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The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis

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THE CULTURAL DEFENSE AND THE PROBLEM OF CULTURAL PREEMPTION: A FRAMEWORK FOR ANALYSIS

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I. INTRODUCTION

—In 1985, in Santa Monica, California, Fumiko Kimura walked into the ocean with her two children after learning of her husband's adulterous affair. She was rescued, but her two children drowned. Kimura claimed that her actions constituted the traditional Japanese practice of *oya-ko shinju*, or parent-child suicide.[1]

—In 1985, Moua, a Hmong tribesman from Laos, abducted a Hmong woman and had sexual relations with her despite her protests.[2] At trial, the defendant argued that his actions were consistent with the Hmong tribal practice of *zij poj niam*, or marriage by capture. The defense attorney claimed that in the marriage by capture ritual, a man abducts a woman and takes her to his family's home where he consummates the marriage. The woman is expected to protest the man's sexual advances as a testament to her virtuousness.

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1. *See* Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 141, 147, 148 (1994) (citing People v. Kimura, No. A-091133 (Los Angeles Super. Ct., Nov. 21, 1985) (unpublished decision)); *see also* Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 462, 463-64, 519 (1993) (citing and discussing the *Kimura* case); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1293 & n.1, 1295 & n.%w, 1304-07 (1986) [hereinafter *Cultural Defense*] (same).

For an in-depth discussion of *oya-ko shinju* and its cultural and legal issues, see Taimie L. Bryant, Oya-ko Shinju: *Death at the Center of the Heart*, 8 UCLA PACIFIC BASIN L.J. 1 (1990); Yuko Kawanishi, *Japanese Mother-Child Joint Suicide: The Psychological and Sociological Implications of the* Kimura *Case*, 8 UCLA PACIFIC BASIN L.J. 32 (1990); Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PACIFIC BASIN L.J. 80 (1990).

Oya-ko shinju is spelled "*oyako-shinju*" by some commentators. *See, e.g.*, Renteln, *supra*; *Cultural Defense*, *supra*. This Article uses the first spelling.

2. *See* Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1114-15 (1994) (citing People v. (Kong) Moua, Case No. 315972-0 (Fresno Super. Ct. 1985) (unpublished decision)); *see also*, Renteln, *supra* note 1, at 445 n.19, 484-85, 519 (citing and discussing the *Moua* case); *Cultural Defense*, *supra* note 1, at 1294 n.9 (same). For a full analysis of the *Moua* case, see Deidre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1 (1994). For another case involving the Hmong culture, see John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 94 & n.35 (1986) (citing People v. (Tou) Moua, No. F-90834-3 (Fresno Mun. Ct. 1985), No. 328-106-0 (Fresno County 1985)); *see also Cultural Defense*, *supra* note 1, at 1293, 1306 (Hmong tribal member, exercising an alleged tribal right, executed his adulterous wife); Dick Polman, *When is Cultural Difference a Legal Defense? Immigrants' Native Traditions Clash with U.S. Law*, SEATTLE TIMES, July 12, 1989, at A1, *available in* WESTLAW, Allnews database, 1989 WL 2933827, at *5-*6.

> The man shows that he is worthy of being her husband by continuing his sexual advances despite her protestations.[3]
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> —In 1987, in Brooklyn, New York, Dong Lu Chen confronted his wife about their sexual relationship. When she told him that she was having an affair, he hit her eight times in the head with a claw hammer, killing her. At trial, an expert for the defense testified that in traditional Chinese culture, a wife's adultery is proof of her husband's weak character and that divorce is considered a great shame upon one's ancestors.[4]
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> —In April, 1992, five friends from a Buddhist youth group helped their friend, Binh Gia Pham, douse himself with gasoline and set himself on fire. "The [forty-three] year-old immigrant was protesting attempts by the Vietnamese government to suppress Buddhism."[5] Pham's friends recorded his death with video cameras, and then reported the incident to the police, not realizing that aiding a suicide was a crime.[6]
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> —On April 27, 1994, Wen Sheng Hsieh was shot and killed in a restaurant that he owned. The attorneys for the defendant, Yi Ching Chou, argued that Chou was driven to seek revenge after a beating by Hsieh a year earlier. The defendant's attorneys argued that the "loss of face" resulting from the beating was further compounded by Hsieh ordering Chou out of the restaurant on the day of the shooting.[7]

The increasing cultural diversity of the United States population has spawned a variety of novel legal issues. The above examples illustrate the dilemma faced by the criminal justice system in determining an accused's culpability. How should the court treat a defendant accused of committing a crime that may have been culturally motivated?

The "cultural defense," as it is commonly called, is a legal strategy that uses evidence about a defendant's cultural background to negate or to mitigate criminal

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3. *See* Myrna Oliver, *Immigrant Crimes: Cultural Defense—A Legal Tactic*, L.A. TIMES, July 15, 1988, at A1, *available in* WESTLAW, LAT database, 1988 WL 2235300, at *1-*2; *see also* Alice J. Gallin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 727 (1994); Lyman, *supra* note 2, at 93-94.

4. *See* Goldstein, *supra* note 1, at 151 (citing People v. Chen, No. 87-7774 (N.Y. Super. Ct., Mar. 21, 1989) (unpublished decision)); *see also* Renteln, *supra* note 1, at 439 n.2, 480-81, 519 (discussing *Chen*); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 6.2, at 494-95 (2d ed. 1995) (same).

5. *See* Richard Lacayo, *Whose Peers?*, TIME, Sept. 22, 1993, at 60, *available in* WESTLAW, Magazine database, at *6.

6. The five friends of Binh Gia Pham were charged with second degree manslaughter, an offense that carries a maximum of ten years in prison. The judge, however, ruled that Pham would have sacrificed himself "with or without" his friends and granted them probation. *See* Lacayo, *supra* note 5, at 60, WESTLAW, Magazine database, at *6-*7.

7. *See* Howard Pankratz, *Jury Rejects "Loss of Face" Insanity Plea*, DENVER POST, Mar. 10, 1995, at B1, *available in* WESTLAW, Allnews database, 1995 WL 6566996, at *1-*2 (quoting defense attorneys Edward Pluss and Dave Heckenbach); *see also* Sue Lindsay, *Killer Gets Life for Slaying at Food Court*, ROCKY MOUNTAIN NEWS, June 2, 1995, at A30, *available in* WESTLAW, Allnews database, 1995 WL 3195616, at *1-*3.

liability (with a concomitant sentence reduction).[8] This Article advocates the formal adoption of an evidentiary framework which would permit cultural evidence to be admitted to explain the defendant's state of mind at the time of the offense. Such a limited use of the cultural "defense" would be used, not to establish a new substantive criminal defense, but to establish the elements of traditional criminal defenses.[9] Thus, cultural evidence would be used in the same way that other types of evidence are used to establish the defendant's state of mind at the time the crime was committed.

Part II briefly discusses the purposes of and the premises underlying criminal law and the general types of criminal defenses. Part III presents and analyzes the arguments for and against recognizing a substantive or a "limited use" cultural "defense." Part III also explains this Article's advocation of the limited use approach. Part IV examines recent applications of cultural evidence to demonstrate its current misuse. Part V introduces the concept of "cultural preemption" and presents an evidentiary framework for evaluating cultural evidence that conforms with the objectives of the United States criminal justice system. Part VI discusses possible objections to the evidentiary framework outlined in Part V.

II. CRIMINAL LAW'S GOALS, PREMISES, AND DEFENSES

A. Criminal Law's Purposes and Premises

Generally, criminal law has five purposes or goals. First, criminal law is intended to prevent harm to society and its individual members.[10] Second, criminal law is aimed at deterring future criminal acts.[11] Third, criminal law is intended to rehabilitate criminals through punishment, and thus make them fit to

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8. *See generally Cultural Defense*, *supra* note 1, at 1293, 1294-95; *see also* Renteln, *supra* note 1, at 439 ("A cultural defense is a defense asserted by immigrants, refugees, and indigenous people based on their customs or customary law."); Andrew M. Kanter, *The* Yenaldlooshi *in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411, 413 (1995) ("At its core, the cultural defense is an argument for tolerance of foreign cultures due to a lack of moral basis for punishment.").

9. Diminished capacity, insanity, battered woman's syndrome, and Child Sexual Abuse Accommodation Syndrome are all examples of evidence of a defendant's background or internal worldview which currently can be used to establish an *element of* a traditional criminal defense (e.g., self-defense). *See* Renteln, *supra* note 1, at 465, 471.

Evidence of a defendant's state of mind can also be used to *create* a criminal defense, based on that particular type of state of mind. *See* DRESSLER, *supra* note 4, §§ 18.06, 25.02, 25.07, 25.08, 26, at 220-21, 314, 327-33, 335-45 (2d ed. 1995) (discussing the debate surrounding the creation of a new special battered woman's defense; explaining the use of insanity as a substantive affirmative defense and the debate around such a defense; and explaining the use of diminished capacity to establish a substantive negative defense or a substantive affirmative defense).

10. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.2, at 10 (2d ed. 1986) (Criminal law is intended to "prevent injury to the health, safety, morals, and welfare of the public.").

11. *See id.* § 1.5, at 23-25. Deterrence is of two types: specific and general. *See id.* Under the theory of specific deterrence, punishment prevents the criminal from committing similar crimes in the future. *See id.* § 1.5, at 23. Under the theory of general deterrence, punishment of a criminal deters others from committing similar crimes out of fear of suffering the same punishment. *See id.* § 1.5, at 24-25.

live in society again.[12] Fourth, the punishment dealt by criminal law is intended as retribution—giving criminals what they deserve.[13] Finally, criminal law educates society as to what constitutes "good" and "bad" conduct.[14]

There are several basic premises upon which criminal law rests.[15] First, based upon the notion of fairness, is the premise that there must be advance warning to the public as to what conduct is criminal and how such conduct will be punished.[16] This premise is sometimes expressed by the maxim "*nullem crimen sine lege, nulla poena sine lege*" (no crime or punishment without law).[17] A second premise is that there cannot be criminal liability for bad thoughts alone.[18] In other words, there must be an *actus reus* or an overt, physical act (or omission where there is a duty to act).[19] A third premise is that the defendant must possess the requisite *mens rea*, or guilty mind.[20] A fourth premise is that the *actus reus* and the *mens rea* must concur.[21] Underlying these four premises is the belief that justice can be attained through a uniform, neutral, and principled application of the law.[22]

Mens rea is the term used to describe the mental element in blameworthy or culpable conduct which leads to criminal liability.[23] The term covers a variety of mental states, all involving some blameworthy element.[24] *Mens rea* means something more than immorality or impure motive; it means a particular kind of intent to commit a crime.[25] The precise definition of *mens rea* has been referred

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12. *See id.* § 1.5, at 24.

13. *See* Renteln, *supra* note 1, at 441-42 (arguing that retribution is "the fundamental justification for punishment," so long as the retribution is proportional). However, according to one criminal law treatise, the retribution theory is currently unpopular with criminal law theorists. *See* LAFAVE & SCOTT, *supra* note 10, § 1.5, at 25-26.

14. *See* LAFAVE & SCOTT, *supra* note 10, § 1.5, at 25. Restraint is an additional theory of criminal punishment. *See id.* § 1.5, at 23-26. Restraint protects the public from future dangerous acts of a convicted individual "by isolating this person from society." *Id.* § 1.5, at 23. However, like retribution, the restraint theory no longer has a strong academic following. *See id.* § 1.5, at 23-24.

15. *See id.* § 1.2, at 8.

16. *See id.*

17. *See id.*

18. *See id.* § 1.3, at 12-15.

19. *See id.* § 1.2, at 8.

20. *See id.* There is a trend in modern criminal law to relax the requirement that there cannot be a crime without a bad state of mind. *See id.* § 1.3, at 12-15.

21. *See id.* § 1.2, at 8. LaFave and Scott list two additional premises, the requirement of causation and the requirement of harm, which are not relevant to our discussion. *See id.*

22. Many legal scholars dispute the ability of the law and legal discourse to be neutral and principled and question the desirability of such objectivity, even assuming its existence. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18 (David Kairys ed., 1982).

23. *See* LAFAVE & SCOTT, *supra* note 10, § 3.4, at 214.

24. *See* LAFAVE & SCOTT, *supra* note 10, § 3.4, at 213. *See generally* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 685-91 (1983).

25. *See* Robinson & Grall, *supra* note 24, at 686; *see also* Renteln, *supra* note 1, at 443; DRESSLER, *supra* note 4, § 10.04, at 106-07.

to as a "baffling problem,"[26] which eludes "any common principle of universal application running alike through all the cases."[27] This is because "*mens rea* does not mean a single precise state of mind which must be proved as a prerequisite for all criminality";[28] rather, a different state of mind may be required for each crime. The United States Supreme Court has stated that

> courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.[29]

The *Model Penal Code* further delineates among mental states by applying different culpability requirements to different material elements of the *same* crime.[30]

In some states, such as California, conviction for certain crimes requires that the defendant possess more than the general blameworthy state required of all crimes. These crimes require that the defendant possess the specific intent to do some particular prohibited act.[31] Typically, assault, attempt, conspiracy, assault with intent to commit a felony, larceny, and robbery are specific intent crimes.[32]

General intent and specific intent are "notoriously difficult terms to define and apply."[33] Often, the same crime requires both specific and general intent. In addition, many crimes require mental states that are not easily categorizable as either "general" or "specific" intent. For example, the California Penal Code

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26. Frances Bowes Sayre, *The Present Signification of* Mens Rea *in the Criminal Law*, *in* HARVARD LEGAL ESSAYS 399, 411 (1934); *see* DRESSLER, *supra* note 4, § 10.02, at 102.

27. Sayre, *supra* note 26, at 404.

28. *Id.* at 402.

29. Morrisette v. United States, 342 U.S. 246, 252 (1952).

30. *See* MODEL PENAL CODE §§ 2.02(1), (2) (1985); *see also* DRESSLER, *supra* note 4, § 10.07, at 120-23. For a discussion of the ambiguities in the MODEL PENAL CODE's culpability terms, see Robinson & Grall, *supra* note 24, at 705-19.

31. For example, the California Supreme Court distinguished general intent crimes from specific intent crimes as follows:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

People v. Hood, 462 P.2d 370, 456 (Cal. 1969) (in bank); *see* CAL. PENAL CODE § 28(a) (West Cum. Supp. 1988).

Many states make this distinction between specific and general intent crimes. *See, e.g.*, COLO. REV. STAT. ANN. § 18-1-501(5) (West Cum. Supp. 1996); LA. REV. STAT. ANN. § 14:10 (West 1986); N.M. STAT. ANN. § 30-3-5 (Repl. Pamp. 1994). However, the MODEL PENAL CODE discards the distinction between "general" and "specific" intent crimes. *See* DRESSLER, *supra* note 4, § 10.07, at 120.

32. *See* B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 101, at 121-22 (2d ed. 1988). *See generally* LAFAVE & SCOTT, *supra* note 10, §§ 3.5(a), (e), at 216-17, 224.

33. People v. Whitfield, 868 P.2d 272, 277-78 (Cal. 1994) (quoting *Hood*, 462 P.2d at 377).

describes "malice" as "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."[34] Although implied malice is not a specific intent crime, evidence of intoxication may negate the requirement that the defendant acted with knowledge of the danger to, and in conscious disregard of, human life.[35] The word "knowingly" as an element of the crime charged requires only a knowledge of the facts without requiring knowledge of the unlawfulness of the act or omission.[36] But where the crime is a codified common-law offense that normally requires only general intent, the addition of the word "knowingly" indicates a legislative intent to require specific intent.[37]

To make matters more complicated, the same *type* of evidence may be excluded in one criminal trial and yet permitted in another. For example, evidence about Child Sexual Abuse Accommodation Syndrome[38] may be admitted in some cases, but excluded in other cases depending upon the facts of the case.[39] The admissibility of evidence varies from case to case, in large part, due to the fact-specific inquiry necessary in criminal cases. Not surprisingly, the confusion concerning the use of cultural evidence, further discussed below in Part IV, stems from the difficulty generally inherent in determining criminal intent and the relevance of certain types of evidence.

