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Culture, Cloaked in *Mens Rea*

Proof beyond reasonable doubt of the *mens rea* or state of mind associated with a particular crime is a requirement for the successful prosecution of all criminal defendants under our system of justice. In the legal jargon, it is part of the prosecution's prima facie case. Concomitantly, criminal defendants may successfully challenge the case against them on the ground (among others) that the prosecution has failed to meet this requirement. In this context one of the essential remaining disputes is waged among legal scholars and practitioners about the propriety of the "cultural defense" in cases involving immigrant crime.[1] Specifically, there is disagreement about the admissibility of evidence about immigrant culture and cultural practices in support of the argument that the defendant suffered from a form of cultural "diminished capacity" or "insanity" at the time of the crime. There also is ongoing debate about the admissibility of such evidence in support of the affirmative defense of provocation. While the latter is technically not directed at *mens rea*, like diminished capacity and insanity, it is introduced to explain the defendant's loss of control in the face of an extreme emotional disturbance.

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In support of the position that evidence about immigrant culture can and should be permitted to explain an immigrant's mental state or his or her loss of control, its proponents, especially practitioners, have suggested that cultural predispositions can and often do affect free will. Or, their colleagues in the academy argue that a sensitivity and even acquiescence to culture in this context is critical to fair results in criminal cases conducted in a pluralistic society. And some have taken a narrower and intermediate view, suggesting that evidence of immigrant culture ought to be admissible, but exclusively in those cases where the charge against the defendant is based on his or her actions or reactions to culturally based subordination. In other words, they argue for culturally based affirmative action in assessing culpability. In my view, each of these arguments is ultimately a pragmatic one: *mens rea* is the sole inquiry in the guilt phase of criminal proceedings that formally is concerned with the defendant's state of mind and insuring at least the possibility of an outright exoneration in cases involving clashes of competing (American and immigrant) cultures is crucial for certain segments of the immigrant community.[2]

Others who take a contrary view of the use of immigrant cultural evidence in this context argue that the effort to cloak immigrant culture in the mantle of *mens rea* is illogical on the facts of the cases at issue, which, they suggest, show the exercise rather than the alteration of free will. They also argue that the effort is inconsistent with existing law and traditional liberal theory—which is both intentionally and strongly nondiscriminatory—and thus ultimately should be seen for what it is: a disguised attempt to have the courts accept informally that which they could not and should not accept formally, an affirmative defense to immigrant crime that would undermine the native American culture's fealty to the uniform application of its criminal laws. I fall squarely in the latter camp, and in this essay I amplify the case for my position. As I have done in the past, I also demonstrate that this view is not anti-immigrant or antiminority, but rather, in strong support of immigrants who would seek the protection of the laws and cultural inclinations of the United States.[3] In this regard, in particular, I also explain the fundamental distinctions between equal protection–based calls for affirmative action in education and employment and similar calls in the context of criminal evidence law.

The best way to accomplish my objectives is to start at the beginning, with the 1989 decision of a New York Superior Court in the case *People v. Chen*.[4]

While there may be some debate about this, I believe that *Chen*, along with the California decision in *People v. Kimura*, initiated this discussion in its current iteration.[5] More important and because it transpired in a relative historical vacuum, *Chen* is perhaps the clearest example of the misuse of cultural evidence in the *mens rea* context. Because it is raw in this respect, *Chen* also is the perfect paradigm through which to view both doctrinal and theoretical arguments about the propriety of the "cultural defense" to immigrant crime. Indeed, even to the extent that my own viewpoint with respect to the various arguments for and against the use of cultural evidence is contested or even rejected, the contrary positions and competing rationales also are laid out, making at least the possibilities clear. Such clarity is critical in this area of the law that is becoming the subject of increasing practical attention, and because the existing literature largely fails to provide such guidance.

Dong Lu Chen and his wife, Jian Wan Chen, immigrated from China to the United States in September 1986 when Chen was fifty years old.[6] According to Leti Volpp, he first "worked as a dishwasher in Maryland, [and] Jian Wan Chen and the three children stayed in New York. During a visit when Jian Wan Chen refused to have sex with him and 'became abusive,' Dong Lu Chen became suspicious that she was having an affair. He returned to Maryland, burdened with the stress of his wife's assumed infidelity."[7] Then, "in June 1987, Dong Lu Chen moved to New York,"[8] where he is said to have obtained work as a garment factory worker.[9] According to the defense,

> On August 24 he rushed into his wife's bedroom and grabbed her breasts and vaginal area. They felt more developed to him and he took that as a sign that she was having affairs. When he confronted her the next day, she said she was seeing another man. On September 7, when he again confronted her and said he wanted to have sex, "she said I won't let you hold me because I have other guys who will do this." His head felt dizzy, and he "pressed her down and asked her for how long had this been going on. She responded, for three months." Confused and dizzy, he picked something up and hit her a couple of times on the head. He passed out.[10]

In fact, on the morning of September 7, 1987, Dong Lu Chen "smashed [his wife's] skull with a claw hammer."[11] He is said to have struck eight times.[12] According to Volpp,

> The forensic pathologist [who testified in the case] reported that Jian Wan Chen was five foot three and weighted 99 pounds. Her body was found with numerous carved lacerations on both sides of her head. She had contusions on both left and right forearms, a contusion on her right wrist, an abrasion at the back of her left hand, and a bruise on her left thumb. The marks on her head were consistent with having been hit by a hammer. There were depressed skull fractures under her lacerations, indicating that a great amount of force was applied to a small surface area. The injuries on her arms, wrist, and hand were consistent with someone holding her or with her warding off a blow from a hammer. They were also consistent with an individual holding her down and striking her in the face with a hammer.[13]

A reporter who covered the story explained further that "when [Chen] was done, he didn't run. He didn't even change his bloody shirt. And when his teen-age son came home, he met the boy at the door and announced, 'I killed your mother.'"[14] Jian Wan "Chen's body was discovered by [the] teenage[r] in the family's Brooklyn apartment."[15] Based on these facts, Elizabeth Holzman, the district attorney responsible for the case, formally charged Chen with second-degree murder, which is defined by subdivision 125.25 of the New York Penal Law as follows:

> A person is guilty of murder in the second degree [punishable by a minimum of fifteen to twenty-five years in prison] when: (1) With intent to cause the death of another person, he causes the death of such person . . . except that in any prosecution under this subdivision, it is an affirmative defense that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or . . . (2) Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.[16]

The New York legislature enacted part (1)(a) of this provision with the express intent that so-called crimes of passion—crimes that were, in the his-

torical jargon, "provoked" specifically by the wife's decision to stray from the marital bed—would be dealt with as manslaughter in the first degree, rather than as second-degree murder. Manslaughter in the first degree, otherwise known as voluntary manslaughter, is defined in subdivision 125.20 of the New York Penal Law: "When (1) With intent to cause serious physical injury to another person, he causes the death of such person . . . ; or (2) with intent to cause the death of another person, he causes the death of such person . . . under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision 125.25."[17] In structuring the law in this way, the legislature also broadened the rather narrow historical category of "provocation" so that this category now encompasses any circumstance that would cause a reasonable person to lose the self-control presumed by the law.

