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# ***1093** INDIVIDUALIZING JUSTICE THROUGH MULTICULTURALISM: THE LIBERALS' DILEMMA [FNa]

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## Introduction

In California, a Japanese-American mother drowns her two young children in the ocean at Santa Monica and then attempts to kill herself; rescuers save her before she drowns. The children's recovered bodies bear deep bruises where they struggled as their mother held them under the water. The mother later explains that in Japan, where she is from, her actions would be understood as the time-honored, customary practice of parent-child suicide. She spends only one year in jail--the year she is on trial. [FN1]

In New York, a Chinese-American woman is bludgeoned to death by her husband. Charged with murder, her husband explains that his conduct comports with a Chinese custom that allows husbands to dispel their shame in this way when their wives have been unfaithful. He is acquitted of murder charges. [FN2]

Back in California, a young Laotian-American woman is abducted from her place of work at Fresno State University and forced to have sexual intercourse against her will. Her Hmong immigrant assailant explains that, among his tribe, such behavior not only is accepted, but ***1094** expected--it is the customary way to choose a bride. He is sentenced to 120 days in jail, and his victim receives $900 in reparations. [FN3]

A Somali immigrant living in Georgia allegedly cuts off her two-year old niece's clitoris, partially botching the job. The child was cut in accordance with the time-honored tradition of female circumcision; this custom attempts to ensure that girls and women remain chaste for their husbands. The State charges the woman with child abuse, but is unable to convict her. [FN4]

In these cases, the defense presented, and the prosecutor or court accepted, cultural evidence as an excuse for the otherwise criminal conduct of immigrant defendants. These official decisions appear to reflect the notion that the moral culpability of an immigrant defendant should be judged according to his or her own cultural standards, rather than those of the relevant jurisdiction. Although no state has formally recognized the use of exonerating cultural evidence, some commentators and judges have labelled this strategy the “cultural defense.” [FN5]

The cultural defense (and the issues it raises about the rights of immigrants to retain aspects of their cultures when they come to the United States) is an important part of the larger debate about multiculturalism which currently is prominent in academic, social, and political circles. In particular, this larger debate concerns whether there is and should be a unifying American culture that guides our institutions, including the justice system, or whether the United States is and should be a culturally pluralistic nation in all respects, including in the law.

[FN6]

The introductory illustrations exemplify this debate in the legal arena with an unusual clarity, because they pit foreign customs and cultural practices directly against essential elements of contemporary American legal culture, including the antidiscrimination principle that is central to equal protection doctrine [FN7] and related principles of universal rights that are at the foundation of feminist legal doctrine.

Allowing sensitivity to a defendant's culture to inform the application of laws to that individual is good multiculturalism. It also is good ***1095** progressive criminal defense philosophy, which has as a central tenet the idea that the defendant should get as much individualized (subjective) justice as possible. [FN8] The illustrations that introduce this Article may be interpreted as reflecting this sort of sensitivity on the part of some prosecutors and judges.

For legal scholars and practitioners who believe in a progressive civil and human rights agenda, these illustrations also raise an important question: What happens to the victims--almost always minority women and children--when multiculturalism and individualized justice are advanced by dispositive cultural evidence? The answer, both in theory and in practice, is stark: They are denied the protection of the criminal laws because their assailants generally go free, either immediately or within a relatively brief period of time. [FN9] More importantly, victims and potential victims in such circumstances have no hope of relief in the future, either individually or as a group, because when cultural evidence is permitted to excuse otherwise criminal conduct, the system effectively is choosing to adopt a different, discriminatory standard of criminality for immigrant defendants, and hence, a different and discriminatory level of protection for victims who are members of the culture in question. This different standard may defeat the deterrent effect of the law, [FN10] and it may become precedent, both for future cases with similar facts, and for the broader position that race-or national origin-based applications of the criminal law are appropriate. Thus, the use of cultural defenses is anathema to another fundamental goal of the progressive agenda, [FN11] namely the expansion of legal protections for some of the least powerful members of American society: women and children.