B. Traditional Substantive Criminal Defenses

1. Negative Defenses

Substantive criminal defenses can be divided into two categories: negative (e.g., failure of proof) defenses and affirmative (e.g., justification or excuse) defenses.[40] A negative defense is one in which the defendant asserts that the prosecution has not

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34. CAL. PENAL CODE § 7(4) (West 1988).

35. *See Whitfield*, 868 P.2d at 276; *see also* CAL. JURY INSTR. CRIM. 8.11 (West 1988).

36. *See* WITKIN & EPSTEIN, *supra* note 32, § 104, at 124. *See generally* LAFAVE & SCOTT, *supra* note 10, §§ 3.5(a), (b), at 215-20.

37. *See id.*; *see also* Morrisette v. United States, 342 U.S. 246, 254 (1952).

38. "Child Sexual Abuse Accommodation Syndrome is a psychological phenomenon prevalent amongst victims of child sexual abuse," State v. Foret, 628 So.2d 1116, 1124 (La. 1993), and is "a listing of factors . . . 'most characteristic of child sexual abuse.'" *Id.* (quoting Dr. Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, J. CHILD SEXUAL ABUSE 153, 154 (1992)).

39. *See, e.g.*, *Foret*, 628 So.2d 1116; Yount v. State, 872 S.W.2d 706 (Tex. Crim. App. 1993) (en banc); People v. Beckley, 456 N.W.2d 391 (Mich. 1989).

40. Two additional types of substantive criminal defenses, which will not be discussed in this Article, are offense modification and nonexculpatory defenses. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203 (1982); *see also* DRESSLER, *supra* note 4, § 16.03, at 182-84. An offense modification defense exists when "the actor has apparently satisfied all elements of the offense charged, [but] has not caused the harm or evil sought to be prevented by the statute defining the offense." Robinson, *supra*, at 209. Examples of offense modification defenses are renunciation, impossibility, and consent. *See id.* at 242. A nonexculpatory defense admits that the defendant is guilty of the offense he or she is charged with committing (legally culpable), and admits that the defendant deserves to be punished (morally culpable), but argues that for public policy reasons the defendant should not be punished. *See id.* at 229-30. Examples of nonexculpatory defenses are statutes of limitation, double jeopardy, immunity, and entrapment. *See id.* at 243; *see also* Renteln, *supra* note 1, at 446 n.22.

established its case against the defendant and/or that the defendant did not commit the offense he or she has been charged with committing.[41] The negative defense "involves showing that the prosecution has not met its burden of proof."[42] The negative defense is more specifically known as a failure of proof defense. For a person to be convicted of a crime, every element of that crime must be established beyond a reasonable doubt.[43] A failure of proof defense asserts that the prosecution has failed to establish all the elements of the alleged crime and, thus, has failed to establish the *prima facie* case.[44]

Narrowly conceived, a failure of proof—or negative—defense is a complete defense. It establishes that the defendant's conduct did not fall under the definition of the alleged offense.[45] A failure of proof defense may not exculpate the defendant. Such a defense, however, may mitigate the punishment received. Thus, a successful failure of proof defense may negate the defendant's guilt for the crime charged (e.g., first degree murder), but the defendant may still be found guilty of a lesser offense (e.g., voluntary manslaughter) and punished to a lesser extent.[46]

2. Affirmative Defenses

Generally, with affirmative defenses, the defendant argues that he or she should not be found guilty or punished (or punishment should be mitigated), even though the elements of the offense have been established, because the defendant is less culpable or blameworthy for specified reasons.[47] The defendant has the burden of proof in demonstrating an affirmative defense.[48] Affirmative defenses can be complete or partial defenses.[49]

Affirmative defenses can be divided into two broad categories: justification and excuse.[50] Justification defenses recognize that the harm caused is a legally

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41. Dressler argues that the failure of proof defense is not a "true" defense. *See* DRESSLER, *supra* note 4, § 16.03, at 182.

42. Renteln, *supra* note 1, at 447.

43. *See* Robinson, *supra* note 40, at 204; *see also* MODEL PENAL CODE § 1.12(1) (1985).

44. *See* Robinson, *supra* note 40, at 204-05; *see also* Renteln, *supra* note 1, at 447. Although the failure of proof defense is a "negative defense" because the defendant must argue that the prosecution has failed to prove its prima facie case, "[t]he defendant . . . may have to act affirmatively to present evidence on the issue of a given element of the offense" to prove that the prosecution has failed to carry its burden. Robinson, *supra* note 40, at 204; *see* Renteln, *supra* note 1, at 447 & n.25.

> [In] theory a cultural defense could be either an affirmative or negative defense, though in practice the cultural defense has most often functioned as an affirmative defense. The reason for this is probably that the legal system, and society as well, are unfamiliar with the folkways of ethnic minority groups.

Renteln, *supra* note 1, at 447 n.25. As a result, the defense "require[s] the use of expert witnesses to explain the cultural practice in order to demonstrate its relevance and importance to the case." *Id.*

45. *See* Robinson, *supra* note 40, at 206, 213; *see also* Renteln, *supra* note 1, at 446-47, 465-66.

46. *See* Robinson, *supra* note 40, at 206; *see also* Renteln, *supra* note 1, at 466 & n.110, 488-89.

47. *See* Robinson, *supra* note 40, at 220, 221, 229; *see also* Renteln, *supra* note 1, at 447.

48. *See* Renteln, *supra* note 1, at 447. "[F]or example, [when] the insanity defense is raised as an affirmative defense in a case, it is the defense attorney who must produce evidence, usually through expert witnesses, to attest to the existence of the alleged mental condition and thereby establish the appropriateness of the defense." *Id.*

49. *See generally* Renteln, *supra* note 1, at 446.

50. *See supra* note 40 and accompanying text.

recognizable one, but "[u]nder the special justifying circumstances . . . that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest."[51] Furthermore, the defendant's conduct, if justifiable, is "correct behavior" which is tolerated or encouraged by society.[52] Justification defenses are exculpatory, providing complete defenses.[53]

Self-defense is an example of a justification defense.[54] In self-defense, the defendant has caused a legally recognizable harm (death of another) and has satisfied the basic elements of a murder-type offense (intent to kill another accompanied by conduct that does kill). The defendant's action, however, to preserve his or her own life when threatened by the deceased is also conduct that society "encourage[s] or at least tolerate[s]"[55] and thus makes the actor legally blameless for the death his or her conduct has caused.[56]

Excuse defenses are similar to justification defenses in that the elements of the offense charged and the defendant's intent are not in question. Excuse defenses are different from justification defenses in that a greater harm was not averted nor a greater societal interest promoted by the defendant's harmful conduct. The defendant's conduct is excused, however, either completely or partially, because the defendant was not legally responsible for his or her action—his or her conduct was not a product of his or her meaningful free will.[57] Examples of excuse defenses are insanity, intoxication, involuntary actions, and provocation/"heat of passion."[58]

III. CULTURAL EVIDENCE AND THE CULTURAL DEFENSE

Generally, three differing viewpoints surround the cultural defense issue. Proponents of a substantive cultural defense would exculpate a criminal defendant if his or her actions would be legal or excusable in his or her native country.[59] Opponents of a cultural defense would prohibit the use of cultural evidence in

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51. Robinson, *supra* note 40, at 213. For a discussion of other theories underlying the justification defense, see DRESSLER, *supra* note 4, § 17.02, at 186-89.

52. *See* Robinson, *supra* note 40, at 214, 229.

53. *See id.* at 220, 229.

54. *See id.* at 215, 242. For a detailed examination of self-defense, see DRESSLER, *supra* note 4, § 18, at 199-229.

55. *Id.* at 229.

56. *See id.* at 214, 229.

57. *See id.* at 229. "An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him." *Id.* Generally, the other purposes of criminal law (e.g., deterrence and education) are not promoted, either. *See generally* Renteln, *supra* note 1, at 492-95. For a discussion of other theories underlying the excuse defense, see DRESSLER, *supra* note 4, § 17.03, at 189-93.

Robinson differentiates excuse defenses from justification defenses as follows: "Excuses do not destroy blame, as do [failure of proof, offense modification, and justification defenses]; rather, they shift [the blame] from the actor to the excusing conditions. The focus in excuses is on the *actor*[; while the focus in justifications is on the *act*]. Acts are justified; actors are excused." Robinson, *supra* note 40, at 229.

58. *See* Robinson, *supra* note 40, at 221, 222.

59. *See* discussion *infra* Part III.A. The term "country" in this Article is broadly defined to include tribes, communities, regions, territories, and nations.

criminal cases, arguing that such evidence is irrelevant.[60] "Limited use" cultural "defense" advocates would permit cultural evidence to be used, not as a negative or an affirmative defense per se, but to prove the *mens rea* element of traditional affirmative or negative defenses and to prove mitigating circumstances at sentencing.[61]

A. *Substantive/Affirmative Cultural Defense Approach*

Proponents of a substantive cultural defense argue for the adoption of a new formal affirmative defense within the criminal law.[62] A substantive criminal defense would excuse the defendant's otherwise criminal behavior because cultural attributes of the defendant induced the defendant to act as he or she did—the defendant's "actions are part of a legitimate tradition, the defendant relied on that tradition, and the tradition trumps the [criminal law in question]."[63] Although most excuse defenses are exculpatory (complete defenses), they also can act as partial defenses.[64] Thus, a substantive cultural defense could be adopted as either a complete defense[65] or as only a partial excuse defense.[66]

Proponents of a substantive cultural defense argue that recognition of this defense is justified for two reasons.[67] First, a cultural defense would tailor the punishment to fit the defendant's culpability, consistent with the liberal legal notion of individualized justice.[68] Under this theory of punishment, the defendant is not blameworthy, or not *as* blameworthy, as one who commits the same act knowing that it is wrong.[69] Thus, a cultural defense would be used the way insanity or provocation/"heat of passion" defenses are used—to excuse, or partially excuse, criminal behavior[70] because it is unfair to (completely or partially) blame and punish the actor.[71]

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60. *See* discussion *infra* Part III.B.

61. *See* discussion *infra* Part III.C.

62. *See, e.g., Cultural Defense*, *supra* note 1, at 1296.

63. Kanter, *supra* note 8, at 449.

64. *See supra* note 57 and accompanying text; *see also* DRESSLER, *supra* note 4, §§ 18.06, 26.03, at 221, 340-45 (discussing the argument that the battered woman's syndrome should be established as a full or partial excuse defense; explaining the "partial responsibility" approach to the diminished capacity defense).

65. *See Cultural Defense*, *supra* note 1, at 1296.

66. *See* Renteln, *supra* note 1, at 490.

67. *See, e.g., Cultural Defense*, *supra* note 1, at 1296.

68. *See* Renteln, *supra* note 1, at 441, 500-01; *see also Cultural Defense*, *supra* note 1, at 1298-99.

69. Professor Kadish states:

> To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him. It is this feature of our everyday moral practices that lies behind the law's excuses.

Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 264 (1987).

70. *See generally* LAFAVE & SCOTT, *supra* note 10, § 4.1, at 304-08.

71. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW, §10.1, at 759 (1978); *see also* Robinson, *supra* note 40, at 199; Kadish, *supra* note 69, at 257.

Second, recognizing a substantive cultural defense would further the United States' commitment to cultural pluralism.[72] Requiring newcomers (or indigenous people[73]) to conform to the dominant population's values is anomalous in a country whose very existence is premised upon cultural and religious freedom.[74] Recognizing a cultural defense would encourage the preservation of traditional cultures which would add to the richness of United States society.[75]

B. No Cultural Defense Approach

Opponents of a cultural defense use the same twin themes of individualized justice and cultural pluralism to argue *against* permitting a substantive cultural defense.[76] Opponents, applying criminal law's premise that justice requires uniform application of the law, claim that an individualized system of justice requires all individuals to obey society's rules and ensures all individuals equal treatment and equal protection under the law.[77]

Opponents further argue that a substantive cultural defense would be unfair because it would treat immigrants and other culturally motivated defendants preferentially,[78] while failing to protect victims of culturally motivated crimes. Thus, a substantive cultural defense would frustrate the protection goal of criminal law. Excusing criminal behavior on the basis of the accused's cultural background would violate the objective of criminal law to prevent injury to society at large.[79] Each member of society is entitled to protection from every other member for unlawful acts. For the legal system to function properly, each individual has the

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72. *See Cultural Defense*, *supra* note 1, at 1300-02; *see also* Kanter, *supra* note 8, at 422; Renteln, *supra* note 1, at 505. Professor Renteln has also argued that recognizing the cultural defense is "necessary and important" and that a pluralistic society like the United States is "only pretending to accept cultural diversity if it rejects it when it really matters." Don J. DeBenedictis, *Judges Debate Cultural Defense*, 78 A.B.A. J., Dec. 1992, at 28, 28 (quoting Professor Alison D. Renteln). Renteln added that "[r]equiring or expecting assimilation of minorities . . . is 'potentially coercive' . . . [and that a]ccommodation of other worldviews would be better." *Id.* (quoting Professor Alison D. Renteln).

73. *See* Kanter, *supra* note 8, at 413.

74. Many legal commentators argue that a failure to recognize and accommodate cultural differences often results in an identity crisis on the part of the nonmajoritarian group. *See generally* Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 507 (1986); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043, 1068 (1988).

For a discussion of the harm caused to Chicano identities as a result of conflict with Eurocentric civil culture, see Carlos Villarreal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193 (1991).

75. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 28-31 (1985) (arguing that America's "melting pot" tradition allows attainment of equality only through cultural subjugation); *see also Cultural Defense*, *supra* note 1, at 1302 & n.46 (citing CALABRESI, *supra*).

76. *See, e.g.*, Chiu, *supra* note 2, at 1095-1120.

77. One commentator argues that a cultural defense makes a "mockery" of individualized justice because "for far too many individuals the result [of using a cultural defense] does not provide justice." Goldstein, *supra* note 1, at 163.

78. *See* Lyman, *supra* note 2, at 116. *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-1, at 992-93 (1978) (discussing the concept that equality sometimes requires that people in dissimilar situations be treated dissimilarly).

79. *See* Renteln, *supra* note 1, at 503.

responsibility to know and obey the law.[80] Opponents also argue that *because* our society is so diverse, one rule of law is imperative to prevent anarchy and disorder.[81] In other words, it is precisely because we have a culturally pluralistic society that we must reject a substantive cultural defense.[82]

In addition, opponents argue that a substantive cultural defense will undermine criminal law's goals of deterrence and education. Under the deterrence theory, punishing the criminal for the crime that he or she committed deters others from committing similar crimes in the future.[83] Opponents explain that penalizing culturally motivated defendants will force them to alter traditions that conflict with United States laws and thereby accelerate the assimilation process.[84] Furthermore, because many cultures condone the subordination of women, many commentators argue that a substantive cultural defense will undermine the progress women have made in this country by failing to educate people that gender oppression should not be tolerated.[85]

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80. *See* Julia P. Sams, Comment, *The Availability of a "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GEORGIA J. INT'L & COMP. L. 335 (1986).