Brooklyn Supreme Court Justice Edward Pincus was assigned to Chen's case, and he sat without a jury.[18] At trial, Chen admitted that he killed his wife because she had committed adultery.[19] To avoid the conviction for second-degree murder that otherwise naturally would flow from such an admission—and thereby to ensure at least a reduction of the charge to first-degree or voluntary manslaughter—Chen's lawyer, Stewart Orden, devised a defense strategy that included the traditional argument under 125.25(1)(a) that Chen had "acted under the influence of extreme emotional disturbance." At the same time, in what appears to have been an effort to reduce the charge even further, to second-degree or involuntary manslaughter, Orden devised the separate and (on the facts) extremely difficult argument that he killed his wife only involuntarily, or unintentionally.[20] Under subdivision 125.15 of the New York Penal Law, "a person is guilty of manslaughter in the second degree when: (1) he recklessly causes the death of another person."[21] While voluntary manslaughter carries a penalty of "up to twenty-five years in prison," involuntary manslaughter is punishable by "up to fifteen years in prison."[22] To both of these ends, Orden sought and obtained leave from the judge to introduce evidence of Chen's "cultural background [to explain his] state of mind."[23]

Specifically, Orden's legal theory was that Chen "lacked the requisite state of mind for murder and involuntary manslaughter because [his] culture made it reasonable for him to perceive and to respond to the situation in a violent way."[24] To this end, Orden produced Burton Pasternak, an anthropology professor at Hunter College who had done field work in China in

the period 1960–88, who testified that "'adultery [is] going to make a Chinese man more prone to violence'" than an American man.[25] More specifically, Pasternak testified that "'in the Chinese context, adultery by a woman was considered a kind of "stain" upon the man, indicating that he had lost "the most minimal standard of control" over her.' . . . 'The Chinese male would . . . be considered a "pariah" among Chinese women because he would be viewed as having been unable to "maintain the most minimal standard of control" within his family.'"[26] As a result, Pasternak explained that "if [Chen] was a normal [Chinese] person, it's not the United States, [he] would react very violently. [He] might very well have confusion. It would be very likely to be a chaotic situation."[27]

Separately, and in support of the argument that Chen actually did not intend to kill or even severely to injure his wife, Pasternak testified that "in traditional Chinese culture, due to societal beliefs concerning infidelity, a Chinese man might threaten to kill his wife if she commits adultery. However, the Chinese community usually stops him from following through with his threats. "'Mr. Chen argued that in the United States he did not have a tight-knit Chinese community to stop him from murdering his wife.'"[28] This suggested an alleged traditional practice, a theatrical production of sorts, involving a cuckolded man who merely pretends to want to kill his wife and who takes an initial step in furtherance of this pretense in order to dispel the tremendous shame that accompanies the provocation, only to be prevented from accomplishing his unintended objective by a knowledgeable community that dutifully intervenes to save his wife and simultaneously restore his honor: "Chen was described by Orden as a product of China, where, it was alleged, infidelity is treated as a shameful slur on the man's ancestral family. Chen didn't intend to kill his wife, Orden claimed. Chen was just 'confused' when he wielded the hammer, because of stress rooted in his cultural heritage."[29]

Finally, and in support of both arguments, the defense presented Chen as a man whose every move was culturally prescribed. For example, Pasternak testified that

> the ability of the Chinese community to define values and define appropriate behavior compared to our own ability to do that is extraordinary. The ability to enforce those values and to protect themselves against deviation also is extraordinary. The Chinese who grows up as a person in Mainland China carries that in his mind. They are like voices of his

> community. It is very difficult to escape. They are very intolerant [of] deviations from those mores, very intolerant, and exert enormous control over people who try to deviate. You carry that with you no matter where you go. Even if you can escape those voices, you cannot escape the information, a deviation being known to everyone, being known to everyone in the Chinese community either here or there. My Chinese friends often say, there is no wall that the wind cannot penetrate. These voices will be heard everywhere.[30]

This notion that Chen lacked free will, that he was, in effect, controlled by the "voice of [the Chinese] community" that "will be heard everywhere" was a central theme of Chen's defense.

The prosecution, in a move some commentators have called incomprehensible, chose not to respond directly to any of Chen's cultural evidence. It did not challenge the accuracy of Pasternak's testimony, nor did it seek to introduce competing cultural evidence. Indeed, Brooklyn district attorney Elizabeth Holzman believed the evidence was irrelevant and inadmissible on the ground that "'foreign customs should not override American law.'"[31] And Kenneth Rigby, the assistant district attorney who actually litigated the case said, "'In our wildest imaginations, we couldn't conjure up a scenario where the judge would believe that anthropological hocus-pocus.'"[32] As a result, Judge Pincus heard no rebuttal testimony on Chinese culture and the matter of adultery, and he heard no rebuttal testimony on the ability of culture more generally to influence a defendant's mental state.

After considering all of the evidence, the judge agreed with the defense that Chen "was driven to violence by traditional Chinese values about adultery and loss of manhood."[33] In the judge's view, "'Chen was the product of his culture. . . . The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor.'"[34] Based on this analysis, the judge concluded that Chen was guilty only of "second-degree manslaughter: reckless homicide without intent."[35] This conclusion would cement *Chen*'s designation as the paradigm "cultural defense" case, as the judge acknowledged that "'were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court would have been constrained to find the defendant guilty of manslaughter in the first degree.'"[36] The culturally premised reduction from first- to second-degree manslaughter, coupled with the judge's

related concern about "'the possible effect of Chen's incarceration on his daughters' marriage prospects'"[37] allowed Chen to walk out of jail a relatively free man. With respect to the latter, the judge noted, "'Now there's a stigma of shame on the whole family.' 'They have young, unmarried daughters. To make them marriageable prospects, they must make sure he succeeds so they succeed.'"[38]

And so the judge ensured that Chen succeeded, but at what expense? As I imply, the cost lay in a legal separation of American and Chinese defendants based on their alleged cultural backgrounds. That is, the rule of *Chen* (if there is one) may be stated as follows: While all men may be angry, provoked to violence even, by their wives' adulterous behavior, Chinese men due to cultural influences may become so angry that their capacity for reasoned thought (even despite a cooling off period) will be so diminished as to rob them of the mental capacity to form intent. This culturally based mental disorder or state of "diminished capacity" may, in turn, cause Chinese men to act as if on cultural automatic-pilot—or in a culturally induced hypnotic state—according to a specially prescribed traditional practice that will restore their honor and physically protect their wives. Where this is the case, Chinese men will be allowed a further reduction in the charge, from voluntary to involuntary manslaughter, a result not available to men outside the Chinese (or similar) culture that causes the incapacity.