Margaret Fung, Executive Director of the Asian-American Defense and Education Fund, provided what is perhaps the best evidence of the ***1096** tension that is created for progressives by these cases. When Ms. Fung first publicly addressed the decision in People v. Chen, [FN12] the New York spousal killing case described above, [FN13] she is reported to have expressed her concern that the result was bad for Asian women and for the image of Asian-Americans: “You don't want to import [immigrant] cultural values into our judicial system . . . . We don't want women victimized by backward customs . . . . We don't want so- called cultural experts perpetuating certain stereotypes that may not be accurate, . . . and putting that out to the American public.” [FN14] Later, however, Ms. Fung was reported to have reformulated her position on the use of cultural evidence by criminal defendants: To bar the cultural defense “would promote the idea that when people come to America, they have to give up their way of doing things. That is an idea we cannot support.” [FN15]

In addition to highlighting the dilemma posed by these cases, Margaret Fung's reactions highlight the twofold discriminatory effect of the cultural defense. [FN16] First, to the extent that cultural evidence is used to determine the outcome of criminal cases and to excuse some perpetrators of crimes, it results in disparate treatment of immigrants and other members of American society. [FN17] Second, the particular cultural norms at issue in these cases are also inherently discriminatory in that they incorporate values about the lesser status of women and children; these values are contrary to those the contemporary international progressive agenda embraces. [FN18] When the American legal system chooses to recognize such traditions in the context of pursuing indi-

vidualized justice for the defendant, it condones the chauvinism that is at the core of these traditions.

The question of how to resolve the competing interests that Margaret Fung's turnaround so clearly sets out--a question that I call the "Liberals' Dilemma" [FN19]--is the focus of this Article. Unlike existing scholarship ***1097** in the area, most of which does not appear to recognize this dilemma, [FN20] it is my premise that the answer for legal (rather than moral) purposes should not be made in an ad hoc fashion, based on political and professional affiliations. Rather, I believe the law must reflect a broader, more considered resolution of this question, and that this resolution can be accomplished only by engaging in a balancing of the two substantial and conflicting interests. [FN21] Thus, the defendant's interest in using cultural evidence that incorporates discriminatory norms and behaviors must be weighed against the victims' and potential victims' interests in obtaining protection and relief through a non-discriminatory application of the criminal law. [FN22] Contemporary jurisprudence favors just this sort of balancing, which considers the interests of the two parties in a given case, as well as those of society generally, in determining the outcome. Using this approach, I conclude that victims' interests in this area are more compelling than those of defendants. [FN23] In the process, I acknowledge that ***1098** my position is contrary to that pure vein of multiculturalism that decries ethnocentrism in any form; and I agree that it also is contrary to those aspects of the liberal agenda that traditionally have sought to embrace (at least in theory) simultaneously both cultural pluralism and individual rights, including the rights of defendants and of the women and children who are often their victims. [FN24] In this context, I believe that there are several reasons for choosing rights over culture.

First, the criminal justice system already affords defendants substantial opportunities to raise established, nondiscriminatory arguments in support of their innocence or of a reduced sentence.

Second, permitting the use of culture-conscious, discriminatory evidence as part of the defendant's case-in-chief distorts the substantive criminal law and affords little or no protection to victims, whose assailants are left, as a result of this distortion, relatively free from broader societal strictures. There presently is no acceptable alternative to cure this deficiency.

Third, the use of cultural evidence risks a dangerous balkanization of the criminal law, where non-immigrant Americans are subject to one set of laws and immigrant Americans to another. This is a prospect that is inconsistent not only with one of the law's most fundamental objectives, the protection of society and all of its members from harm, but also with the important human and civil rights doctrines embodied in the Equal Protection Clause. [FN25] Thus, society as a whole is best served by a balance that avoids the use of discriminatory cultural evidence.

Fourth, despite the benevolent interpretation I earlier afforded the modern acceptance of immigrant cultural evidence by some prosecutors and judges, there also is the substantial concern that culture consciousness--at least of the sort that leads to discriminatory results--may not be a good thing for a judicial system that is already plagued by a racist and sexist history. As Justice Brennan commented in his dissenting opinion in McCleskey v. Kemp, "[f] ormal dual criminal laws may no longer be in effect, and intentional discrimination may no longer be prominent. Nonetheless . . . 'subtle, less consciously held racial attitudes' continue to ***1099** be of concern." [FN26] It is at best ironic that progressive forces would purposefully give back to the system a new and lawful opportunity to treat immigrant women, children, and other minority victims of crimes as less valuable. At worst, this trend may foreshadow a return to overtly racist decisionmaking by some prosecutors and judges.

The acceptance of discriminatory cultural evidence at the very same time that laws are being developed to

protect women and children from gender-related violence does more than set up a theoretical conflict. [FN27] For example, in 1994, Congress enacted the Violence Against Women Act [FN28] that, inter alia, provides grants for state court judges and other court personnel to be trained to identify and reject arguments about, among other things, cultural stereotypes. [FN29] This statute, and recently issued asylum guidelines that define the political circumstances warranting asylum as including crimes of sexual violence, [FN30] are based upon broad international declarations concerning the universality of a woman's right to be free from gender-motivated violence. [FN31] These federal initiatives incorporate the very broad equal protection and rule-of-law principles that are at the core of the argument against the use of cultural evidence. They are at least inconsistent, if not in direct confrontation, with the development of state common law that incorporates gender-discriminatory cultural evidence.