81. Deputy District Attorney Lauren L. Weis, the prosecutor in the California *People v. Kimura* case, reasoned that "[y]ou're treading on such shaky ground when you decide something based on a cultural thing because our society is made up of so many different cultures. It is very hard to draw the line somewhere, but they are living in our country and people have to abide by our laws or else you have anarchy." Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, *available in* LEXIS/NEXIS, Genfed Library, NTLAWJ File (quoting Deputy District Attorney Lauren L. Weis).

82. This view is reflected in the statement expressed by Elizabeth Holtzman, the district attorney in the New York *People v. Chen* case, who stated that "[t]here should be one standard of justice, not one that depends on the cultural background of the defendant." Marianne Yen, *Refusal to Jail Immigrant Who Killed Wife Stirs Outrage*, WASH. POST, Apr. 10, 1989, at A3, *available in* WESTLAW, Allnews database, 1989 WL 2062004, at *5 (quoting Brooklyn District Attorney Elizabeth Holtzman); *see also*, Sams, *supra* note 80, at 335. Sams argues that if the cultural defense is accepted by American courts, the following four problems will arise: (1) difficulties in defining which groups of defendants may assert the defense; (2) maintaining the deterrent effect of the criminal law on these groups; (3) maintaining fairness to the majority of Americans who cannot use the defense; and (4) upholding the principle of legality. *See id.* at 345. An additional problem is maintaining fairness to the would-be victims of culturally motivated defendants. *See* Renteln, *supra* note 1, at 503; *see also* Goldstein, *supra* note 1, at 163.

83. *See* LAFAVE & SCOTT, *supra* note 10, § 1.5, at 24-25.

84. *See* Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 779 (1987); Lyman, *supra* note 2, at 87; Sams, *supra* note 80, at 335. *But see* Renteln, *supra* note 1, at 494 (arguing that in many cases general deterrence will not be affected by a cultural defense).

85. *See* Goldstein, *supra* note 1, at 144. *See generally* Gallin, *supra* note 3; Cathy Young, *Equal Cultures—or Equality?: There's a Choice to Make Between Feminism and Multiculturalism*, WASH. POST, Mar. 29, 1992, at C5, *available in* WESTLAW, Allnews database, 1992 WL 2196303; Jenny Rivera, *Domestic Violence Against Latinas By Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994). Rivera explains that

> even if violent actions against women are inherent to a particular culture in certain situations, such conduct or norms are often based on patriarchal structures. Legitimizing violent actions as cultural norms only reinforces the patriarchy, and would only lead to further abuse of women. The actions must also be rejected because they run counter to a legal system allegedly founded on the equality of all individuals.

Rivera, *supra*, at 251.

Judge Margaret Taylor of New York has said: "I'm to the point [that] I'm pretty fed up with excusing men's violence . . . . I no longer think it should be excused on a cultural basis." DeBenedictis, *supra* note 72, at 28 (quoting New York Judge Margaret Taylor).

Recent cases involving a cultural defense underscore its potential impact upon the criminal law's deterrence and education goals. In Los Angeles, for example, the disallowance of a cultural defense to domestic abuse charges in the prosecution of several Vietnamese men for battery informed other members of the Vietnamese community that this practice, even if permissible in Vietnam, would not be tolerated in the United States.[86] In stark contrast, after the *People v. Chen*[87] decision, in which cultural evidence was allowed to defend and excuse the defendant's killing of his adulterous wife, many battered women in the Asian community expressed fear that the legal system would fail to protect them from their husbands.[88] As a result, Asian women were reluctant to report battering incidents.[89] Barbara Chang, co-director of the New York Asian Women's Center, stated that although it has always been difficult to convince Asian immigrant women to endure the confusing and frustrating process involved with obtaining protective court orders, after *Chen*, many Asian women believe the effort is no longer worth it.[90]

Opponents of a substantive cultural defense also assert that the defense is inherently problematic. First, permitting a cultural defense to *excuse* the defendant's behavior would, in some cases, characterize the defendant's actions as a manifestation of a mental defect. Excuse defenses are generally based on the theory that the defendant is not blameworthy, or as blameworthy, because the defendant had "a *disability* causing an *excusing condition*. The *disability* is the abnormal condition of the actor at the time of the offense. We say, for example, that the actor is suffering from insanity, intoxication, subnormality, or immaturity."[91] Thus, a substantive cultural defense would attach a negative value to the cultural practice rather than a positive or "neutral" value. The cultural practice would be characterized as "strange" and the defendant's adherence to it labeled a "disability,"

One commentator states that because immigrants may be accustomed to laws that allow men to kill their wives, there is a real risk that widespread acceptance of a cultural defense would have disastrous consequences for immigrant women. *See* Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 626-27 (1991).

86. Michael R. Yamaki, a criminal defense lawyer, stated: "I had a whole stream of Vietnamese men accused of wife beating . . . . They would look incredulously at the police and say, 'This is my wife,' like a wife was property almost. They would look at me and say, 'What is the problem here? How can they put me in jail for this?'" Oliver, *supra* note 3, at A1, 1988 WL 2235300, at *16 (quoting Michael R. Yamaki). Yamaki added that "[a]s they start going to court and start getting carted off to jail for things like wife beating, it gets the word out . . . . Some of these guys get the brunt of being educated for the benefit of the whole community." *Id.* at A1, 1988 WL 2235300, at *17 (quoting Michael R. Yamaki).

87. No. 87-7774 (N.Y. Super. Ct., Mar. 21, 1989) (unpublished decision) (cited in Goldstein, *supra* note 1, at 151); *see* discussion *infra* Part IV.B.

88. *See* Goldstein, *supra* note 1, at 162.

89. *See* Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown*, NEWSDAY, Nov. 26, 1989, at 4, *available in* WESTLAW, Allnews database, 1989 WL 3472702, at *4.

A battered Chinese woman at the New York Asian Women's Center confessed that "[e]ven thinking about [the *Chen*] case makes me afraid . . . . My husband has told me: 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.'" *Id.* at 4, 1989 WL 3472702, at *1-*2. Another battered Chinese woman said: "You can't help but think there is nowhere to go for help," reasoning that if a man only gets five years' probation for killing his wife, "what if you only get hit or beaten? If everyone thinks like this judge, you can't get any protection." *Id.* at 4, 1989 WL 3472702, at *4.

90. *See id.*

91. Robinson, *supra* note 40, at 221.

thereby undermining the goal of cultural pluralism and forcing the homogenization of United States society.

Opponents further argue that a cultural defense is a double-edged sword that can be used to promote racism and perpetuate stereotypes.[92] Under this theory, a prosecutor could introduce evidence about a defendant's cultural background to prove that the defendant was more likely to have committed a crime because of his or her cultural background.[93] This misuse of cultural evidence dangerously panders to the racist beliefs that jurors may hold. The effects are even more detrimental when false or anachronistic stereotypes are promoted.[94]

Finally, opponents argue that the cultural defense should not be permitted because the grave potential for overbroad application makes it impractical.[95] A cultural defense may be inappropriately used for two reasons. First, any nondominant ethnic,

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92. Professor Denno has cautioned against the use of gender differences for the same reason. *See* Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 85-86 (1994). "[G]ender-stereotyping can result in personal stigmatization, or harm men or women as a group. If poorly used, it can ease conviction . . . . [G]ender differences . . . should not justify either mitigations in punishment or the underlying rationales for criminal law defenses, unless the defenses are appropriately factually-based." *Id.* at 85-86 (footnotes omitted).

One commentator has argued that the "real danger" with the cultural defense debate lies in the "reproduction and perpetuation of stereotypes about Asian Americans . . . ." Chiu, *supra* note 2, at 1103; *see* Polman, *supra* note 2, at A1, 1989 WL 2933827, at *4 ("You don't want to import those cultural values [that harm women] into our judicial system . . . . We don't want women victimized by backward customs." (quoting Margaret Fung, Director of the Asian American Legal Defense and Education Fund)).

93. For example, in *State v. Boulabeiz*, 634 N.E.2d 700 (Ohio 1994), the defendant was accused of hitting two women with his automobile because the women were fighting in the street. *See id.* The prosecutor questioned a defense witness about the culture and beliefs of people living in Morocco, the defendant's native country; the number of brothers and sisters in the defendant's family; whether the defendant's sisters travelled; whether women living in Morocco had the right to vote or own property; and the consequences a Moroccan woman might face if she fought in the street. *See id.* at 702. In his closing argument, the prosecutor stated: "Why would anybody do this [hit two women with his car]? And that was the only reason for asking questions about the cultural mind-set that exists in another part of the world in terms of attitude [sic] towards women, and I think that could be part of this. I don't know." *Id.* (quoting the prosecutor). The defendant was convicted of felonious assault. *See id.* at 701. Unfortunately, on appeal, the Ohio Court of Appeals held that the prosecutor's questions and his remarks during closing argument concerning Moroccan culture did *not* prejudice the defendant. *See id.* at 703.

94. For example, in *People v. Criscione*, 177 Cal. Rptr. 899 (1981), the defendant was accused of murdering his girlfriend. *See id.* On cross-examination of the defendant's brother, the prosecutor asked: "[A previous witness] described your family as a typical Italian family. Does that mean the father is an ogre and the mother is a dominant overbearing person?" *Id.* at 904 (quoting the prosecutor). The prosecutor then asked a series of questions intended to establish that the defendant's violent attitude and conduct toward the victim, and women in general, were not symptomatic of mental diseases, but a "normal response" of a man raised in a traditional Italian culture. *See id.* The defendant was convicted of second-degree murder. *See id.* at 899. On appeal, the California Court of Appeals held that what was most invidious about the prosecutor's tactics was not the appeal to ethnic prejudice, but the "palpably false nature of the information argued, which can only have been intended to divert the jury from a rational consideration of the grave question of appellant's sanity." *Id.* at 906. The California Court of Appeals reversed and remanded the jury's finding that the defendant was sane at the time of the killing. *See id.* at 909.

95. *See* Goldstein, *supra* note 1, at 158. For example, Professor Herman states that "[t]he problem with recognizing a cultural defense as an excuse is that the slope of determinism is indeed a slippery one . . . . To understand all is to forgive all. But if we forgive all, we have no criminal law left." Susan N. Herman, *New York Forum About Crime: Should Culture Be a Defense?*, NEWSDAY, Apr. 20, 1989, at 80, *available in* WESTLAW, Allnews database, 1989 WL 3373080, at *5.

racial, or cultural group member could argue that he or she should be permitted to use a cultural defense.[96] Underlying this "slippery slope" argument is the belief that the legal system is incapable of drawing lines between categories of individuals who should or should not be permitted to use the cultural defense[97]—should it be limited to immigrants or available to all non-dominant cultural groups?[98] If limited

96. *See* Goldstein, *supra* note 1, at 159-60. Cultural defenses may be attempted by "any minority who has suffered an inhibiting 'experience' in America. For example, defendants may present evidence on the 'African American experience,' or the 'Japanese American experience,' or the 'Hispanic experience' in America." *Id.* As a result, Goldstein argues that a "formalized cultural defense encompasses too broad a defendant group to have any practical application." *Id.*

Attempts have been made to use a "cultural defense" in cases involving American-born defendants. For example, in *People v. Rhines*, 182 Cal. Rptr. 478 (Ct. App. 1982), in response to a rape charge, the black defendant offered cultural evidence of the "cultural difference[s]" in the social practices of blacks and whites as (1) a substantive cultural defense and (2) as cultural evidence to prove the element of voluntary consent of the black victim for a substantive failure of proof defense. *See id.* at 480, 483. The *Rhines* court, however, rejected the defendant's proffered expert testimony on the grounds that such testimony was irrelevant, sexist, and racist. *See id.* at 483-84. For a critique of the proffered "cultural defense" in *People v. Rhines*, see Kimberlé Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 402, 422-24 (Toni Morrison ed., 1992).

Native American defendants have asserted a cultural defense in at least two cases. In *State v. Butler*, No. C-85-05-32135 (Or. Cir. Ct., Sept. 1985) (unpublished decision), two Native Americans killed a systematic, white gravedigger. The defendants argued that their action was comparable to self-defense, *see* Renteln, *supra* note 1, at 453, and that "desecration of [their tribe's] burial grounds by the victim constituted provocation into a culturally recognized act of war," Kanter, *supra* note 8, at 437 n.134. Although the judge did not allow the case to focus on cultural conflicts, he did allow testimony on the tribe's "religious beliefs concerning sacred burial grounds and the significance of their desecration." Renteln, *supra* note 1, at 453; *see* Kanter, *supra* note 8, at 435 n.122. In *People v. Croy*, 710 P.2d 392 (Cal. 1985), the defendant was accused of murdering a police officer after fleeing a liquor store and being chased by twenty-seven police officers. The defendant lived in an area of California "where there had been longstanding conflict between the Anglo and Native American populations." Renteln, *supra* note 1, at 454. At trial, the defense attorney "presented a cultural defense in the context of self-defense," arguing that the defendant feared Anglos and white authorities because of discrimination the defendant had suffered and because of the historical persecution of Native Americans by Anglos and the United States government. *See* Renteln, *supra* note 1, at 454-56; *see also* Kanter, *supra* note 8, at 435 n.122.

Renteln notes that *Croy* is not truly a cultural defense case because "the case did not deal with any cultural conflict as much as it dealt with race relations. Native Americans do not believe that homicide is justifiable; the conflict was not about divergent perceptions of reality as in other cultural defense cases." Renteln, *supra* note 1, at 455.

97. Indeed, it has been stated that "[t]here is realistically no way to limit [the use of cultural defenses], nor would it be fair to do so." Renteln, *supra* note 1, at 497. However, Renteln does argue that the use of cultural defenses can be limited by requiring that the custom in question be authentic and by requiring that only customs that evidence a radically different worldview from dominant cultural customs be permitted to support a cultural defense. *See id.*; *see also supra* note 96.

98. For a discussion and advocation of a formal Native American cultural defense, see generally Kanter, *supra* note 8.

Renteln argues that the use of a cultural defense should be limited to "bona fide ethnic minority groups" and should not be permitted to be used by sub-culture group members, such as gang members or the extremely wealthy. *See* Renteln, *supra* note 1, at 497-98. Renteln explains that "the sub-culture defense has more to do with class differences than cultural differences" and that the worldview of subcultures "is not radically different from the rest of society." *Id.* at 497. "For example, gang members do not believe in witchcraft, coining, or other customs integral to a markedly different conceptual system." *Id.*

to immigrants, should it be limited to newly-arrived immigrants? How "newly-arrived" is newly-arrived? Five years? Ten years?[99]

Second, the cultural defense may be applied in an overbroad fashion because culture is a difficult concept to identify and define.[100] Culture is amorphous. It is not static over time and it may be defined differently by different members of the same social group.[101] Therefore, the existence and prevalence of any given cultural practice is prone to varying interpretations.[102]

C. *The "Limited Use" Approach*

Advocates of the "limited use" approach would permit cultural evidence to be used to determine the existence and/or degree of the requisite *mens rea* for the crime.[103] Advocates would also allow cultural evidence in the sentencing stage[104] to determine the existence of mitigating factors.[105] This approach uses cultural evidence in much the same way that evidence on the battered woman syndrome is used in cases where battered women kill their batterers. Expert testimony on the battered woman's syndrome assesses the reasonableness of the defendant's actions from the point of view of a reasonable battered woman and not a hypothetical reasonable person. The evidence of past abuse does not justify or excuse the use of deadly force,[106] but aids in determining the defendant's state of

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99. *See* Goldstein, *supra* note 1, at 160 ("Without an enunciated standard, courts will be without direction and uncertain as to the application of the defense."); *see also* Chiu, *supra* note 2, at 1101-02. Chiu argues that "[d]efining the parameters of a group who could raise the defense would require crafting a rule that would take into account the innumerable permutations of race, ethnicity, language, education, religion, culture, gender, length of residence in the United States, and age. Use of these factors to measure behavioral assimilation would be a difficult and subjective task at best." *Id.*

One commentator has argued that the cultural defense should be limited to the first ten years an immigrant is in this country. *See* DeBenedictis, *supra* note 72, at 29 (quoting a statement by Judge Joan Dempsey Klein, California Court of Appeals).