This assessment of the facts and the "rule" that derives from them is flawed in at least five respects. First, it is doctrinally flawed because there is no basis in the facts even as presented by the defense to support a reduction of the charge against Chen to involuntary manslaughter. Second, the result is logically impossible: one cannot simultaneously lose one's mind, even for a moment, and reflect this loss in the exercise of a culturally appropriate traditional practice. Third, the result is flawed because it assumes erroneously that culture can deprive an individual of his ability to exercise free will in a sense that is legally and philosophically cognizable; more specifically in this context, it assumes (again erroneously) that immigrant or minority culture can deprive a member of that culture of the ability to conform his behavior to majoritarian norms. Fourth, the *Chen* result is anathema to the Constitution and its philosophical foundations, which contemplate the equal treatment of both defendants and victims of crime, as well as the establishment and existence of the criminal laws as a common boundary of individual liberty. Fifth, the result is also anathema to the very political philosophy on which

proponents of the cultural defense rely. That is, liberal theory contemplates that the United States will be a tolerant and ideologically plural nation; however, the absolute outer boundaries of that tolerance are established by the criminal laws that are thought to be necessary to the proper ordering of the society, and thus immutable. I address each of these five points in turn.

First, the result in *Chen* is doctrinally flawed because, although the record may support a finding that Chen was provoked to attack his wife, there is simply no basis in the facts to conclude that he acted "recklessly" rather than "intentionally" with respect to her death. As we have seen, the relevant law provides that "a person is guilty of manslaughter in the second degree when: (1) he recklessly causes the death of another person."[39] This is in contrast to the mental state required for voluntary manslaughter that is found when "with intent to cause the death of another person, he causes the death of such person . . . under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance."[40] A man who is provoked to kill his adulterous wife is the paradigm case of voluntary manslaughter. A person is said to act "recklessly" toward another when he "is aware that his conduct *might* cause the result [here the death] though it is not substantially certain to happen."[41] This is in contrast to the definition of "intent," which is found when the defendant desires the consequences or "knows that his conduct is *substantially certain* to cause the result, whether or not he desires the result to occur."[42] "Death" for both manslaughter and murder is defined as death *or* serious bodily injury. Thus, to rule as Judge Pincus did, that Dong Lu Chen did not "know that his conduct [wa]s substantially certain" to cause Jian Wan Chen's death, or that he knew only that "his conduct might" cause her death, would require a finding that Chen did not know that eight vicious blows from a claw hammer to his wife's skull "would" or "was substantially certain to" be deadly; it also would require finding that he understood that such a vicious attack only "might" be deadly. Such subtlety is not present on the facts of the *Chen* case. Indeed, to the contrary, all of the evidence points *either* to the fact that Chen was provoked and thus intended his wife serious bodily harm or death, *or* to the fact that he was delusional and had no inkling that she was in any danger at all.

Even if we assume for purposes of this discussion that *Chen*'s evidence (stripped or not of its cultural veneer) supported either a traditional or a modern provocation defense, this could have resulted only in a reduction in the charge from murder to voluntary manslaughter, since provocation as-

sumes that the defendant, acting "in the heat of passion," in fact intended his victim serious bodily harm or death. There is simply no basis in that doctrine to argue for a further reduction of the charge to involuntary manslaughter. Thus, to explain the further reduction, we must look beyond the provocation defense to Chen's second theory, based on an alleged Chinese traditional practice, that raising the claw hammer was not a sign that he intended his wife any real harm but rather a signal to the Chinese community that it should come immediately to save her. It was essential for Chen's defense in this respect that cultural evidence be admitted, since, without it, no American fact finder—in other words, no jury or judge acting as fact finder—would find credible the argument that Chen never intended his wife serious harm. Rather than offering such proof, however, Chen's defense presented testimony through Pasternak that was likely a figment of that anthropologist's imagination, "his own American fantasy" according to Volpp.[43] Even if, however, one were to suspend disbelief (as the judge apparently did) and credit that testimony, the doctrinal result would not be "recklessness" and a charge of involuntary manslaughter but rather an outright acquittal. That is, to the extent that Chen still believed in the inevitability of a community rescue as he raised the murder weapon—at which moment he was hearing "the voices of Chinese culture" calling to him to enact this ritual—he was not conscious of a real risk of harm to his wife but fully delusional. The insanity defense, or a defense of involuntary action based on the sleepwalking or automatism cases, provide the most appropriate doctrinal theories in that circumstance and would result not in a conviction of involuntary manslaughter but a judgment that fully absolved the defendant of responsibility for *any* crime.[44]

In the end then, the best case for Chen under existing criminal law doctrine was that he was a man who happened to be from China, who was truly upset that his wife repeatedly had rejected his sexual advances, and who thought (perhaps in the heat of passion) that his wife should die for her sins and for his shame. This is the traditional stuff of voluntary manslaughter.[45] That the judge gave Chen a better deal under these circumstances implies an old racist perspective—about the propensities of "others" to violence and about the relative insignificance of their victims—that has formally been rejected in the law. It also implies a more modern political view about cultural relativism that, whatever its merits otherwise, has no basis in applicable legal doctrine.

While several commentators have approved the use of the cultural defense, and a few specifically of its application in *Chen*, none has explained the court's use of culture to effect the reduction of Chen's offense from voluntary to involuntary manslaughter. As a result, it is unclear whether their approval includes the outcome in the case or simply the use of cultural evidence to prove provocation and thus to establish a defense that is common to the criminal law without regard to the particular culture out of which the provocation arises. As I show, however, a cultural defense in the sense of the *Chen* result cannot be justified on the basis of any existing doctrine. Indeed, while some have argued—based, for example, on an uncritical commitment to pluralism—on behalf of the exoneration or quasi-exoneration allowed in *Chen* and analogous cases, the law as it exists would have to be changed substantially in order to accomplish this end.

