding evidentiary and criminal justice issues which arise in cases with defendants no matter where they were born and raised.

There is little doubt that American society stereotypes, demeans, and discriminates against other cultures. The goal of society should be to eradicate this discrimination. However, that is not the main goal of the criminal justice system. Evidence of cultural practices may contain stereotypes or be oppressive, but, unless it is irrelevant or unreliable, the criminal justice system must see to it that defendants are allowed to present it in their defense. Relevancy is a concept that the criminal justice system understands and it should remain the touchstone for cultural evidence.

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271. Hopefully, the use of multiple cases to demonstrate this Essay's conclusions has answered some of the potential retorts. *See, e.g.*, Maguigan, *supra* note 3, at 86-87:

> Commentators who argue that no corrective measures are necessary because the current criminal justice system sufficiently accommodates cultural information ignore the fact that courts often fail to find cultural information either admissible or relevant to jury instructions requested by defendants. Those commentators . . . urge reliance on judicial discretion without considering the limits imposed by pluralistic ignorance. They assume the admissibility of cultural evidence at trial without analyzing the examples of its exclusion or of judicial determinations that the evidence, even when it is received, fails to satisfy existing definitional requirements.