100. *See* Chiu, *supra* note 2, at 1101; 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, 49, 52 (1995); Renteln, *supra* note 1, at 498.

101. *See* Rivera, *supra* note 85, at 251 (Identifying a particular norm or set of norms as culturally inherent is "problematic, because defining and identifying culture, or specific aspects of culture, is difficult.").

102. The difficulty of pin-pointing a cultural belief because of the nonstatic nature of culture is exemplified by *People v. Chen*, No. 87-7774 (N.Y. Super. Ct., Mar. 21, 1989) (unpublished decision). In *Chen*, the expert witness testified to Chinese beliefs which are no longer held, or as strongly held. *See infra* notes 193-200 and accompanying text.

103. *See generally* Maguigan, *supra* note 100.

104. *See* Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 360 (1994) (A judge should consider the defendant's race as a mitigating factor during sentencing where "cultural uniqueness peculiar to the offender's race exists and is causally related to the crime.").

Renteln argues that cultural considerations should be allowed at *both* the trial and sentencing stages, and that to distinguish between the two stages, or to admit cultural evidence only at sentencing, is misguided and would be unjust. *See* Renteln, *supra* note 1, at 491-92.

105. *See generally* Chiu, *supra* note 2.

106. For a discussion of justification and excuse defenses, see *supra* Part II.B.2.

mind.[107] The battered woman's syndrome is asserted, not to prove that the defendant was a battered woman, but to prove that she reasonably perceived her life to be in imminent danger when she killed her batterer.[108] Similarly, the limited use cultural "defense" would be incorporated into existing law as evidence of the accused's state of mind, where the defendant's state of mind is relevant to the offense, and not to excuse his or her actions.

This Article supports a limited use cultural "defense." While the arguments for and against a cultural defense are persuasive, neither position is convincing because both fail to consider criminal law's broad aim: to prevent harm to society.[109] The limited use approach, on the other hand, is consistent with criminal law's objectives, as discussed in Part II.A.

The problem with the limited use approach is not in its conceptualization, but in its application. Many courts claim to use cultural evidence in determining the defendant's state of mind when they are actually using cultural evidence to excuse the defendant's behavior. Even worse, under the guise of this approach, some judges are reinforcing harmful stereotypes and encouraging oppressive practices against subordinated groups, such as women.[110] Objections to the cultural defense are based upon widely-publicized cases in which cultural evidence was misused. Misuse of the cultural defense should not be used to justify a prohibition of the cultural defense. Such misuse, however, does emphasize the necessity of providing guidelines to assist the judiciary in determining whether to admit cultural evidence. Part V proposes a conceptual framework which permits the limited use of cultural evidence, yet safeguards against both the perpetuation of racist stereotypes and the reinforcement of societal forms of oppression. The framework is intended to minimize judicial misuse of cultural evidence while upholding the goals of the United States criminal justice system.

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107. *See, e.g.*, People v. Humphrey, 56 Cal. Rptr. 2d 142 (1996) (Evidence on the battered woman's syndrome is admissible in California to prove the honest belief requirement of self-defense and the reasonableness of that belief.).

108. *See generally* Annie E. Thar, Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U. L. REV. 348 (1982); *see also* Roberta K. Thyfault, *Self Defense: Battered Woman Syndrome on Trial (1984), in* SARA LEE JOHANN & FRANK OSANKA, REPRESENTING . . . BATTERED WOMEN WHO KILL 30 (1989); DRESSLER, *supra* note 4, § 18.06, at 215-21. For a critical view of both the battered woman syndrome defense and of the feminist critique of the defense, see generally Anne M. Coughlin, *Excusing Women*, 82 CA. L. REV. 1 (1994).

109. *See* LAFAVE & SCOTT, *supra* note 10, § 1.2, at 10. Renteln's support of an affirmative, partial excuse cultural defense is based, at least partially, in her belief that "the fundamental justification for punishment is retribution." *See* Renteln, *supra* note 1, at 442. The rationale for Renteln's argument for a partial excuse cultural defense is that an individual should be punished—but only to the degree he or she deserves—and that the law must explicitly acknowledge that although a defendant may be legally culpable, he or she may not be (as) morally culpable because of the cultural motive underlying his or her conduct. *See id.* at 445. However, this Article's advocation of a limited use approach of cultural evidence is based on the premise that the protection of society is, or should be, the preeminent justification for punishment, not retribution.

110. *See, e.g.*, People v. Chen, No. 87-7774 (N.Y. Super. Ct., Mar. 21, 1989) (unpublished decision) (cited in Goldstein, *supra* note 1, at 151).

IV. MISAPPLICATION OF CULTURAL EVIDENCE

This section discusses how cultural evidence was applied in two highly-publicized cases, *People v. Kimura* and *People v. Chen*. These two cases were selected because they illustrate how a purported "limited use" of cultural evidence became a substantive criminal defense.

A. People v. Kimura

In *People v. Kimura*,[111] the defendant attempted to drown herself and her children in the ocean after learning of her husband's adulterous affair.[112] Cultural evidence was implicitly used to demonstrate that the defendant was adhering to the accepted Japanese tradition of *oya-ko shinju*, or parent-child suicide.[113]

In California, where Kimura was charged, murder is defined as "the unlawful killing of a human being . . . with malice aforethought."[114] Malice can be express or implied. It is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."[115] It is implied when "no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[116] Voluntary manslaughter under California law is defined as "the unlawful killing of a human being without malice"[117] and "upon a sudden quarrel or heat of passion."[118]

The defense presented evidence to the judge and the prosecutor that mother-child suicide is understood within the Japanese culture, even if it is not promoted.[119] The judge received a petition signed by 25,000 members of the Japanese-American community which stated that in Japan, Kimura would be charged at most with involuntary manslaughter "resulting in a light, suspended sentence, probation, and supervised rehabilitation."[120] In addition, Japanese culture accepts suicide as an honorable way of dying.[121] Kimura, after learning of her husband's adulterous affair, chose to die rather than live in shame and humiliation.[122] A mother who

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111. No. A-091133 (Los Angeles Super. Ct., Nov. 21, 1985) (unpublished decision). For a discussion of this unpublished case, see Goldstein, *supra* note 1, at 147; Renteln, *supra* note 1, at 462, 463-64.

112. *See* Goldstein, *supra* note 1, at 147.

113. *See generally* Chiu, *supra* note 2, at 1117.

114. CAL. PENAL CODE § 187 (West Cum. Supp. 1997).

115. *Id.* § 188 (West 1988).

116. *Id.*

117. CAL. PENAL CODE § 192 (West Cum. Supp. 1997); *see* CAL. JURY INSTR. CRIM. 8.40 (West Supp. 1990).

118. CAL. PENAL CODE § 192 (West Cum. Supp. 1997).

119. *See* Sherman, *supra* note 81; *see also* Robert W. Stewart, *Probation Given to Mother in Drowning of Her Two Children*, L.A. TIMES, Nov. 22, 1985, at B7, *available in* WESTLAW, LAT database, 1985 WL 2013333, at *6; Renteln, *supra* note 1, at 463 & nn. 91-92.

120. *See* Sherman, *supra* note 81 (quoting a petition signed by 4,000 members of the Japanese community in Los Angeles); *see also* Renteln, *supra* note 1, at 463.

121. *See* Choi, *supra* note 1, at 83. *But see* Chiu, *supra* note 2, at 1117 n.392 ("Although understandable within Japanese culture, suicide is still shameful because it represents failure." (citing Deborah Woo, The People v. Fumiko Kimura: *But Which People?*, 17 INT'L. J. SOC. LAW. 403, 413 (1989))).

122. *See id.*; *see also* Paul Feldman, *Mother Pleads No Contest in Drowning of 2 Children*, L.A. TIMES, Oct. 19, 1985, at B1, *available in* WESTLAW, LAT database, 1985 WL 2025039, at *2.

commits suicide and leaves her child is regarded in Japan as a cruel and terrible person.[123] Rather than leave her children to face a life of humiliation and disgrace, Kimura chose to include them in her suicide.

Kimura initially was charged with two counts of murder and two counts of felony child endangerment.[124] The prosecution, allowing Kimura's plea of voluntary manslaughter,[125] denied that cultural factors influenced the plea bargain.[126] The facts of the case, however, belie the prosecution's claim that cultural evidence was not used to establish that Kimura's mental state at the moment of the crime was not that "which was required for murder charges."[127] The prosecution's determination that Kimura did not have the requisite *mens rea* for murder is otherwise illogical. Without an understanding of Kimura's cultural background there is no evidence that her actions were the result of "heat of passion." Kimura took a bus from her home in Tarzana, California to Santa Monica, a trip which took approximately two hours. She left the stroller at the bus stop, presumedly because she knew she would no longer need it. Kimura clearly intended to kill her children, as well as herself. Her actions, taken without the cultural context, indicated deliberation and premeditation, and thus would have satisfied the requisite *mens rea* for murder. Therefore, despite the prosecution's denial of doing so, cultural evidence *was* used, even though it was not *formally* admitted into court.

The cultural evidence was used to establish that Kimura, in adhering to the well-documented,[128] traditional Japanese practice of *oya-ko shinju*, was "temporarily insane."[129] The prosecution stated that Kimura "was not a rational person at the time . . . and to punish somebody like this woman by sending her to state prison, I don't think society would benefit from it."[130] Although culture was not the sole basis upon which the plea agreement was reached, it was a significant factor. Cultural evidence gave both the judge and the prosecutor a better understanding of Kimura's world and provided a context for her actions.[131] The spokesperson for the prosecution stated that "[b]ased on the unusual facts of this case, a significant quantity of psychiatric evidence indicates that Kimura's state of mind at the time of the crime was less than that required for a murder conviction."[132] These "unusual facts" would not have been established if cultural evidence had not been implicitly

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123. *See* Kawanishi, *supra* note 1, at 40; Choi, *supra* note 1, at 82.

124. *See* Alison Matsumoto, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the* Kimura *Case*, 4 J. INT'L L. & PRAC. 507, 523 (1995).

125. *See Kimura*, REUTERS, LTD., Oct. 19, 1985, *available in* LEXIS/NEXIS, News Library, Reuna File [hereinafter REUTERS].

126. *See id.* The defense also denied that cultural factors influenced the result. *See* Stewart, *supra* note 119, at B7, 1985 WL 2013333, at *7.

127. Feldman, *supra* note 122, at B1, 1985 WL 2025039, at *3.

128. *See supra* notes 119-121 and accompanying text.

129. *See generally*, Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. IS. L.J. 49, 61 (1993).

130. Stewart, *supra* note 119, 1985 WL 2013333, at *7 (quoting Deputy District Attorney Lauren L. Weis).

131. *See generally* Matsumoto, *supra* note 124, at 526 ("Thus, even though culture was not [expressly acknowledged] as a mitigating factor in the determination of Mrs. Kimura's criminal liability, the sentencing judge, consciously or unconsciously, seemed to take this into account in accepting Mrs. Kimura's diminished capacity at the time she committed her crime.").

132. REUTERS, *supra* note 125 (quoting prosecution spokesman Al Albergate).

allowed in the courtroom. As Gerald Klausner, Kimura's defense attorney, stated, her behavior was "psychological in origin, but cultural in direction. Culture shaped or directed her actions."[133]

The prosecution's purported "nonuse" of cultural evidence was a *misuse* of cultural evidence. The cultural evidence was not, in fact, used to show that cultural beliefs shaped Kimura's state of mind, but to prove that Kimura was mentally unstable at the time of the offense. Kimura was not excused from her actions because *oya-ko shinju* would have been excused in her home country; she was excused because her adherence to *oya-ko shinju* was used to prove that she was temporarily insane.[134] Her temporary insanity, in turn, was the basis for her substantive cognitive insanity defense[135] and *excused* her actions.

B. People v. Chen

In *People v. Chen*,[136] the defendant was accused of murdering his wife by hitting her in the head eight times with a claw hammer after learning that she was having an affair. The defense argued that Chen's cultural background resulted in his "diminished capacity" to form the intent necessary for premeditated murder.[137] Under New York law, a person is guilty of second degree murder when, "[w]ith intent to cause the death of another person, he [or she] causes the death of such person or of a third person,"[138] or he or she "recklessly engages in conduct which creates a grave risk of death to another person"[139] and causes such death under circumstances that evince a "depraved indifference" to human life.[140] A person is guilty of first degree manslaughter when, "[w]ith intent to cause serious physical

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133. Sherman, *supra* note 81 (quoting defense attorney Gerald L. Klausner).

134. *See* Lam, *supra* note 129, at 61.

135. *See* Renteln, *supra* note 1, at 462 & n.89, 463.

136. No. 87-7774 (N.Y. Super. Ct., Mar. 21, 1989) (unpublished decision). For a discussion of this unpublished case, see Goldstein, *supra* note 1, at 151; Renteln, *supra* note 1, at 439, 480-81.

137. *See* Goldstein, *supra* note 1, at 152. "The term 'diminished capacity' is used and misused to describe two different concepts . . . . First, there is a *mens rea* form of diminished capacity." DRESSLER, *supra* note 4, § 26.01, at 335. This form acts as a failure of proof negative defense. *See id.* "As such, it ought to be, but is not, recognized as a potential basis for exculpation for any crime." *Id.* "Partial responsibility" is the second form of diminished capacity, and functions as a partial affirmative defense. *See id.* "Recognized now in only a few states, and only for the crime of murder, this defense mitigates a criminal homicide to manslaughter." *Id.* It appears that the "diminished capacity" defense argued in *Chen* was a *mens rea* failure of proof negative defense. For further discussion of the two types of diminished capacity defenses, see *id.* § 26, at 335-45; Renteln, *supra* note 1, at 465-71.

It should be noted that diminished capacity and provocation/"heat of passion" defenses are very different defenses. Not only is the diminished capacity defense usually a negative defense and provocation an affirmative defense, but, while provocation can include "any 'violent, intense, high-wrought or enthusiastic emotion,' . . . including fear, jealousy, and 'wild desperation,'" DRESSLER, *supra* note 4, § 31.07, at 490 (citations omitted), provocation also requires that the actor be an "ordinary person" with an "average disposition . . . and [a] normal mental capacity." *Id.* at 493. A defendant seeking to show that he or she "had *abnormal* human frailties . . . might support a diminished capacity claim, [but such claim would be] out of place in a provocation defense." *Id.* at 494 (citation omitted).

138. N.Y. PENAL LAW § 125.25(1) (McKinney 1987). First degree murder applies only to specified situations not relevant to the *Chen* case. *See id.* § 125.27 (McKinney Cum. Supp. 1997).

139. *Id.* § 125.25(2).