My second criticism of the cultural defense is that it is generally "disingenuous because it relies upon an illogical and contorted analysis of the *mens rea* requirement at issue."[46] That is, "the immutable flaw in th[e] argument [that 'custom caused a mental disease or defect, or something short of that, that impaired the defendant's ability to think rationally'] is that cultural evidence of custom conflicts with the impaired state of mind paradigm of these doctrines. . . . By definition, the custom is alleged to be the normal, traditional, sane practice under the circumstances. Indeed, in most cases defendants present evidence that their actions were planned and executed in full compliance with an established custom."[47] In this respect, Chen's defense was internally inconsistent: He argued simultaneously that his rage was governed by his cultural predispositions to such an extent that he became mentally unstable, and that he purposefully acted his part in a culturally rational traditional practice. The only way to resolve this inconsistency is to accept the premise that culture can alter free will, that it can result, for example, in a state of cultural automatism, insanity, or diminished capacity. As I argue below, this premise is ultimately untenable in U.S. jurisprudence. Therefore, once again, the best we can say about Chen's evidence is that it establishes him as a man who killed his wife, either because he was so enraged by her adultery that he tried to kill her, or that he acted to defend his honor in the only way his culture recognized but that the community that would have saved her in China did not exist in the United States.

On this point, I am in substantial agreement with other commentators, including those with whom I otherwise disagree. For example, in a 1993

article in which Alison Dundes Renteln argues that the cultural defense ought to operate as a "partial excuse," she notes:

> Immigrants and refugees in most cultural defense cases are, in fact, perfectly sane according to the standards of their own culture, and, indeed, according to Western clinical standards. Giving them no option other than an insanity defense to present the cultural dimension of the case would require a gross falsification of the facts. Furthermore, comparing the logic of immigrants with that of the insane is, at the very least, insulting. . . . Such a comparison, even if successful as a strategy for avoiding incarceration, would require the ethnocentric assessment of the perspectives of other peoples.[48]

Renteln's work is notable for being among the first important pieces of legal scholarship in this area, and it continues to resonate in the most recent articles and essays on the subject.

For example, James J. Sing, in an article criticizing my application of equal protection doctrine to the cultural defense cases, concurs that "both critics and advocates of the cultural defense have noted that the use of the insanity doctrine to try cultural defense claims leads to the undesirable legal association of culturally informed actions and criminally insane behavior." He goes on to explain his own view, with which I agree, that the

> application of temporary-insanity doctrine logically precludes introduction of cultural evidence. . . . this theory is at odds with the basic notion underlying all cultural defense claims that the defendant's foreign culture functions as a legitimate yet alternative source of norms. . . . The problem . . . is that the logic of the cultural defense focuses not on the linkages between culture and "irrational" mental defect, but rather on the very rational process by which culture influences people's behavior. . . . Mental defect of any stripe implies a sense of abnormality that d[oes] not obtain in the defense attorney's analytic scheme. . . . To claim that nearly everyone from a given culture is abnormal (or even possesses the same latent capacity for abnormality) is nonsensical because it is simply to assert a definition of what is "normal." Such rhetorical maneuvering illustrates that the real illogic lies perhaps not with [the defendant's] criminal behavior, but rather in the defense's characterization of the defendant as "cultural/defective."[49]

My third criticism of the use of cultural evidence in the state-of-mind context centers on the notion of free will in the law. There is much literature to support the general premise that human behavior is dictated or at least strongly suggested by a combination of genetics and environment —the classic "nature and nurture" paradigm—and to support the further premise that culture constitutes an important aspect of the environmental component. Thus, lawyers and legal academics, philosophers and anthropologists talk about "enculturation," "memetics," or "meme theory," and "cultural determinism."[50] Nevertheless, "the general presumption in the criminal law is that behavior is a consequence of free will."[51] This presumption is said to "find its intellectual roots in [Emmanuel] Kant's insistence that moral agency is the central feature of personhood."[52] According to Linda Ross Meyer, "Essential to [Kant's vision of] moral agency is the capacity to will, which, for Kant, is to act in accordance with the conception of laws, rather than be passively subjected to forces of nature. Acting in accordance with the conception of laws requires that our thoughts be free, free to follow logic rather than the random fluctuations of brain chemistry, free to make sense." In the end, this Kantian vision was codified in the law, which as a result, operates on the assumption that liberal society is "a union of reasonable moral agents who respect each other and live under common laws of reason."[53]

Of course, the fact that this is the way things are, and that any argument seeking to change such an understanding will face substantial institutional opposition, does not justify anything from a moral perspective. Thus, for example, when Joseph Grano derides arguments in support of "new deterministic defenses—drug addiction, brainwashing, battered wife syndrome, post-traumatic stress, and just plain rotten social background"—and explains that "the view that the blame for crime lies with society rather than with the individual offender did not have much popular appeal even in the 1960s, and it has even less appeal today as crime runs rampant in our cities,"[54] he is not telling us anything about why we do not have or could not develop a justice theory that is sufficiently flexible to include consideration of social or cultural influences on behavior. I disagree strongly to the extent that Grano's larger thesis implies that group identity is always irrelevant to the law's treatment of individual members of the society. However, it would be disingenuous not to acknowledge the evident practical and philosophical necessity of the particular legal presumption he treats in this context, that

the criminal law is properly wedded to the notion of free will, even if it is in some instances a legal fiction.

Indeed, the basic rationales for that presumption must be the following: First, the social compact could not have existed and cannot survive in the absence of individual responsibility. That is, a collection of individuals each lacking responsibility for the harm he or she might do to others simply could not sustain itself. Second, to the extent that theories explaining the absence of free will apply literally to all of us, their effect is to deny that there is any normative purpose for the penal law as it exists or even as it might be reconceived, and thus to admit that the social compact cannot ensure an ordered community. While some lament and even vilify what they view as the empty mantra of "social order," there is no historical example of a society that functioned or functions positively for its individual members and successfully as a whole without it. As Michael Waltzer has written, in his book *On Toleration*, "no [political] arrangement . . . is a moral option unless it provides for some version of peaceful coexistence (and thereby upholds basic human rights.) We choose [from among relatively tolerant forms of government] within limits."[55] And thus, when Chen's defense decided to rest on the notion that he was governed in all respects by the "voices of his [mainland Chinese] community" rather than by his individual assessment of right and wrong and by the very different cultural norms that are codified in U.S. law, it may or may not have been factually accurate, but it certainly was wrong with respect to this original and essential presumption.