This Article has four Parts: Part I discusses the cases that best illustrate the use of cultural evidence as a defense to criminal conduct. Part II describes the progressive tradition of individualizing justice through multiculturalism, and analyzes this tradition in the context of the cases discussed in Part I. Part III discusses the historical and philosophical origins, as well as the contemporary liberal interpretation, of the equal protection doctrine, which includes assurances both to defendants and to their victims of nondiscriminatory application of the laws. It then analyzes the cases discussed in Part I, and concludes that their results are inconsistent with this doctrine. Part IV reviews existing commentary on the cultural defense, and concludes that it fails to resolve the significant antidiscrimination concerns raised by the use of cultural evidence. It then discusses the new federal legislation and policies that seek to protect women from gender-motivated violence, and suggests that these initiatives may resolve the liberals' dilemma in the large majority of cases where women are victims. To the extent that they do not, Part IV proposes***1100** that the dilemma be resolved using an important contemporary jurisprudential tool, the balancing doctrine. Using this approach, Part IV concludes that on balance, the interests of victims outweigh those of defendants, and thus that the cultural defense should be barred. Finally, the Article concludes that multiculturalism is, and ought to continue to be, a substantial force in the debate over the future of our institutions and the evolution of our legal doctrine. However, our nation's history of formal dual laws based on race, national origin, and gender is a constant reminder that we must not permit anything, including multiculturalism, to pervade the law, lest we risk repeating this history.

## I. The Cultural Defense Cases

The affirmative presentation of foreign customs as exonerating evidence in criminal cases where both the defendant and his victim are from the same culture, [FN32] known in the legal literature as the immigrant “cultural defense,” [FN33] is perhaps the clearest example of how multiculturalism has influenced the law. While there are not an overwhelming number of published examples in which the cultural defense has been used successfully, there are enough--particularly in jurisdictions such as California, New York, Georgia, and Minnesota, where non-European immigrants are clustered--to warrant significant academic attention. [FN34] This is particularly***1101** true because acceptance of the defense is largely tied to a resolution of the contemporary national debate about multiculturalism, and because the results in successful cases implicate fundamental equal protection concerns.

The defense assumes that “someone raised in a foreign culture should not be held fully accountable for conduct that violates United States law . . . [if that conduct] would be acceptable in his or her native culture.” [FN35] Two reasons are given for this assumption. First, the defense's proponents argue that an immigrant may not have had an opportunity to learn about our customs, values, and laws, and thus should not be responsible for

his unwitting transgressions. [FN36] Advocates of this position claim that, despite established doctrine to the contrary, for immigrants, ignorance of the law is an excuse. [FN37] Second, proponents of the ***1102** cultural defense argue that even when an immigrant has learned our customs, values, and laws, his or her cultural practices should be respected by our legal system. [FN38] One commentator has even suggested that the cultural defense is mandated by our American values of "individualized justice and cultural pluralism." [FN39]

Cultural evidence is introduced at various stages in the criminal process, including before indictment and during the guilt and sentencing phases of the trial. [FN40] Before indictment, the evidence may be a component of the state's determination whether to charge a defendant and, when charges are pursued, of the prosecution's determination of the particular charges to be brought. For example, in a Minnesota case in which a Hmong man from Laos had kidnapped and raped a young girl, the prosecutor interviewed members of the Hmong community about the custom of marriage-by-capture, and then decided not to charge the man for kidnapping or rape. [FN41] Ultimately, his decision not to charge the man with more serious crimes appeared to be influenced by the Hmong community's own standards rather than those incorporated in Minnesota's criminal code. [FN42]

During the guilt and sentencing phases of proceedings involving the use of immigrant culture, the defense generally introduces evidence of a custom through expert testimony. [FN43] For example, in People v. Chen, an anthropologist testified for the defense about the nature of the alleged ***1103** Chinese custom of wife beating. [FN44] Evidence also has been introduced by the defendant's community. For example, in People v. Kimura, [FN45] the judge determined that charges against the defendant ought to be reduced after reviewing letters from the Japanese community attesting to the custom of mother-child suicide and to the nature of punishment in Japan. [FN46]