140. *See id.*

injury to another person, he [or she] causes the death of such person or of a third person"[141] or, "[w]ith intent to cause the death of another person, he [or she] causes the death of such person or of a third person under circumstances which do not constitute murder because he [or she] acts under the influence of extreme emotional disturbance."[142] "The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree . . . ."[143] A person commits second degree manslaughter when he or she "recklessly causes the death of another person."[144]

Chen was originally charged with second degree murder.[145] The judge, however, found him guilty of the lesser charge of second degree manslaughter after hearing testimony that Chinese culture condemned adultery.[146] The second degree manslaughter charge signifies that Chen did not intend to kill his wife, but acted "recklessly" thereby causing her death.[147] The facts—hitting his wife eight times in the head with a claw hammer[148]—demonstrate that Chen intended to kill his wife, or, at the very least, that he intended to cause his wife "serious physical injury" (the requisite intent for first degree manslaughter[149]). Nevertheless, the judge sentenced Chen to five years probation on the second degree manslaughter charge after hearing testimony that, in traditional Chinese culture, a wife's adultery is proof that her husband has a weak character.[150] The defense lawyer argued that "[m]arriage is a sacred institution in China . . . . When there is this kind of [adulterous] situation, the attendant shame and humiliation is magnified a thousandfold."[151] Chen's lawyer further claimed that "the basis for the defense was not that it's acceptable to kill your wife in China. The basis of the defense is the emotional strain based on cultural differences and the state of the defendant's mind."[152] The defense attorney explained that cultural pressures provoked Chen into an extreme mental state of "diminished capacity," leaving him without the ability to form the intent necessary for more serious charges of premeditated murder.[153]

The judge found that Chen was "driven to violence by traditional Chinese values about adultery and loss of manhood."[154] In ordering probation, the judge cited the

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141. *Id.* § 125.20(1).
142. *Id.* § 125.20(2).
143. *Id.*
144. *Id.* § 125.15(1).
145. *See* Choi, *supra* note 1, at 85.
146. *See* Celestine Bohlen, *Holtzman May Appeal Probation for Immigrant in Wife's Slaying*, N.Y. TIMES, Apr. 5, 1989, at B3, *available in* LEXIS/NEXIS, News Library, NYT File.
147. *See generally* N.Y. PENAL LAW § 125.15(1) (McKinney 1987).
148. *See* Chiu, *supra* note 2, at 1053.
149. *See supra* note 141 and accompanying text.
150. *See* Chiu, *supra* note 2, at 1053, 1114.
151. Leslie Gevirtz, *Immigrant Gets Probation for Killing Wife*, U.P.I., Mar. 31, 1989, *available in* LEXIS/NEXIS, News Library, UPI File (quoting defense attorney Stewart Orden).
152. *Id.* (quoting defense attorney Stewart Orden).
153. *See* Goldstein, *supra* note 1, at 152 (quoting defense attorney Stewart Orden); *see also supra* note 137.
154. Goldstein, *supra* note 1, at 152 (quoting Jetter, *supra* note 89, at 4).

"cultural aspects, the effect of his wife's behavior on someone who is essentially born in China, raised in China, and took all his Chinese culture with him to the United States."[155] The court further stated that Chen's cultural background was "something that made him crack more easily. That was the factor, the cracking factor."[156]

Both the *Chen* and *Kimura* cases illustrate a misuse of cultural evidence. In both cases, cultural evidence should have been used to establish the lack of *mens rea* required for the crime charged. In *Kimura*, however, the evidence, although not formally admitted, was used to establish temporary insanity and thereby excuse the defendant's actions.[157] Cultural evidence was not used to negate the requisite *mens rea* for the offense charged or to establish "heat of passion"; instead, it was used to establish mental illness.

Similarly, cultural evidence in *Chen* was used, not to show that the defendant was more enraged due to cultural influences than an "Americanized" individual, but to excuse his actions.[158] There was no evidence to support a finding of "recklessness." Consequently, a proper use of cultural evidence would only have mitigated Chen's crime to manslaughter in the first degree.

V. A FRAMEWORK FOR ANALYSIS OF ADMISSIBILITY OF CULTURAL EVIDENCE

Generally, the trial judge makes the threshold determination whether to permit expert testimony,[159] and has broad discretion regarding its admissibility.[160] Accordingly, it is the judge who determines the admissibility of cultural evidence, either to negate or mitigate the *mens rea* element of the crime charged. The judge may also evaluate cultural evidence during the sentencing phase of the trial to determine the existence of mitigating circumstances.[161] In addition, both the court and the prosecutor may consider cultural evidence in the plea bargaining phase to permit the defendant to plead guilty to a lesser offense.[162]

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155. Gevirtz, *supra* note 151 (quoting Judge Edward Pincus).

156. Bohlen, *supra* note 146, at B3.

157. *See supra* notes 134-135 and accompanying text.

158. *See* Chiu, *supra* note 2, at 1101.

159. Many states have statutes that provide for an evidentiary hearing out of the presence of the jury. *See, e.g.*, N.M. R. EVID. 11-104(A); OHIO R. EVID. 104(A). In California, section 402 of the Evidence Code, provides that "when the existence of a preliminary fact is disputed," the court "may hear and determine the question of the admissibility of evidence out of the presence of hearing of the jury." CAL. EVID. CODE § 402 (West 1995).

160. *See generally*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); *see also* Scott v. Yates, 643 N.E.2d 105 (Ohio 1994); People v. Schor, 516 N.Y.S.2d 436 (N.Y. Crim. Ct. 1987); State v. Catsam, 534 A.2d 184 (Vt. 1987); State v. Brown, 687 P.2d 751 (Or. 1984).

161. *See Cultural Defense*, *supra* note 1, at 1295. In his dissent in *United States v. Yu*, 954 F.2d 951, 956 (3d Cir. 1992), Judge Becker stated that a person's ignorance based on cultural differences might be considered a mitigating factor at sentencing for two reasons. First, the defendant's conduct may be more understandable than similar conduct by someone familiar with the laws of this country and, second, the defendant may be less likely than an ordinary offender to repeat the offense. *See id.* For a discussion of cases involving the issue of ancestral background in sentencing, see generally Arthur L. Burnett, Sr., *National Origin and Ethnicity in Sentencing*, 9-Fall CRIM. JUST. 26 (1994); *see also* Gomez, *supra* note 104.

162. *See* Maguigan, *supra* note 100, at 57; *see also Cultural Defense*, *supra* note 1, at 1295.

Expert testimony regarding cultural practices is problematic because of the difficulty inherent in defining "culture."[163] Culture is, by its very nature, constantly in a state of flux,[164] constantly evolving. Therefore, culture is prone to varying interpretations regarding the existence and prevalence of any given practice.[165] Due to the persuasive nature of expert testimony[166] and the potential misuse of this type of evidence, the judge, in exercising her discretion, must have a framework to evaluate the admissibility of cultural evidence and ensure its accuracy.

A. *FRE Rule 702—Reliability*

Federal Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[167]

The United States Supreme Court has interpreted Rule 702 to mean that an expert's testimony must be both reliable and relevant.[168] Many states have adopted the equivalent of Rule 702 in their penal codes.[169] Therefore, before admitting expert testimony regarding cultural evidence, a trial judge must determine whether such evidence is reliable.[170] In making this determination, the judge must evaluate such factors as the qualifications of the testifying expert, the research upon which the expert testimony is based, and the nature of the testifying expert's knowledge.[171]

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163. *See* discussion *supra* Part III.B; *see also supra* notes 99-102.

164. *See supra* note 101.

165. *See supra* note 102.

166. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993). The *Daubert* Court stated that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Id.* (quoting Judge Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

167. FED. R. EVID. 702.

168. *See Daubert*, 509 U.S. at 590, 591. *Daubert*, by its own terms, applies only to scientific expert testimony. *See id.* at 590 n.8.

169. *See, e.g.*, FLA. STAT. ANN. § 90.702 (Harrison 1996); LA. CODE EVID. ANN. art. 702 (West 1995); N.M. R. EVID. 11-702; VT. R. EVID. 702.

170. Federal Rule of Evidence 104 provides that:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a). Many states have similar rules. *See, e.g.*, OHIO R. EVID. 104(A), 702. *Cf.* State v. Foret, 628 So.2d 1116, 1127 (La. 1993) (holding that child psychologist's testimony using dynamics of Child Sexual Abuse Accommodation Syndrome to diagnose whether abuse had occurred did not pass threshold test for admissibility).

171. *See, e.g.*, Holiday Inns, Inc. v. Shelburne, 576 So.2d 322 (Fla. Dist. Ct. App. 1991) (holding that an expert on grief and bereavement who had a Ph.D. in sociology, had been researching grief for fifteen years, and had taught at numerous seminars was properly permitted to testify as an expert in the field); Porter v. State, 576 P.2d 275 (Nev. 1978); State v. Valencia, 575 P.2d 335 (Ariz. 1977); State v. Brown, 564 P.2d 342 (Wash. 1977).

The decision whether an expert witness has the necessary expertise and qualifications to testify is within the trial judge's discretion[172] and will not be disturbed on appeal unless clearly erroneous or prejudicial to the adverse party.[173]

An expert witness' "'[k]nowledge' connotes more than subjective belief or unsupported speculation."[174] The expert must have some basis for the testimony being presented and must have some knowledge superior to that possessed by an ordinary juror.[175] Under Rule 702 of the Federal Rules of Evidence, as interpreted by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, "[p]roposed [expert] testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known."[176] The *Daubert* Court stated that the trial court must make a "preliminary assessment of ... the reasoning or methodology underlying the testimony [of a scientific expert witness to ensure that it] is scientifically valid and ... [to assess] whether that reasoning or methodology properly can be applied to the facts in issue."[177] The Supreme Court suggested that trial courts consider whether the scientific technique has been subjected to peer review and/or publication,[178] the known or potential rate of error,[179] the existence of standards controlling the technique's operation,[180] the technique's refutability,[181] and the general acceptance of the technique in the scientific community.[182]

A determination of the reliability regarding cultural evidence should, similarly, hinge upon the reliability of the social science reports, publications, and other documentation being presented. For example, the defense presentation of the Hmong marriage ritual in *People v. Moua*[183] is criticized as misrepresenting the cultural practice at issue.[184] In *People v. Moua*, the Hmong defendant was accused of kidnapping and raping a Hmong woman.[185] The defendant argued that his actions were part of a Hmong marriage ritual.[186] The only cultural data presented by the defense, however, was a twenty-two page pamphlet which contained only superficial descriptions of a few types of Hmong marriage practices and cited only

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172. *See Daubert*, 509 U.S. at 592-93; *see also* People v. Schor, 516 N.Y.S.2d 436, 438, 440 (N.Y. Crim. Ct. 1987).

173. *See* Scott v. Yates, 643 N.E.2d 105, 107 (Ohio 1994) (citing Alexander v. Mt. Carmel Med. Ctr., 383 N.E.2d 564, 565 (Ohio 1978)); *see also* State v. Catsam, 534 A.2d 184, 188-89, 195 (Vt. 1987); State v. Brown, 687 P.2d 751, 775 (Or. 1984).

174. *See Daubert*, 509 U.S. at 590.

175. *See* OHIO R. EVID. 702; OR. R. EVID. 401, 403, 702; TEX. R. CRIM. EVID. 702; *see also Shelburne*, 576 So.2d 322; *Schor*, 516 N.Y.S.2d 436; Commonwealth v. Seese, 517 A.2d 920 (Penn. 1986).

176. *Daubert*, 509 U.S. at 590.

177. *Id.* at 592-93.

178. *See id.* at 593.

179. *See id.* at 594.

180. *See id.*

181. *See id.* at 593.

182. *See id.* at 594.

183. Case No. 315972-0 (Fresno Super. Ct. 1985) (unpublished decision) (cited in Renteln, *supra* note 1, at 445 n.19).

184. *See* Evans-Pritchard & Renteln, *supra* note 2, at 20.

185. *See* Chiu, *supra* note 2, at 1115; *see also* Evans-Pritchard & Renteln, *supra* note 2, at 2-3.

186. *See* Chiu, *supra* note 2, at 1115; *see also* Evans-Pritchard & Renteln, *supra* note 2, at 9-12.

one reference.[187] The cultural evidence presented was, in other words, not of the calibre that would normally pass muster under the standards required under *Daubert* for admissibility of scientific expert testimony.[188]

Moreover, because culture is constantly evolving, definitions of "cultural practices" are particularly susceptible to an expert's subjective interpretation.[189] For example, the expert in *People v. Chen* was an anthropologist who testified in the nonjury murder trial that, although he did not know the defendant, he "knew" the defendant's culture.[190] He did not cite any cases where Chinese men had killed their adulterous wives, but said he knew of violent incidents.[191] His testimony was constructed from romanticized and fetishized relics of a mystical, ancient, and fictional China.[192]

The expert's testimony in *Chen* has been attacked by legal commentators as an inaccurate depiction of Chinese culture.[193] The expert claimed that "[i]n the Chinese context, divorce is virtually the end . . . . It could be the end of a person's real life."[194] He further testified that while "Americans" were familiar with divorce, it is a "remarkable thing to [the Chinese] still. We are at two extremes . . . . To a Chinese, it is a matter of great concern and it's uncommon."[195] In actuality, given the rise in the number of divorces in China today,[196] modern Chinese society no longer stigmatizes divorces.[197] According to a recent survey, less than 12% of Chinese believe that divorce is disgraceful.[198] The expert's testimony revealed outdated patriarchal and racist stereotypes.[199] His testimony was not supported by

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187. *See* Evans-Pritchard & Renteln, *supra* note 2, at 20. The authors state that "the cultural circumstances of [*People v. Moua*] were not sufficiently explored or understood before a decision was reached" as demonstrated by the "confusion between two Hmong methods of marrying—elopement and abduction—which were [both] referred to as 'marriage by capture.'" *Id.* at 29-30.

188. *See* Catherine Trevison, *Changing Sexual Assault Law and the Hmong*, 27 IND. L. REV. 393 (1993); *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590, 592-95 (1993).

189. *See* Goldstein, *supra* note 1, at 166 ("Many experts will express differing or possibly inaccurate views based upon their own subjective study").

190. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 57 (1994); *see also* Goldstein, *supra* note 1, at 151 (describing the expert testimony in *Chen*).

191. *See* Volpp, *supra* note 190, at 70.

192. *See id.* at 68 n.51 (The expert's testimony "fetishized 'difference' as a way to anchor the 'foreignness' of the 'Chinese,' and structured his 'Chinese friends' as native informants.").

193. *See id.* at 66-76; Maguigan, *supra* note 100, at 94.

194. Volpp, *supra* note 190, at 69 n.55 (quoting anthropologist and defense expert Burton Pasternack *in Chen*, No. 87-7774, Record at 55-56) (second alteration in original).

195. *Id.* at 71 n.64 (quoting anthropologist and defense expert Burton Pasternack *in Chen*, No. 87-7774, Record at 76) (second alteration in original).

196. *See Survey Shows Divorce Rising Among Chinese*, CHI. TRIB., Oct. 11, 1992, at 5, *available in* WESTLAW, CHITRIB database, at *1 [hereinafter *Divorce Rising*] (reporting that the Chinese divorce rate has more than doubled in the 1980s); *Divorce Loses Stigma with 10% Annual Rise*, BBC SUMM. OF WORLD BROADCASTS, Oct. 8, 1992, *available in* LEXIS/NEXIS, News Library, BBCSWB File [hereinafter *Divorce Loses Stigma*].

197. *See Divorce Loses Stigma*, *supra* note 196.

198. *See Divorce Rising*, *supra* note 196, at 5, WESTLAW, CHITRIB database, at *2.