My fourth criticism is that, even if one otherwise were to accept the viability of Chen's defense, it is inherently discriminatory and thus in conflict with strong antidiscrimination principles embedded primarily in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As I explain elsewhere,

> Tolerance of the use of immigrant cultural evidence in [this context] fundamentally conflicts with the principle that "the protections given by the laws of the United States shall be equal in respect to life and liberty . . . [for] all persons." Indeed, permitting cultural evidence to be dispositive in criminal cases violates both the fundamental principle that society has a right to government protection against crime, and the equal protection doctrine that holds that whatever protections are provided by government must be provided to all equally, without regard to race, gender, or national origin.[56]

U.S. culture and law today indisputably are wedded to this principle, especially in their more progressive incarnations. The fact that this marriage has grown out of a rejection of our own "long and unfortunate history with slave and black codes and gender discriminatory laws" ensures that we are unlikely even for arguably good reasons to develop the new "culture codes" suggested by the application of the cultural defense in *Chen*. The result in that case squarely violated the antidiscrimination principle when "the judge . . . effectively carved out a group—'people from China'—and distinguished them from others in society for purposes of applying the state's criminal laws. The result of this classification was that, at least in that courtroom on that day, the state's criminal code did not apply to 'people from China' [either defendants or their victims] in the same manner as it applied to others."[57]

Two other commentators have addressed directly the equal protection challenge posed by the use of cultural evidence to negate *mens rea* or to show provocation.

First, Leti Volpp has suggested that the Equal Protection Clause in this context ought to be interpreted according to "antisubordination" rather than "antidiscrimination" doctrine. While antidiscrimination doctrine presupposes a racially and ethnically neutral Equal Protection Clause,[58] Volpp argues that antisubordination doctrine presupposes the need for or at least the propriety of positive action to elevate oppressed members of the society ultimately to ensure that the promises of that clause are kept.[59] She suggests that antisubordination doctrine is properly applied to the criminal law, just as it is applied to justify affirmative action in employment and education, because it is essential to demonstrate "a serious commitment to evaluating and eradicating all forms of oppression."[60] Volpp's position appears to arise from her fundamental view that U.S. history, culture, and law are racist, ethnocentric, and sexist, at least to some important extent.[61] Based upon that assumption, she "argue[s] that the 'cultural defense' for Dong Lu Chen [an oppressor within the cultural context at issue in his case] was inappropriate. . . ." At the same time, she "approv[es] the [informal] use of cultural information for women like Helen Wu," a defendant in a California case who killed her son (arguably in part) because she was "subordinated on the basis of gender as well as impacted by dynamic forces from within and without [her] communit[y.]"[62]

Second, James J. Sing has argued that antidiscrimination theory ought to

protect equally the rights of immigrant and American-born or American-raised defendants to use culture to establish a provocation defense. He explains that "[if] . . . the provocation defense is in essence a dominant-cultural defense, then denying foreign defendants the right to introduce cultural evidence effectively denies them the use of the provocation doctrine." This denial, he claims, "jeopardizes cultural defendants' rights to due process and equality before the law" because it ensures that "the provocation defense . . . would in effect be available only to members of the dominant culture." In this context, Sing also acknowledges and appears to agree with Volpp's separate critique of my equal protection analysis; he also claims to disagree with my view that "incorporation of a substantive cultural defense will lead to special treatment of immigrant groups."[63]

I agree with Volpp and Sing that U.S. legal history, indeed, even contemporary experience, is replete with egregious examples of discrimination against minority and immigrant groups, as well as against women. I also agree that this discrimination and its vestiges must be eradicated; our combined work is clearly all to that end. But I fundamentally disagree with their overarching and largely implicit theme that the United States today has no culture that is worthy of acknowledgment or respect, and thus that this country may not morally codify its existing norms to the exclusion of others.[64] They are wrong on both accounts. The United States is not "without culture" or "culturally neutral" as they suggest.[65] To the contrary, this country has a strong cultural commitment, largely codified in the law, to an admittedly ethnocentric vision of human and women's rights.[66] This vision disallows respect for many of the traditional practices (although not all) that have formed the basis of cultural defense claims.[67] Specifically, it rejects culturally dictated wife killing or other physical violence within the family, although it continues to recognize lesser culpability for those crimes in certain circumstances applicable equally to all defendants regardless of their cultural heritage. Respect for cultural difference does not mean acquiescence to all aspects of that difference no matter their effect on the ability of the dominant culture to function. Ultimately, despite the fact that culture (including American culture) evolves and is properly influenced by a sensitivity to multiculturalism,[68] in the end and pragmatically speaking, "justice *is* what the people in a particular community *think* it is."[69]

I reject Volpp's suggestion that an appropriate response to the United States's history of discrimination is an affirmative action excuse for certain

subordinated criminal defendants, and Sing's similar suggestion that such affirmative action is appropriate for all criminal defendants "with culture." (While Sing claims that the injection of immigrant culture in the mix would merely equalize things, since American defendants already have their culture codified in the law, in fact his proposal would have the effect of denying to the United States the right to codify its dominant morality in the law, and more specifically, to give only to immigrant defendants an additional defense to the criminal charge, as the judge in *Chen* expressly acknowledged.) I also reject the suggestion of these two commentators that my disagreement with them reflects a general antipathy toward other affirmative action programs. My view is quite to the contrary. Affirmative action is essential to achieve the equal protection of the laws in areas such as education and employment, where there appears to be no equally viable alternative to ensuring that groups that historically have been discriminated against will be treated fairly. However, using affirmative action principles in the criminal law context would not be intended to ensure that immigrants receive equal treatment under existing law, but rather to excuse conduct by them that would subject a nonimmigrant to more severe punishment, and to treat the harm to their victims as less significant. The result clearly is a denial of equal protection to otherwise similarly situated defendants *and* victims.

And, while I find excellent Sing's central premise that the provocation defense, particularly in its more modern forms, is the most logical framework for many and perhaps even most cases that could involve a cultural defense, I disagree with his included argument that if an immigrant defendant is not permitted to introduce cultural evidence in this context, he is in effect denied the use of that defense and thus the equal protection of the laws.[70] There is no American (or other cultural) monopoly on husbands killing their adulterous wives; this is truly a cross-cultural phenomenon. Moreover, the criminal law in this country, and undoubtedly elsewhere, takes into consideration this "traditional practice" in dealing with such homicides. The judge in *Chen* explicitly recognized this fact, noting that even if Chen had not been Chinese, he would have been guilty of voluntary manslaughter and not murder under New York law. The reason is that Chen may be said to have acted as a result of an extreme emotional disturbance caused by his wife's infidelity. If we are to believe his version of the facts, Chen lost control in the same way that a nonimmigrant American man could reasonably be understood to lose control in similar circumstances. Thus, his defense

of provocation did not rely upon, nor did it require for its success, the use of cultural evidence.[71]

Finally, to the extent that much of the debate about the cultural defense turns philosophical, my fifth criticism of its use to negate *mens rea* rests on the foundations of American political philosophy and its most tolerant vision. That is, even the most liberal of liberal theory accepts that tolerance for ideological and other pluralism has its limits and that, ultimately, liberty must be ordered according to the harm principle.[72] For example, John Stuart Mill emphasized that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others."[73] John Locke's view was even more restrictive of the government's right to interfere with the existence and development of plural viewpoints and behaviors; nevertheless, he recognized that the state was entitled and even required to promulgate uniform criminal laws.[74] In other words, neither Mill nor Locke assumed the possibility of a society whose individuals could be free entirely from personal responsibility for the harm they might cause others through the exercise of their own liberties. Indeed, as the *Chen* case demonstrates so clearly, such a condition would have made individual liberty for all a logical impossibility: That result afforded liberty only to Dong Lu Chen. It placed no meaningful responsibility on him when he violated his wife's individual rights to life and liberty. And, taken to its logical conclusion, it does not allow the American community to take action to change the dangerous and displaced tradition that allegedly prompted his behavior.

And thus, the cultural defense flies squarely in the face of the harm principle, the most liberal vision of tolerance that may be claimed for this (or any other) democracy. Its recognition would result in a version of liberty for the "cultural" defendant that was truly unbounded, so that he could act with impunity against the interests of his victim and of the society. Ultimately, this brings me full-circle to my central constitutional and philosophical concern with the cultural defense, that it denies to the victims of crime that is alleged to be the result of "culture" the rights to individual liberty and personal safety that are promised by the American social compact. For whatever reason or reasons immigrants might come to this country, their coming is very much a "deal" (one that Americans are presumed to have accepted) whose

terms include their adoption of American political culture's vision of liberty *and* their acceptance of its limitations. At bottom, this means two things. First, for penal purposes, this culture is entitled to define the harmful deviations that it accepts and those that it rejects, and it will enforce the lines thus drawn uniformly. Second, every individual who is part of the social compact—including the native born and immigrant alike—is responsible for his or her own conformance with the law and, equally important, is entitled to its full protection.

Applying this analysis to other and future cultural defense cases means looking to both their doctrinal and theoretical positions, and asking the following questions: Are these positions based in arguments that are cognizable under existing law? Do they confuse "culture" with "insanity" or some lesser version of diminished mental capacity, so that they are inherently illogical and, at the same time, racist? Do they seek to deny the existence and relevance of free will in a context that does not involve a true case of mental disease, disorder, or defect? Is their effect to protect or to deny crime victims who happen not to be white equal protection of the laws? And, finally, are they based in a respect for or a denial of the harm principle and its underlying premise that democratic society must be ordered at least by a uniform system of criminal laws? In the end, these questions, based on the paradigm established in *Chen*, should provide some guidance to those who would attempt to disentangle the merits of cases in which culture is cloaked in *mens rea*, and thereby offered as an excuse for otherwise criminal conduct.

Notes

I am grateful, as always, to Jim Coleman. The wonderful image of culture as "cloaked" in *mens rea* is originally Neal A. Gordon's, and I thank him for allowing me to borrow it here. See his essay on the subject, "The Implications of Memetics for the Cultural Defense," *Duke Law Journal* 50 (2001): 1809.

1 The essential terminology in this debate centers on the phrases *cultural defense* and *cultural evidence*. Unfortunately, their use by scholars, judges, and practicing lawyers has been inconsistent, making the parsing of cases and evaluation of policy-based arguments unnecessarily difficult. As Neal Gordon notes, "This lack of specificity in the defense leads to its application to a number of diverse cases without a clear statement of what it is trying to prove or disprove" (Gordon, "The Implications of Memetics," 1811). In this essay, I use the term *cultural defense* to signify the use of immigrant culture to negate *mens rea* and to establish provocation. In the past, I have used the term to signify a de facto affirmative defense to the prosecution's prima facie case. See Doriane Lambelet Coleman, "Individualizing Justice through Multiculturalism: The Liberals' Dilemma," *Columbia Law Review*

96 (1996): 1093, 1094, 1100–4. For a comprehensive discussion of the different uses of cultural evidence in criminal proceedings, see Alison Dundes Renteln, "Raising Cultural Defenses," in *Cultural Issues in Criminal Defense*, ed. James G. Connell III and Rene L. Valladares (Yonkers, NY: Juris, 2000), 7.1–7.43.

2 Criminal proceedings typically are divided into two phases, the "guilt" and "sentencing" phases. The former is designed to determine whether the prosecution can prove beyond reasonable doubt the elements of the crime(s) charged, in other words, whether the defendant is "guilty." The latter is designed to determine the appropriate punishment, once such guilt is established.

3 I first argued this position in "The Liberals' Dilemma."

4 No. 87-7774 (Sup. Ct. N.Y. County, December 2, 1988). The Record of Court Proceedings in *Chen* is said to be missing from the court's files and thus is no longer directly available for review or citation. Thus, throughout this essay, as I do in "The Liberals' Dilemma," I cite to those who either had access to the Record before it was missing, or to those who were present at the proceedings.

5 *People v. Kimura*, Record of Court Proceedings, No. A-091133 (Sup. Ct. L.A. County, November 21, 1985).

6 Leti Volpp, "(Mis)Identifying Culture: Asian Women and the 'Cultural Defense,'" *Harvard Women's Law Journal* 17 (1994): 57; see also, Dick Polman, "When Is Cultural Difference a Legal Defense? Immigrants' Native Traditions Clash with U.S. Law," *Seattle Times*, July 12, 1989; Alexis Jetter, "Fear Is Legacy of Wife Killing in Chinatown: Battered Asians Shocked by Husband's Probation," *Newsday*, November 26, 1989.