199. Tsiwen Law, a Philadelphia lawyer and former president of the Philadelphia chapter of the Asian American Bar Association, stated that the expert testimony in *Chen* was "an outdated version of the [Chinese] culture . . . . Under the feudal system, misuse of a spouse may have been acceptable. But now in China, you can be prosecuted." Polman, *supra* note 2, at A1, 1989 WL 2933827, at *9-*10 (quoting Tsiwen Law). Professor

reliable reports or contemporary social science studies, but on fieldwork that he had conducted between the 1960s and 1988.[200]

Many argue that the cultural expert's testimony in *Chen* illustrates the necessity of excluding cultural evidence in order to eliminate the risk of reinforcing harmful stereotypes.[201] While there is a real possibility that cultural evidence will further racist stereotypes, an absolute ban on cultural evidence is an overreaction. While cultural evidence presents an actual risk of stereotyping, it is also inaccurate and ethnocentric to presume that all cultures are similar to "American" culture. Rather, the courts must scrutinize the evidence being presented to ensure that it accurately reflects the culture from which it is purported to originate. The reliability and accuracy of the data used to support the existence of the cultural evidence being presented will increase the accuracy and the reliability of the cultural evidence itself. For example, the Japanese-American community's widespread support for Fumiko Kimura diminished the likelihood that the evidence regarding parent-child suicide was based upon stereotyped or racist assumptions of Japanese culture.[202]

Finally, the susceptibility of cultural evidence to racist stereotyping can be minimized by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof . . . ."[203] Thus, the value of the expert's testimony in *Chen* might have been diminished had the prosecution challenged the accuracy of the evidence.[204] Instead, the prosecution failed to introduce any expert testimony challenging the validity of the cultural evidence presented.[205] Assistant District Attorney Kenneth Rigby, who handled the case, said he did not think it was necessary—"[i]n our wildest imaginations, we couldn't conjure up a scenario where the judge would believe that anthropological hocus-pocus."[206]

By contrast, in *People v. Chou*,[207] the jury rejected the "cultural defense" in large part because of the testimony presented by the prosecution's expert

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Sharon K. Hom of the City University of New York Law School, who has taught law in China, states that the testimony in *Chen* "reinforces patriarchal and racial stereotypes—which don't even exist in China today." Patricia Hurtado, *Killer's Sentence Defended: "He's Not a Loose Cannon,"* N.Y. NEWSDAY, Apr. 4, 1989, at 17, 1989 WL 3369661, at *5 (quoting Professor Sharon K. Hom).

One commentator deconstructs the *Chen* expert's depiction of the Chinese and examines his method of "creating an unrecognizable 'other'" which enables the "anthropologist 'expert' to subordinate members of the foreign culture through descriptive control." Volpp, *supra* note 190, at 62.

200. *See generally* Volpp, *supra* note 190, at 70.

201. *See* Goldstein, *supra* note 1, at 166 (arguing that "social science did not offer a correct cultural representation in the *Chen* case").

202. In contrast, much of the conflict in *People v. Moua* involved the veracity of the cultural claims. *See* Evans-Pritchard & Renteln, *supra* note 2, at 4. "[A]lthough the charge under American law was 'rape', the defense asserted that the Kong Moua was following the traditional Hmong 'marriage by capture' ritual." *Id.* The facts, however, demonstrate that neither set of words "captures precisely what transpired." *Id.*

203. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993).

204. Professor Maguigan cautions against using the *Chen* case as a basis for concluding that receiving evidence of traditional patriarchal values will necessarily lead to an outcome which validates those values in light of the prosecution's failure in *Chen* to present rebuttal evidence. *See* Maguigan, *supra* note 100, at 78.

205. *See id.*

206. Polman, *supra* note 2, at A1, 1989 WL 2933827, at *11 (quoting Brooklyn Assistant District Attorney Kenneth Rigby).

207. *See generally* Pankratz, *supra* note 7; *see also* Lindsay, *supra* note 7.

witness.[208] Chou's attorneys argued that Chou, accused of shooting and killing the victim, was driven to seek revenge because he had "lost face" after a fight a year prior to the shooting.[209] Yet, Dr. Freda Cheung, a psychologist with the University of California at Los Angeles, testified that Chou never would have confronted the victim in a public place if he were concerned about "face."[210] Apparently, Dr. Cheung's testimony was sufficient to convince the jury that the defendant was not genuinely acting as a result of cultural pressures.

B. FRE Rule 401—Relevancy

In addition to being reliable,[211] expert testimony must be relevant.[212] Rule 401 of the Federal Rules of Evidence states that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[213] Many states have statutes similar to Rule 401.[214]

Cultural evidence is relevant only insofar as the defendant's state of mind is relevant to the crime. Consequently, expert testimony regarding the defendant's cultural background should not be used when the defendant is charged with a strict liability crime. Furthermore, the defendant must establish that he or she should be permitted to take advantage of the cultural defense. In other words, the defendant must establish that he or she is someone who is influenced by the traditions and practices of his or her home country.[215] In determining the extent of the defendant's biculturation,[216] the judge may consider such factors as the defendant's age, education, length of residency in the United States, nature and length of employment, adherence to traditional practices other than the cultural practice at issue, language ability, and relationships with individuals of different

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208. *See* Lindsay, *supra* note 7, at A15, 1995 WL 3195616, at *1-*2.

209. *See* Pankratz, *supra* note 7, at B1, 1995 WL 6566996, at *1-*3.

210. *See id.* Dr. Cheung also testified that loss of face among the Chinese "never justifies shooting a man in the heart." *Id.* at B1, 1995 WL 6566996, at *2.

211. In addition to providing reliable expert testimony, the accuracy of cultural evidence is affected by the court interpreter's ability to translate the testimony of the defendant and other witnesses. *See* Evans-Pritchard & Renteln, *supra* note 2, at 18-19.

Professors Evans-Pritchard and Renteln discuss the difficulty of finding a qualified court interpreter in *People v. Moua*. *See id.* at 18. ("Judging by the transcripts, the court interpreter's ability to translate from Hmong into English was in question. His clumsy phrasing of the witness's words did little to clarify the facts for the . . . judge . . . . [The interpreter] was also interpreting the facts of the case without reference to what the witness was saying.").

212. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); State v. Brown, 687 P.2d 751 (Or. 1984).

213. FED. R. EVID. 401.

214. *See, e.g.*, N.M. R. EVID. 11-401; OR. REV. STAT. § 40.150 (1995).

215. This requirement is similar to that required in cases where battered women kill their batterers. Before expert testimony on battered woman's syndrome can be introduced, the defendant must establish that she is a "battered woman." *See* Bechtel v. State, 840 P.2d 1, 9 (Okla. Crim. App. 1992).

216. "[A] bicultural person is someone who 'has had extensive socialization and life experiences in two cultures and who participates actively in these cultures.'" Evans-Pritchard & Renteln, *supra* note 2, at 6 (quoting Kathryn Rick, An Investigation of the Process of Biculturation with Hmong Refugees 25 (1988) (unpublished Ph.D. thesis, Univ. of Colo.)).

cultural backgrounds.[217] If, after carefully considering the relevant factors, the judge determines that the defendant is successfully acculturated into "American" society,[218] cultural evidence would not be relevant to the defendant's case.

People v. Wu[219] illustrates the difficulty courts have with determining the relevancy, and thus admissibility, of cultural evidence. In that case, the defendant, Helen Wu, strangled her son to death after learning that her husband was having an affair.[220] The relevance of the cultural evidence in *Wu* depended in large part upon the requisite state or states of mind for the crime or crimes charged. Under California law, first degree murder requires that the defendant have an intent to kill, and that the defendant acted with premeditation, deliberation, and malice aforethought.[221] Second degree murder does not require premeditation, but does require malice aforethought.[222] Voluntary manslaughter is the intentional killing of a human being without malice aforethought.[223] Involuntary manslaughter is defined as an unintentional killing "in the commission of an unlawful act, not amounting to felony."[224]

The prosecution's theory of the case was that the defendant killed her son out of anger at his father.[225] The defense's theory was that the defendant killed her son because she thought that he was ill-treated and she wanted to take care of him in the afterlife.[226] There was no dispute that the defendant intentionally killed her son.[227] Therefore, the crimes for which the defendant could be convicted were first degree murder, second degree murder, and voluntary manslaughter. The relevant mental states for these crimes according to the court, thus, were premeditation and deliberation, malice aforethought, and specific intent to kill.[228] Accordingly, cultural evidence should have been introduced only if it could have helped prove the existence, or non-existence, of any or all of the above mental states.[229]

At trial, experts on transcultural psychology testified that, in their opinion, Wu "was acting while in an emotional crisis . . . and that her emotional state was

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217. *See id.* at 6 ("The extent of successful biculturation among Hmong refugees depends on such variables as age, education, and length of residency in the United States."); *see also* Lam, *supra* note 129, at 51 (establishing four categories to be used in determining the applicability of cultural evidence to the defendant).

218. The judge also should examine the cultural beliefs proffered to see if a true conflict exists between the defendant's cultural beliefs and the dominant society's cultural beliefs. *See supra* notes 96-97.

219. 286 Cal. Rptr. 868 (Ct. App. 1991). The California Supreme Court, in denying review of the Court of Appeal's decision, ordered that the Court of Appeal's decision be not officially published. *See id.* at 868 n.*.

220. *See id.* at 877. *People v. Wu* is an extremely complicated case. For an in-depth discussion of *Wu*, see Renteln, *supra* note 1, at 472-74.

221. *See* CAL. PENAL CODE § 189 (West Cum. Supp. 1997), § 187(a) (West 1988).

222. *See id.* § 187(a); *see also* People v. Butts, 46 Cal. Rptr. 362 (1965).

223. *See* CAL. PENAL CODE § 192(a) (West Cum. Supp. 1997); CAL. JURY INSTR. CRIM. 8.40 (West Cum. Supp. 1990) (definition of voluntary manslaughter).

224. CAL. PENAL CODE § 192(b) (West Cum. Supp. 1997).

225. *See Wu*, 286 Cal. Rptr. at 870 (decision ordered to be not officially published).

226. *See id.*

227. *See generally id.* at 883. The issue was not whether Wu intended to kill her son—she did—but, whether she killed her son out of revenge or for cultural reasons.

228. *See id.*; *see also supra* notes 222-224.

229. *See Wu*, 286 Cal. Rptr. at 883.

intertwined with, and explainable by reference to, her cultural background."[230] Wu was convicted of second degree murder and sentenced to a prison term of fifteen years to life.[231] On appeal to the California Court of Appeals, Wu argued that the trial court committed reversible error by refusing to instruct the jury on her theory of the case which included consideration of her cultural background.[232]

Wu requested the following instruction:

> You have received evidence of defendant's cultural background and the relationship of her culture to her mental state. You may, but are not required to, consider that the [sic] evidence in determining the presence or absence of the essential mental states of the crimes defined in these instructions, or in determining any other issue in this case.[233]

The prosecutor objected to the instruction because it was a non-pattern jury instruction and there was no appellate law concerning instruction on "cultural defenses."[234] The trial court refused to give the instruction, stating "that it did not want to put the 'stamp of approval' on [the defendant's] actions in the United States, which would have been acceptable in China."[235]

The California Court of Appeals reversed the lower court's decision and stated that the jury should have been instructed that it could consider evidence of the defendant's cultural background.[236] The court of appeals noted that it "is error for a court not to give an instruction if that instruction is both correct in law and applicable on the record; it is not error if either condition is lacking."[237] Under California law, the trier of fact may consider any admitted evidence.[238] The court of appeals noted that the prosecutor never objected to the admission of evidence concerning the defendant's cultural background.[239] Thus, the court of appeals explained, the issue on appeal was not whether cultural evidence was relevant, but "on what issues was such evidence relevant."[240]

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230. *Id.* at 884. Wu argued that she was acting in an automatistic, fugue state of consciousness. *See* Renteln, *supra* note 1, at 473. Automatism is an affirmative defense. *See* Robinson, *supra* note 40, at 242; *see also* Renteln, *supra* note 1, at 474.

231. *See Wu*, 286 Cal. Rptr. at 869; *see also* Renteln, *supra* note 1, at 473.

232. *See Wu*, at 869-70; *see also* Renteln, *supra* note 1, at 473. Wu asserted an automatism defense and a cultural defense, "although the two are clearly linked." Renteln, *supra* note 1, at 473. The trial court failed to give jury instructions on either defense. *See Wu*, 286 Cal. Rptr. at 869-70; *see also* Renteln, *supra* note 1, at 473. The trial court did recognize the relevancy of a provocation/"heat of passion" defense. *See Wu*, 286 Cal. Rptr. at 883. The California Court of Appeals agreed that cultural evidence was relevant to a provocation/"heat of passion" defense. *See id.*

233. *Wu*, 286 Cal. Rptr. at 879-80.

234. *Id.* at 880.

235. *Id.*

236. *See id.* at 887; *see also* Renteln, *supra* note 1, at 473. In denying review, the supreme court ordered that the opinion be not officially published. *See Wu*, 286 Cal. Rptr. at 868 n.*. "Despite the depublication, Helen Wu was entitled to a new trial. On retrial she was convicted of voluntary manslaughter. Sentencing was delayed in order to give prison officials more time to evaluate her case and Wu eventually received the maximum possible sentence for voluntary manslaughter—eleven years." Renteln, *supra* note 1, at 474 (citations omitted).

237. *Wu*, 286 Cal. Rptr. at 882 (quoting People v. Benson, 802 P.2d 330 (Cal. 1990)).

238. *See id.* at 883 (citing CAL. EVID. CODE § 351).

239. *Id.* at 883.

240. *Id.*

The court of appeals, in deciding whether cultural evidence was relevant to proving the applicable mental states, was essentially determining the admissibility of *any* cultural evidence.[241] Because the cultural evidence had already been admitted at trial, and was uncontested by the prosecution, the court of appeals was forced to frame the broader admissibility issue as pertaining to the *application* of admissible evidence.[242] In other words, despite its statement to the contrary, the court of appeals discussion of "*on which issues*" the cultural evidence was relevant was, in fact, a discussion of whether the cultural evidence was relevant and therefore, admissible, *at all*.[243]

The court of appeals attempted to distinguish between the relevance of the cultural evidence, and the relevance of the cultural evidence *to* the defendant's state of mind.[244] The cultural evidence, however, would not, or should not, have been admitted as relevant if it did not concern the defendant's state of mind.

Under this Article's proposed framework, the trial judge in *Wu* should have determined whether the cultural evidence was relevant to proving any of the mental states required for homicide. As previously mentioned, under California law first degree murder requires premeditation, deliberation, and malice aforethought.[245] The prosecution's theory was that the defendant had planned to take revenge on her husband by killing their son.[246] Cultural evidence was relevant in establishing that the defendant acted under "heat of passion" at the time of killing her son. "Heat of passion" negates the malice intent required for both first and second degree murder and reduces an intentional killing to voluntary manslaughter.[247] The facts and circumstances must have been sufficient to arouse the passions of an "ordinarily reasonable man."[248] There is both an objective and a subjective element to voluntary manslaughter. The objective element requires that the "heat of passion" must be due to "sufficient provocation."[249] There is, however, no specific type of provocation required by *California Penal Code* section 192.[250] The subjective element requires that the defendant acted under the "actual influence" of a strong passion at the time of the killing.[251]

As the California Court of Appeals noted, the expert testimony concerning the defendant's cultural background was relevant in explaining the source of the defendant's stress and in explaining how statements made by the defendant's son, in light of all the facts and circumstances, constituted "sufficient provocation"

241. *See id.* at 883-85.
242. *See id.* at 883.
243. *See id.*
244. *See id.*
245. *See* CAL. PENAL CODE §§ 187, 189 (West Cum. Supp. 1997).
246. *See Wu*, 286 Cal. Rptr. at 870.
247. *See* CAL. PENAL CODE § 192(a) (West Cum. Supp. 1997); *Wu*, 286 Cal. Rptr. at 883; People v. Wickersham, 650 P.2d 311 (Cal. 1984).
248. *Wickersham*, 650 P.2d at 321.
249. *Wu*, 286 Cal. Rptr. at 883.
250. CAL. PENAL CODE § 192 (West Cum. Supp. 1997); *see Wu*, 286 Cal. Rptr. at 884 (quoting trial court (quoting People v. Berry, 556 P.2d 777, 780 (Cal. 1976) (in banc))).
251. *See Wu*, 286 Cal. Rptr. at 884.

causing the defendant to kill her son in a "heat of passion."[252] In other words, cultural evidence could have shown that an ordinarily reasonable Chinese woman would have reacted the way the defendant had, *even if an ordinarily reasonable "American" woman would not have reacted similarly.*

C. FRE Rule 403—Probative Value and Prejudice—and the Effects of Cultural Preemption

Rule 403 of the Federal Rules of Evidence excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."[253] Many states have adopted a statute similar to Rule 403.[254] The potential for unfair prejudice, confusion, or misleading the jury is compounded where the evidence sought to be introduced is cultural. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it"[255] and because of the aura of credibility that often accompanies it.[256] It is precisely because of this risk that the judge exercises more control over expert witnesses in weighing possible prejudice against probative force under Rule 403.[257]

The amorphous nature of culture lends itself to both confusion of the issues and misleading of the jury. Labeling a practice as "cultural" implies that it is an inherent and intrinsic part of the society which purportedly practices it. The rationale underlying the recognition of a cultural defense rests, in large part, upon the notion of self-determination.[258] All cultures are equal and all peoples should have the ability to determine for themselves to what norms and traditions they wish to adhere.