7 Volpp, "(Mis)Identifying Culture," 64–65.

8 Ibid., 65.

9 Polman, "When Is Cultural Difference a Legal Defense?"

10 Volpp, "(Mis)Identifying Culture," 65.

11 Jetter, "Fear Is Legacy of Wife Killing."

12 Polman, "When Is Cultural Difference a Legal Defense?"

13 Volpp, "(Mis)Identifying Culture," n. 77.

14 Polman, "When Is Cultural Difference a Legal Defense?"

15 Jetter, "Fear Is Legacy of Wife Killing."

16 New York Penal Law (1995), sec. 125.25, "Murder in the Second Degree," in John Kaplan, Robert Weisberg, Guyora Binder, *Criminal Law: Cases and Materials*, 3d ed. (Boston: Little, Brown, 1996), 394.

17 Ibid., 393–94.

18 Jetter, "Fear Is Legacy of Wife Killing."

19 Margaret Talbot, "Making American Law Suit All No Easy Task," *Mainichi Daily News*, August 29, 1997.

20 Polman, "When Is Cultural Difference a Legal Defense?"

21 New York Penal Law (1995), sec. 125.15, "Manslaughter in the Second Degree."

22 Ibid., sec. 125.15, and sec. 125.20, "Manslaughter in the First Degree," 394.

23 Polman, "When Is Cultural Difference a Legal Defense?"

24 Sharan K. Suri, "A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses," *Michigan Journal of Gender and Law* 7 (2000): 107, 119.

25 Jetter, "Fear Is Legacy of Wife Killing."
26 Suri, "A Matter of Principle and Consistency," 122.
27 Volpp, "(Mis)Identifying Culture," 65. Pasternak's remarks only indirectly related to Chen himself. As the trial transcript apparently made clear, Pasternak could not "comment on the mental state of this particular person. I am not a psychiatrist. I don't know this particular person," (65).
28 Nicole A. King, "The Role of Culture in Psychology: A Look at Mental Illness and the Cultural Defense," *Tulsa Journal of Comparative and International Law* 7 (fall 1999): 199, 221.
29 Polman, "When Is Cultural Difference a Legal Defense?"
30 Volpp, "(Mis)Identifying Culture," 68.
31 Polman, "When Is Cultural Difference a Legal Defense?"
32 Ibid.
33 Jetter, "Fear Is Legacy of Wife Killing."
34 King, "The Role of Culture in Psychology," 221.
35 Polman, "When Is Cultural Difference a Legal Defense?"
36 Coleman, "The Liberals' Dilemma," 1124.
37 Ibid.
38 Ibid.
39 New York Penal Law (1995), sec. 125.15.
40 Ibid., secs. 125.15, 125.20.
41 Wayne R. LaFave and Austin W. Scott Jr., *Criminal Law*, 2d ed. (St. Paul, MN: West, 1986), 239.
42 Ibid.
43 It appears that the anthropological evidence presented by the defense in *Chen* was at least anachronistic, or perhaps even fraudulent. See, for example, Jetter, "Fear Is Legacy of Wife Killing" (noting that Chinese men who kill their wives are dealt with harshly by Chinese courts); Volpp, "(Mis)Identifying Culture," 70 (noting that Pasternak's "bizarre portrayal of divorce and adultery in China in fact had little basis in reality"); Polman, "When Is Cultural Difference a Legal Defense?" (quoting Margaret Fung, director at the time of the Asian American Legal Defense and Education Fund, who explained, "'We don't want women victimized by backward customs . . . that . . . may no longer be sanctioned in their homelands and [w]e don't want so-called cultural experts perpetuating certain stereotypes that may not be accurate'").
44 The difficulty of a defense such as this is that there is no recourse in the criminal law for the harm caused by the person acting involuntarily. In other words, we would have to tolerate Chinese men killing their wives in the grip of an overpowering cultural urge. For obvious reasons, as well as others perhaps less obvious that I explore in this essay, it is difficult to imagine extending the bounds of the law's tolerance for cultural diversity to this point.
45 I previously have agreed with Volpp (and the prosecution) that Chen ought not to have had the benefit even of the traditional provocation defense because the evidence suggests that he may not have acted "in the heat of passion." That is, he waited almost two weeks after Jian Wan Chen first rejected him and told him that she was having an affair before he killed her. See Coleman, "The Liberals' Dilemma," n. 59. While this passage of time

certainly suggests an ample "cooling off" period that ordinarily would make a provocation defense difficult, it nevertheless might still have been available to Chen based on his repeated and again unsuccessful efforts to regain her affections, including the day before or on the day of the murder.

46 Coleman, "The Liberals' Dilemma," n. 48.

47 Ibid.

48 Alison Dundes Renteln, "A Justification of the Cultural Defense as Partial Excuse," *Southern California Review of Law & Women's Studies* 2 (1993): 437, 461.

49 James J. Sing, "Culture As Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law," *Yale Law Journal* 108 (1999): 1852–55; see also Holly Maguigan, "Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?" *New York University Law Review* 70 (1995): 36, 73–75. While I disagree with Maguigan that to address the concerns raised by the use of cultural evidence to negate *mens rea* it is sufficient for the prosecution vigorously to challenge the substantive validity of that evidence, her work is important in its acknowledgment of the doctrinal issues raised by *Chen*, among other cases, and in its effort to address the practical problems inherent in the cultural defense. Ultimately, this arena will be where the issues are resolved.

50 *Enculturation* has been defined as "'the internalization of the elements of culture characteristic to an individual's society.'" See Renteln, "Raising Cultural Defenses," 7.2 (quoting Ralph Linton, *The Tree of Culture* 3d ed. [New York: Knopf, 1957], 39). According to Linton, "The process of enculturation is so powerful that 'even the most deliberately unconventional person is unable to escape his culture to any significant degree . . . . Cultural influences are so deep that even the behavior of the insane reflects them strongly'" (39). Neal Gordon explains that a *meme* is a cultural counterpart to a gene, "an element of culture that may be considered to be passed on by non-genetic means, esp. imitation" (Gordon, "The Implication of Mimetics," 1816). Meme theory or memetics "holds that memes evolve in the same manner that plants and animals evolve—by the process of natural selection" and that they "structure [the human] mind [they inhabit] to [ensure] their survival" (ibid). In other words, our thoughts and actions are controlled by ideas that we have little ability to reject. "Cultural determinism" is largely identical and most often discussed in the legal literature. For example, Volpp describes "the problem of cultural determinism inherent in the use of the cultural defense . . . [which] rests on the notion that one's behavior is determined by one's [culture] identity" (Volpp, "(Mis)Identifying Culture," 63). See also Sumi Cho, "Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption," *Boston College Law Review* 40 (1998): 73, 79 (noting that "cultural determinism" typically disregards "personal agency").

51 Deborah W. Denno, "Human Biology and Criminal Responsibility: Free Will or Free Ride?" *University of Pennsylvania Law Review* 137 (1988): 615.

52 Linda Ross Meyer, "Unruly Rights," *Cardozo Law Review* 22 (2000): 1, 5.

53 Ibid., 5, 6.

54 Joseph D. Grano, "Ascertaining the Truth," *Cornell Law Review* 77 (1992): 1061, 1062.

55 Michael Walzer, *On Toleration*, (New Haven: Yale University Press, 1997), 5.

56 Coleman, "The Liberals' Dilemma," 1135–36.

57 Ibid., 1141.
58 Ibid., 1129–35.
59 Volpp, "(Mis)Identifying Culture," 97–101.
60 Ibid., 98; Leti Volpp, "Talking 'Culture': Gender, Race, Nation, and the Politics of Multiculturalism," *Columbia Law Review* 96 (1996): 1573, 1595–1600 (linking this criminal law-based antisubordination argument to the debate about affirmative action in the employment context).
61 Volpp's combined work is replete with suggestions in this respect. While I agree with her view that the history of the United States and its laws leaves much to be desired in the ways in which it has treated and continues to treat women, immigrants, and minorities, I continue to disagree that it is useful or even correct to describe the legal and anthropological culture of this country as primarily racist, ethnocentric, or sexist. Indeed, in doing so, she and others who write in this vein commit the same cardinal sin of "essentialism"—this time of American culture—that they are so quick to denounce in others. The particular irony of their own sin is that it places them and their important mission to achieve parity for the disenfranchised squarely against the broader and largely sympathetic American enterprise: in a purely comparative cultural, legal, and political sense, it is undoubtedly true that the United States does rather well by their interests. More important still is the fact that the equal protection paradigm exists here, where it does not elsewhere, to allow for many of the greater gains that they (and I and the majority of Americans) appropriately seek.
62 Volpp, "(Mis)Identifying Culture," 97, 98.
63 Sing, "Culture As Sameness," 1848–49, 1878, 1878–79 and n. 14, 1878–80.
64 However else Volpp and Sing may articulate this view, it is certainly implicit in the suggestion they make throughout their work that the law ought to be tailored to the individual defendant. Thus, for example, when Volpp argues that cultural evidence (of mother-child suicide as a traditional practice) is appropriately used to negate *mens rea* for women like Helen Wu, Volpp is suggesting that whatever the U.S. criminal law might codify otherwise with respect to such violence, it should not apply to her specifically (or to Chinese women raised within that tradition) because she is (or they are) subordinated within her (or their) immigrant culture. And when Sing suggests similarly that provocation doctrine ought to vary in its success and effect depending on the cultural evidence the defendant may muster, he also is rejecting the right of the United States to codify one or another cultural version of that doctrine. Despite the merits of such suggestions, I previously have argued that they easily are outweighed by their balkanizing effects. Coleman, "The Liberals' Dilemma," esp. 1135–44. And despite the minor furor that has ensued in the literature, I continue to subscribe to this position.
65 Volpp and Sing both suggest that non-immigrants tend to view themselves as being "without culture." They also suggest that non-immigrants tend to view immigrants as "cultural," as "having culture," or as influenced by culture to an inordinate extent. In other words, they suggest that Americans view themselves and their law as "objective." And both commentators expend quite some effort to reveal "the truth": that Americans "have culture" too. See, for example, Volpp, "(Mis)Identifying Culture"; Leti Volpp, "Blaming Culture for Bad Behavior," *Yale Journal of Law and the Humanities* 12 (2000): 89; Sing,

"Culture As Sameness." The text that accompanies this note expresses my view that their argument in this respect is disingenuous given the rest of what they have to say. That is, when they argue that immigrant culture ought to be incorporated in the law, *they* deny either the existence or the moral standing of American culture, rather than the other way around.

66 Coleman, "The Liberals' Dilemma," 1135–44, 1164–65; Doriane Lambelet Coleman, "The Seattle Compromise: Multicultural Sensitivity and Americanization," *Duke Law Journal* 47 (1998): 717, 778–81.

67 There have been cases where cultural evidence was properly used to negate *mens rea*. For example, where the crime—such as sexual battery—is denominated as one requiring "specific intent" it would be entirely appropriate to introduce cultural evidence tending to show that whatever else the defendant intended, his objective was in no way sexual. This was done in a relatively recent case in Texas, involving an Albanian immigrant named Sadri Krasniqi, who was charged with and properly exonerated of the sexual battery of his daughter. See Sing, "Culture As Sameness," 1851 (noting case); Farah Sultana Brelvi, "'News of the Weird': Specious Normativity and the Problem of the Cultural Defense," *Columbia Human Rights Law Review* 28 (1997): 657 (describing case in substantial detail). In addition, there have been cases involving immigrant or minority traditional practices that, if not respected by the general public, must certainly be tolerated as within existing principles of U.S. law. See Coleman, "The Seattle Compromise" (describing failed efforts of a public hospital to offer symbolic female circumcisions to Somali immigrants).

68 See Coleman, "The Seattle Compromise," 780.

69 Joseph H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (New York: Oxford University Press, 2000), 24.

70 Sing, "Culture As Sameness," 1878–79.

71 I certainly leave open the possibility that there might be some instances in which cultural evidence would be necessary to a provocation defense that could not otherwise be understood by a trier of fact from the majority culture. I do not agree, however, that this is necessary in the majority of cases to achieve the result the defense intends. It certainly was not necessary in *Chen*.

72 In fact, as I have previously explained, the Supreme Court's jurisprudence is clear that "ordered liberty" today goes well beyond the boundaries of this traditional harm principle: "Ordered liberty provides for freedom within assumed societal goals and values as opposed to freedom from assumed goals and values. Specifically, ordered liberty permits cultural pluralism within boundaries that the majority is willing to tolerate, so that the liberty we are afforded is not unfettered, but rather, bounded by prevailing social dictates." Coleman, "The Seattle Compromise," 718–19.

73 John Stuart Mill, "On Liberty," reprinted in part in Michael Curtis, ed., *The Great Political Theories*, vol. 2 (New York: Avon Books, 1981), 186.

74 Jean Hampton, *Political Philosophy* (Boulder, CO: Westview, 1997), 171.