Our society values cultural diversity because of the richness it brings to the existing culture and because of the historical premium placed upon an individual's freedom of choice in the pursuit of life, liberty, and happiness.[259] The United

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252. *Id.*

253. FED. R. EVID. 403.

254. *See, e.g.*, FLA. STAT. ANN. ch. 90.403 (Harrison 1996); IDAHO R. EVID. 403; LA. CODE EVID. ANN. art. 403 (West 1995); N.M. R. EVID. 11-403; OR. R. EVID. 403.

255. Weinstein, *supra* note 166; *see* State v. O'Key, 899 P.2d 663, 672 (Or. 1995) (Evidence perceived by lay jurors to be scientific in nature possesses unusually high degree of persuasive power and should therefore be supported by appropriate scientific validation.).

256. *See, e.g.*, State v. Rodgers, 812 P.2d 1208, 1212 (Idaho 1991) (holding that the expert interpretation of blood splatter evidence would not cause jurors to be over-impressed by an "aura of reliability"); Spencer v. General Electric Co., 688 F. Supp. 1072, 1077 (E.D. Va. 1988) (holding that the victim could not introduce expert testimony of "posttraumatic stress disorder" to prove the occurrence of rape because "its aura of scientific basis renders it unfairly prejudicial"); State v. Brown, 687 P.2d 751, 773 (Or. 1984) (discussing the potential misuse and overvaluation of polygraph evidence).

257. *See* Weinstein, *supra* note 166, at 632.

258. Professor Karst argues that constitutional doctrine "makes two promises to members of racial, religious, and ethnic minorities. First, it promises them the opportunity to participate in our public life as equal citizens while maintaining such ties to the minority cultures, as they may choose." Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 306 (1986). Second, because such paths are available to them, "members of minority groups are to have the opportunity to choose to identify with the cultural norms of the larger society." *Id.*

259. *See id.* at 336-40.

States Constitution's guarantees of freedom of religion and association,[260] in particular, preserve and protect a newcomer's traditional values and customs. Therefore, a failure to consider a defendant's cultural background essentially punishes the defendant for coming from a cultural background that differs from an Anglo-American culture. Consequently, advocates of a cultural defense argue that in order to promote respect for other cultures, cultural background evidence should be admissible.

In reality, however, cultures often are defined, not by the masses of a particular society, but by the power elite in that society. The premium that United States society places upon tolerance and individual liberty should not be diminished when the oppressor in another society becomes a member of a marginalized group in United States society. Labeling a practice or tradition as "cultural" may be a generalization which defines a practice of political, economic, or social domination which is forced upon the subordinated group rather than created and developed by it.[261]

I use the term "cultural preemption" to refer to the systemic usurpation, by economic, social, or political means, of the power to define one's own culture. The subordinated group's ability to define and shape the culture of the society in which it exists is essentially *preempted* by the existing power structure, including coercion and persecution by the government, societal pressure to maintain the status quo, and insufficient resources.[262] Because in most societies, most women are subordinated to most men,[263] women comprise the group which is most often culturally preempted. In many cases, the efforts of women to define and maintain a cultural identity are life-endangering.[264] Not surprisingly, the cases involving a cultural defense often involve practices that harm women.[265]

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260. *See* U.S. CONST. amend I.

261. One legal commentator argues that the criminal law should not permit defenses that "perpetuate bigotry and inequality." Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 481 (1994-95).

262. *See id.* at 480. Smith argues that crimes involving cultural offenses are often "committed by a member of a dominant group which asserts its domination through criminal conduct, encouraged at every turn by various cultural influences that support its power, victimizing those who are already subordinated within the culture." *Id.*

See also Spatz, *supra* note 85, at 633. Spatz explains that "[t]he shortcomings of local women's groups are the result of insufficient staff and funding, the inability of local groups to convince the government to change, and the pressure on such groups to focus on immediate concerns." *Id.*

263. *See* Spatz, *supra* note 85, at 628 (stating that "all societies 'devalue' women" and citing as examples female infanticide in China and sex selective abortions in India).

264. *See* Mahnaz Afkhami, *Identity and Culture: Women as Subjects and Agents of Culture Change*, *in* FROM BASIC NEEDS TO BASIC RIGHTS 227 (Margaret Schuler ed., 1995). "Algerian women have been threatened with physical mutilation and death for objecting to fundamentalist propositions to curtail [women's] rights. In Sudan, Egypt, Morocco, and Pakistan women are increasingly under attack." *Id.*

For example, many African and Asian women reject the notion that the practice of female genital mutilation must be understood in a "cultural context." Nafis Sadik, a Pakistani physician who heads the United Nations Population Fund, states that "[n]o value worth the name supports the oppression and enslavement of women . . . . The function of culture and tradition is to provide a framework for human well-being. If they are used against us, we will reject them." Barbara Crossette, *Female Genital Mutilation by Immigrants Is Becoming Cause for Concern in the U.S.*, N.Y. TIMES, Dec. 10, 1995, at A18, *available in*, LEXIS/NEXIS, News Library, NYT File.

265. However, this is not always true. *See, e.g.*, People v. Kimura, No. A-091133 (Los Angeles Super. Ct., Nov. 21, 1985) (unpublished decision) (cited in Renteln, *supra* note 1, at 462 n.88); People v. Wu, 286 Cal. Rptr. 868 (Ct. App. 1991) (opinion ordered not officially published) (cited in Renteln, *supra* note 1, at 472 n.131); *see also* Renteln, *supra* note 1, at 503-04. "It is important to realize that women in some cases, e.g.,

The danger of cultural preemption is exacerbated by the subordinated group's lack of access to the media and other modes of communication to the outside world. The way a particular society is perceived, and thus the definition of that society's "culture" by the outside world depends in large part on the ability to disseminate information to that outside world.[266]

Additionally, a cultural practice of subordination may be in the process of a slow and difficult reform.[267] Slavery, for example, was defended for many years as being an integral part of southern "culture." This definition of southern culture changed as the values and perceptions of white Americans evolved. Furthermore, slavery never would have been part of southern "culture" if African Americans had not been preempted from establishing their own culture as the culture of the South.

Expert testimony may essentialize[268] the defendant's culture, and ignore the beliefs and practices of disempowered subgroups within that culture.[269] Given the difficulty in defining culture, the likelihood increases that expert testimony will, out of necessity, provide a broad, simplistic characterization of the defendant's culture rather than an accurate, contemporary depiction of the norms and mores that reflect the social progress occurring in the defendant's home country. The expert testimony may focus on history and tradition and ignore the efforts of marginalized groups to re-define the culture—efforts which are often thwarted by the government or impeded by a lack of political or financial resources.[270]

Fumiko Kimura and Helen Wu, have benefitted immensely from the willingness of judges to consider the cultural facets of their cases." *Id.* at 503. Furthermore, the cultural defenses in *Kimura* and *Wu* involved practices which harmed children.

266. For example, as African women became more media visible, the characterization of clitoridectomies as human rights abuses gained acceptance. Abdel Halim states that the earliest efforts to eradicate clitoridectomies started in the Sudan almost fifty years ago. *See* Asma Mohamed Abdel Halim, *Rituals and Angels: Female Circumcision and the Case of Sudan*, *in* FROM BASIC NEEDS TO BASIC RIGHTS 249, 250 (Margaret A. Schuler ed., 1995). These efforts were hindered by taboos surrounding sexual behavior and a societal resistance to the education of women. *See id.* at 250.

In the late 1950s and the 1960s, the Sudanese Women's Union launched a campaign challenging the health hazards of clitoridectomies. The campaign did not attract widespread attention because many Sudanese thought the campaign addressed a "private issue" that should not be discussed in public. *See id.*

267. The evolution of cultural practices includes religious practices. One commentator notes that even in societies where religious fundamentalism appears particularly strong, the status of women is improving. "The reason is that despite the existing obstacles an increasing number of women have become conscious of themselves as authentic individual human beings independent of their kinships and community relations and increasingly insist that others acknowledge this fact." Afkhami, *supra* note 264, at 228.

268. *See* Angela P. Harris, *Race and Essentialism*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 238-42 (Katherine T. Bartlett & Roseanne Kennedy eds., 1991). Professor Harris defines "gender essentialism" as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." *Id.* at 238. I use the term "essentialize" here to describe the characterization of a culture based upon the characteristics of the dominant culture, without regard for the various subcultures which comprise a society.

269. One commentator argues that the expert testimony presented in the *Chen* decision presented a version of "Chinese culture" that "privileged race over any consideration of gender oppression." Volpp, *supra* note 190, at 76. Volpp states that "[the expert's] perspective was 'male,' obviating the possibility that a woman, and specifically a Chinese immigrant woman, might describe divorce, adultery, and male violence within 'Chinese culture' very differently." *Id.*

270. The Sudanese Women's Union, for example, was banned for eighteen years due, in large part, to the political instability in Sudan. *See* Halim, *supra* note 266, at 250-51.

To minimize the prejudicial effects of cultural preemption, 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) the purpose of the cultural practice; (2) the moral culpability associated with the cultural practice; (3) the deterrence/educational value of prohibiting the cultural evidence; and (4) alternative forms of sentencing.

First, the judge should examine the *purpose of the cultural practice*. If the purpose of the practice is to perpetuate the subordination of a particular group,[271] such as women,[272] the danger of cultural preemption increases. The practice, deemed "cultural" by an expert for the defense, may be viewed by women from that particular society as merely a means of male domination.[273]

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271. Some may argue that the definition of a "subordinated" group is subject to arbitrary categorization. Professor Mari Matsuda has responded to this criticism by stating that

> [t]o conceptualize a condition called subordination is a legitimate alternative to denying that such a condition exists. In law, we conceptualize. We take on mammoth tasks of discovery and knowing. We can determine when subordination exists by looking at social indicators: wealth, mobility, comfort, health, and survival tend to mark the rise to the top and the fall to the depths.

Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2362 (1989).

272. One commentator cautions that the value of multiculturalism should not be confused with cultural relativism which justifies abuse of women based upon cultural norms. *See* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987).

273. Asma Mohamed Abdel Halim, a Sudanese lawyer working to eradicate the practice of genital mutilation, commented on the disingenuity of labeling oppressive practices "cultural": "My culture has changed much for men. We women are always kept the same . . . . Men who are dressed in three-piece suits will tell us not to dress in Western clothes." Charlotte Grimes, *Women Press U.N. on Rights*, ST. LOUIS POST-DISPATCH, June 3, 1993, at C1, *available in* WESTLAW, Allnews database, 1993 WL 8024364, at *5 (quoting Asma Mohamed Abdel Halim).

Even American-born women of color are often preempted from defining their cultural identity. Many are accused of betrayal by their communities for trying to find ways to end practices of male domination and abuse. *See* Rivera, *supra* note 85, at 249. Rivera explains:

> [I]f a Latina decides to go beyond the perimeters of her community and seek assistance from outsiders—persons already considered representatives of institutional oppression—the community may view her acts as a betrayal. A Latina, therefore, may tolerate abuse rather than call for outside help. This hesitance to seek assistance provides the community with an excuse for ignoring or denying violence against Latinas, as well as for trivializing and resisting Latina activists' efforts to create a community strategy to end the violence.

Id.; *see also* Chiu, *supra* note 2, at 1120; Maria Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, C989 ALI-ABA Proc. 259 (Mar. 26, 1995). Chiu states:

> The ultimate trap for a woman of color is the casting of gender power against racial solidarity, a deep conflict that underlies the cultural defense debate. Should she choose gender over race, she is spurning cultural and racial affinity for white feminism. Should she remain silent, she legitimizes sexism in her community. Like African American women who oppose patriarchy in their community, Asian American women who reject the subordination of women in the Asian American community are roundly excoriated as race traitors or as lackeys for white feminists.

Chiu, *supra* note 2, at 1121 (footnotes omitted). Ontiveros notes that the Anita Hill hearing

> reinforced the perception that any woman who raises the issue of sexual oppression in the black community is somehow a traitor to the race, which translates into being a traitor to black men. It is particularly disheartening knowing that probably a lot of black people took this stance despite believing Anita Hill. They who decided that standing behind a black man—even one with utter contempt for the struggles of African-Americans—is more important [than] supporting a black woman's right not to be abused.

Ontiveros, *supra*, at 268 (quoting Barbara Smith, *Ain't Gonna Let Nobody Turn Me Around*, MS., Jan.-Feb., 1992, at 37, 38).

Imagine a defendant, arrested for wife battering, who argues that he did not realize battering was against the law. An expert for the defense testifies that, although illegal in the defendant's home country, domestic violence is the single greatest cause of injury to young women and batterers are often not punished.[274] The expert, of course, is testifying on behalf of an "American."[275] Although domestic violence is unfortunately and admittedly a part of United States society,[276] most American women (and men) would be unwilling to define battering as an "American cultural practice."

The prevalence of a particular practice alone does not constitute an accurate or acceptable means of proving a "cultural" practice.[277] In many cases, evidence that a particular practice is prevalent, combined with the exoticization of another society, results in mis-categorizing a practice as a valid cultural one, rather than as a means of domination.[278]

Second, and closely tied with the first factor, is the *moral culpability*[279] associated with the cultural practice.[280] In *Kimura*, for example, the purpose of parent-child suicide is to save the child from societal ostracization. Fumiko Kimura's moral culpability is not the same as that of a mother who, in retaliation against her adulterous husband, vindictively kills her child.[281]

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274. *See* Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213 (1988); Lisa R. Beck, Note, *Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York*, 15 FORDHAM URBAN L.J. 999 (1987); Rivera, *supra* note 85, at 249.

275. Approximately two to four million women in the United States are victims of domestic violence each year. *See* Elizabeth A. DeLahunta & Asher A. Tulsky, *Personal Exposure of Faculty and Medical Students to Family Violence*, 275 JAMA 1903 (1996), *available in* WESTLAW, MAGSPLUS database, 1996 WL 11243015, at *1-*2; *see also* Joseph R. Biden, Jr., Symposium, *Q: Does the Violence Against Women Act Discriminate Against Men?*, INSIGHT MAGAZINE, May 27, 1996 at 25, *available in* WESTLAW, MAGSPLUS database, 1996 WL 8311172, at *4-*6; Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being*, 273 JAMA 1781 (1995), *available in* WESTLAW, MAGSPLUS database, 1995 WL 10027577, at *1-*2; Linda K. Meier & Brian K. Zoeller, *Taking Abusers to Court: Civil Remedies for Domestic Violence Victims*, TRIAL, June 1, 1995, *available in* WESTLAW, MAGSPLUS database, 1995 WL 15142678, at *1-*2; Antonia C. Novello et al., *A Medical Response to Domestic Violence*, 267 JAMA 3132 (1992), *available in* WESTLAW, MAGSPLUS database, 1992 WL 11637463, at *1-*2.

276. Studies indicate that 50% of all women in the United States will suffer some form of domestic violence at some time in their lives. *See* sources cited in *supra* note 275; *see also* LENORE E. WALKER, THE BATTERED WOMAN ix (1979).

277. *See* Smith, *supra* note 261, at 480 ("With few exceptions, cultural defenses dredge up the worst aspects of the culture at large.").

278. For example, the trial judge in *Chen* fell prey to his exoticization of Chinese culture when he uncritically accepted the expert's testimony without first considering the transitional nature of modern day China. *See generally* Maguigan, *supra* note 100, at 77-78.

279. *See* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 388 (1976). Professor Gomez states that, in cases where the defendant's cultural background is a significant factor in the crime committed, the sentencing judge should consider the offender's culpability. *See* Gomez, *supra* note 104, at 360. A sentencing judge often takes into consideration an individual assessment of the defendant's moral culpability. *See, e.g.*, United States v. Barker, 771 F.2d 1362, 1365 (9th Cir. 1985).

280. For an interesting discussion of the application of moral education theory to cultural defense cases, see Lisa A. Smith, *The Moral Reform Theory of Punishment*, 37 ARIZ. L. REV. 197 (1995).

281. Apparently, even Fumiko Kimura's husband believed that her actions were motivated by love and not vengeance. Upon learning of his son's death, Fumiko Kimura's husband, Itsuroku, reacted with "grief, guilt—and forgiveness, even saying that he envied the strength of the bond his wife had with his children." Michael Reese,

In many cases, the moral culpability of the cultural practice may differ depending upon how the purpose of the cultural practice is characterized. For example, some would argue that clitoridectomies are intended to preserve family unity, whereas others would argue that the practice is intended merely to control a woman's sexuality. In such cases, the judge would have to balance the harmfulness of the practice with its purported benefit.

The growing number of women who are seeking asylum in the United States in order to escape genital mutilation highlights the extent of cultural preemption in many countries where the practice is prevalent.[282] It also causes one to question the sincerity of those who claim that deference for cultural diversity precludes an examination of the morality of any cultural practice, even when it occurs within the United States.[283] The disempowerment experienced by immigrant women is compounded when they arrive in the United States because many of them speak little or no English, and are often without emotional or financial support.[284] As a result, the vulnerable position of immigrant women in United States society warrants a more critical appraisal of the cultural practice at issue.[285]

The third factor to consider in determining the admissibility of cultural evidence is the *effect on the purposes and premises underlying the criminal law.* More specifically, what effect would admission of the evidence have on the deterrence/education goals of the criminal law? Permitting evidence on a cultural practice, such as wife battering, that perpetuates the subordination of women, and demonstrates moral culpability, might send a message to others in the defendant's community that observing the practice will not be punished. On the other hand,

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A Tragedy in Santa Monica, NEWSWEEK, May 6, 1985, at 10, *available in* LEXIS/NEXIS, News Library, NWEEK File.

282. *See* Keith Donoghue, *A Rite of Passage*, THE RECORDER, Jan. 18, 1996, at 1, *available in* LEXIS/NEXIS, News Library, RECRDR File.

283. For example, Daniel Stein, executive director of the anti-immigration Federation for American Immigration Reform in Washington, D.C., opposes asylum for women fleeing genital mutilation, ostensibly because, "[i]t is our Western notions of civilized behavior that are imposing themselves on . . . age-old practices . . . ." *Id.* at 13 (quoting Federation for American Immigration Reform executive director Daniel Stein). His concern of cultural imperialism appears disingenuous, given his anti-immigration agenda.

284. *See* K. Connie Kang, *Forum to Focus on Spouse Abuse Among Asians Conference*, L.A. TIMES, Aug. 27, 1994, at B3, 1994 WL 2339034, at *2 ("Incidents of domestic violence are as prevalent among Asian Americans as among other groups in this country, but Asian victims—especially immigrants—face added obstacles because of ignorance and language and cultural barriers . . . ."). Estelle Chun, a family law specialist at the Asian Pacific American Legal Center of Southern California, states that "[a]s tragic as spousal abuse is for white women, born here . . . with friends and relatives, you just can't compare that to [the plight of] immigrant women . . . . They have no money, they don't speak English—they don't even know how to take the bus." *Id.*, 1994 WL 2339034, at *3 (first omission in original) (quoting Estelle Chun).

285. Professor Crenshaw notes that "[i]mmigrant women generally have limited access to . . . resources . . . . Moreover, sometimes cultural barriers may further discourage women from reporting or escaping battering situations." *See* Kimberlé Williams Crenshaw, Transcript, *Panel Presentation on Cultural Battery*, 25 U. TOLEDO L. REV. 891, 894 (1995). Professor Crenshaw adds that immigrant women may be especially vulnerable to spousal abuse due to fear of deportation and language barriers which limit their ability to utilize social support services. *See id.* at 894-95.

See also Anna Y. Park, *The Marriage Fraud Act Revised: The Continuing Subordination of Asian & Pacific Islander Women*, 1 ASIAN AM. PAC. IS. L.J. 29 (discussing the domestic violence in the Asian and Pacific Islander communities).

preventing the use of the cultural defense to excuse the defendant's behavior sends a clear message that the behavior is unacceptable in this society. For example, many Hmongs in Fresno followed the "marriage-by-capture"/rape trial closely.[286] As a result of the publicity, many Hmongs are modifying their traditions to conform with the United States legal system.[287] By contrast, it is unlikely that a woman contemplating parent-child suicide will be deterred by the legal penalty that will await her should she fail.

In determining the deterrence/educational value of prohibiting cultural evidence, the judge should evaluate different approaches that promote both the criminal justice system's deterrence and individualized justice objectives. Thus, while cultural evidence may not be permitted to negate the defendant's intent, it might mitigate the sentence. The guilty verdict would send a clear message to the defendant's community that the particular cultural practice is not acceptable, but, at the same time, the sentence would be tailored to fit the defendant's culpability.

The fourth factor is that the judge might also consider *alternative forms of sentencing*. Instead of sending a guilty defendant to prison, the defendant could be sentenced to community service, educating other members of his or her community that the cultural practice at issue is criminal. The increased awareness within the defendant's community would diminish the likelihood that, in the future, a member of the community would continue the cultural practice not knowing of its wrongfulness by American legal standards.[288] At the same time, the sentence would not punish the defendant unfairly for committing a crime that he or she had no idea was wrong. Some cities are already responding to the need for education. Police officers with the multilingual Asian Task Force in Los Angeles and the Hmong Task Force in the Fresno Police Department are attempting to inform Asian communities about United States laws.[289]

Finally, the admissibility of cultural evidence under Rule 403 does not hinge upon any single factor, but depends upon a careful consideration and weighing of all aforementioned factors. For example, a judge could find that the purpose of clitoridectomies is to control a woman's sexuality, yet find that a woman who has performed the practice on her children is not morally culpable because she truly believed that she was acting in the best interests of her children. On balance, however, the judge might still exclude the cultural evidence because the defendant's lack of moral culpability is outweighed by the purpose and deterrence considerations.

VI. ANTICIPATED OBJECTIONS TO THE PROPOSED FRAMEWORK

The proposed framework will probably raise many objections. At the risk of "pre-empting" opposing views, this section addresses some of the anticipated objections.

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286. *See* Mark R. Thompson, *Immigrants Bring the Cultural Defense Into U.S. Court*, WALL ST. J., June 6, 1985, *available in* WESTLAW, Allnews database, 1985 WL-WSJ 251041, at *6.

287. *See id.*

288. One legal commentator states that an effective educational program could reduce or eliminate the need for a cultural defense by ensuring a well-informed and "morally" educated public. *See* Smith, *supra* note 280, at 208.

289. *See* Thompson, *supra* note 286, 1985 WL-WSJ 251041, at *6.

Perhaps the strongest opposition to the proposed framework may come from those who argue that to judge the morality of a cultural practice is "hubristic and ethnocentric."[290] This criticism overlooks that the cultural practice is being "judged" because it is being practiced *within* United States borders. The value of cultural diversity does not occupy a privileged position in relation to other "American" values. The relativist position is out of place in a discussion about the treatment of criminals in the United States. As a sovereign nation, the United States is at liberty to determine its citizens' values and rights. It is precisely *because* a cultural defense is consistent with the goals of United States society that it should be recognized. Many nations do *not* recognize a cultural defense. By contrast, judging the morality of cultural practices performed in *other countries* would raise legitimate concerns about ethnocentricism.[291]

Some may question the wisdom of granting broad judicial discretion in cultural "defense" cases. Under the third "balancing" prong of the framework (Federal Evidence Rule 403 and this Article's proposed factors), the judge must determine the effects of cultural preemption by exercising moral judgment regarding the nature and purpose of the cultural practice at issue. Those who fear that the proposed framework gives judges too much discretion ignore that judges *already* have a great deal of discretion.[292] Judges have always infused their idea of morality into their decisions. The rules of law are often expressed in language that is vague, broad, and, consequently, prone to subjective interpretation.[293] Criminal cases often require subjective interpretations of "intent" due to the murky concept of "*mens rea*," as noted in Part II.A. The admissibility of evidence *under existing evidence codes* varies based upon the ideological and philosophical inclination of the presiding judge.[294]

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290. *See* Smith, *supra* note 280, at 208.

291. Unfortunately, the international human rights community is often too quick to relegate women's rights issues as "cultural" and therefore "private," even when the state is involved in the violation. Consequently, the human rights community is reluctant to criticize many of the practices which violate women's human rights. Lori Heise, of the Women's Global Leadership Center at Rutgers University, states that "[t]raditionally, there's been a distinction between pubic and private violence. A man raping a woman might be a crime but not a human rights violation. Women respond that prosecutors don't prosecute, police don't protect—you have state complicity, allowing it to continue with impunity." Grimes, *supra* note 273, at C1, 1993 WL 8024364, at *5 (quoting Lori Heise). In many countries, however, local pressure is resulting in progress for women. Women around the world have formed feminists groups. *See generally* Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287 (1987).

292. *See* BRUCE JACKSON, LAW AND DISORDER 138 (1984) (discussing the broad discretion granted both judges and prosecutors); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4-5 (1972).

293. *See* Walter W. Cook, *The Logical and Legal Bases of the Conflict of Law*, 33 YALE L.J. 457, 458 n.5 (1924); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925). In fact, much of the Critical Legal Studies literature is devoted to exposing the subjectivity of the judicial decisionmaking process. *See generally* PETER FITZPATRICK & ALAN HUNT, CRITICAL LEGAL STUDIES 1 (Peter Fitzpatrick & Alan Hunt eds., 1987); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

294. *See* Smith, *supra* note 261, at 492 ("Might judges be more willing to consider low mental capacity, a history of sexual abuse . . . in sex crimes than in other crimes? Do judges suddenly become enlightened about the complexity of what causes individuals to commit crime when the crime is sexual assault upon a woman?"). Hopefully, this Article's proposed evidentiary framework will enable judges to make more uniform and principled decisions about the admissibility and application of cultural evidence.

Under cases interpreting Federal Rules of Evidence Rules 702 and 401, the judge decides whether the evidence sought to be introduced is both reliable and relevant. The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[295] stated that a judge, in determining the admissibility of scientific expert evidence, must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[296] The Court acknowledged that judges are granted broad discretion in making this determination, but stated that "[w]e are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test."[297] Under Rule 702, the judicial inquiry regarding the scientific validity of the proposed scientific expert testimony is a "flexible one" which includes a variety of factors that may be, but need not be, considered.[298]

Furthermore, judges are already passing on the "morality" of cultural practices and either excluding the evidence if they find the practice immoral, or excusing the defendant's behavior if they find that the practice is not immoral, or not immoral "enough." The judge's beliefs, prejudices, and ideological predispositions ultimately determine what type of evidence will be admitted at trial and what type of instructions will be given to the jury. Even the staunchest advocate of the law's objectivity would be unwilling to argue that a presiding judge has no biases or that a judge's worldview has no effect on the outcome of an evidentiary hearing. Indeed, many legal scholars argue that, far from being rational and objective, the law is arbitrary and indeterminate.[299] The proposed framework does not grant judges *more* discretion than they already have; on the contrary, it checks their power by exposing the subjectivity in their decisions. It forces judges to reveal their decisionmaking process instead of permitting them to hide their racism and misogyny behind their purported deference for cultural differences.

VII. CONCLUSION

As people from different countries come to the United States, many of whom do not speak English and who are not familiar with the customs, traditions, and laws of this nation, legal issues will arise with which the law, as it exists now, is ill-equipped to deal. For example, how should the law treat a crime committed by an individual who did not believe that the act that she or he committed was wrong? Our traditional notions of "intent" no longer prove satisfactory. Without an adequate consideration of the implications that arise as a result of the increasing diversity of the United States population, and the changing needs of our society, the justice system may prove to be "unjust."

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295. 509 U.S. 579 (1993).

296. *Id.* at 600.

297. *Id.* at 593.

298. *See id.* at 594-95 & n.12.

299. *See* Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L. J. 855 (1987); KARL N. LLEWELLYN, THE BRAMBLE BUSH (1960), *construed in* Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 297 (1989).

Opponents of the cultural defense argue that recognizing this defense will undermine the purposes of the criminal justice system. Opponents argue that there should be consistency and fairness in the law's application and that "ignorance of the law is no excuse." Furthermore, opponents argue that permitting a cultural defense will be tantamount to condoning the cultural practice and will undermine the criminal justice system's deterrence and protection goals.

A limited use of cultural evidence, however, promotes, rather than undermines, the objectives of the criminal justice system. The problems that have arisen as a result of a "cultural defense" arise out of the application of cultural evidence. Cultural evidence has either been wholly excluded or uncritically accepted.

This Article proposes a framework for evaluating cultural evidence which conforms to the guidelines set forth under existing rules of evidence governing the admissibility of expert evidence. Under the first prong of the framework, applying Federal Rule of Evidence 702, a judge determines the reliability of the cultural evidence being presented by evaluating the qualifications of the testifying expert, the quality and extent of the research upon which the testimony is based, and the nature of the testifying expert's knowledge. The second prong of the framework requires that the judge, under Federal of Evidence 401, determine the relevance of the cultural evidence by admitting such evidence only in cases where state of mind is an element of the crime charged. In addition, the judge evaluates whether the cultural evidence is relevant to *this particular defendant* by examining whether the defendant has successfully acculturated into mainstream United States society and determining whether there is a "true" cultural conflict. In determining the defendant's acculturation, the judge is essentially evaluating the sincerity of the defendant's claim that cultural factors influenced his or her actions.

The third prong of the framework requires the judge, under Federal Rule of Evidence 403 and this Article's proposed balancing factors, to consider the pre-judicial nature of cultural evidence in light of the problem of cultural preemption. In evaluating the prejudicial nature of the evidence, the judge examines the purpose of the cultural practice and the moral culpability of the defendant in carrying out the practice. In addition, the judge considers the deterrence/educational value of prohibiting the evidence in addition to any alternatives to sentencing. After a careful consideration of all the factors comprising the third prong of the framework, the judge determines whether the probative value of the cultural evidence would be outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

The proposed framework provides a mechanism by which to evaluate cultural evidence within the confines of the United States criminal justice system. Because most societies are comprised of dominant and subordinate groups, the recognition of cultural diversity often results in the perpetuation of practices of subordination. The proposed framework takes into consideration the problem of cultural preemption while upholding the principles of cultural pluralism and individualized justice.