Despite the fact that no jurisdiction has formally recognized culture as an affirmative defense, cultural evidence may provide the foundation of the defense position in the cases in which it is presented, either on its independent strength, or in the context of the traditional criminal law defenses of consent, insanity, diminished capacity, and provocation. However, because these defenses are inconsistent with the lucid, generally planned--or, to use the language of the criminal law, premeditated--practice of a native custom, [FN47] defense attorneys who premise arguments on custom, and prosecutors and judges who choose to consider this evidence, engage in a contorted mens rea analysis that necessarily ignores the true nature of the act. [FN48] Indeed, in the guise of traditional ***1104** analysis, the parties often engage in what are in fact conflict and choice of law(s) analyses to reach a decision sensitive to the multicultural position. [FN49] This legal contortion is well-recognized (if not acknowledged) by scholars who have studied these cases. For example, speaking about the Kimura case, political scientist Alison Dundes Renteln noted that "legal scholars could say that the U.S. legal system was treating a foreign cultural perspective as a form of insanity . . . . Or they could say this case shows that the American legal system will respond to a cultural defense in an indirect way." [FN50] Ultimately, if it is effective, the cultural defense results in a range of leniencies--from outright exoneration to mitigation--for the immigrant defendant who has acknowledged committing acts ordinarily deemed criminal. [FN51]

***1105** The following discussion describes the most prominent categories of cases in which immigrant culture has been used as evidence in the criminal process. [FN52]

### A. Rape as Courtship, or Marriage-by-capture

The practice of the families of rape victims marrying off the victim to her rapist persists in places as diverse as Sicily and West Africa. [FN53] In these cultures, the marriage is seen as a form of restitution to the victim's

parents because they are no longer able to arrange a profitable union for their daughter, who has lost her virginity. [FN54] In some Asian cultures, this kind of restitution is especially significant for the family because female children are viewed as financial liabilities until they can be married off. [FN55] Two variants on this theme involve men who rape women or girls they want to marry but are unable to persuade in the usual way, and couples who are not given permission to marry who engage in sexual relations to achieve the same end. [FN56]

Another variation of this custom has been offered as evidence in the United States when Hmong men from Laos are accused of kidnapping and rape. In this context, the custom has been used both to convince prosecutors not to bring charges at all and to reduce charges already brought. The cases involve the following fact pattern: An adult Hmong man, who allegedly wishes to marry, unilaterally selects a woman or girl--she may be as young as ten years old--to become his bride. He then engages in ritual flirtation. If the woman signals acceptance of the courtship, the man is then required to take her, by force, to his family's house and to consummate the union by having sexual intercourse with her. According to tradition, during both the capture and the sex, the woman or girl continually resists and protests verbally. [FN57]

Laotian girls and women who have been the victims of this ritual here in the United States have asked prosecutors to charge their aggressors***1106** with kidnapping and rape, including statutory rape. The Laotian men have argued in response that they should not be punished because they have followed the accepted Laotian custom of "marriage-by-capture," which, significantly, includes the very protestations that the victims thought would communicate their lack of consent. Indeed, the custom is said to require the girl or woman to protest her capture and "marriage" to prove both that she is virtuous and that the man, her capturer, is strong enough to be her husband. [FN58] Thus, defendants claim that the fact that victims protest merely indicates that the customary practice was followed. Needless to say, legal acceptance of this fiction eliminates any possibility that victims may effectively deny consent.

The paradigmatic case in this area is People v. Moua. [FN59] There, the defendant, a Laotian Hmong man, forcibly abducted a Laotian woman from the Fresno City College campus and forced her to engage in sexual intercourse. The woman subsequently called the police and accused the defendant of kidnapping and rape. [FN60] Moua presented the prosecution with evidence of the marriage-by-capture ritual, and because the judge would not exclude that evidence, the State declined to pursue kidnapping charges, and instead accepted Moua's plea of guilty to a false imprisonment charge. The judge accepted the defendant's plea, and sentenced him to a 120-day jail term and a $1,000 fine, $900 of which was paid to the victim as "reparations." [FN61] No further charges were brought, and the defendant was not punished for kidnapping or for forcing the woman to engage in unwanted sexual relations (rape). In a subsequent statement to the press about the case and the role of cultural evidence in particular, the judge noted that "[i]n a special-intent crime like murder, I think cultural defense could go all the way to acquittal." [FN62]

A Minnesota prosecutor, drawing on a similar analysis and rationale, reached essentially the same result in a case involving a Laotian girl who was abducted and raped by a Hmong man. A newspaper covering the event described the course of events:

With the help of St. Paul's Southeast Asian Refugee Study Project, [the prosecutor] learned that in the Hmong "marriage by capture," the woman or girl, often under 15 years of age, must protest her capture by insisting "No, no, I am not ready" to be considered virtuous and desirable. If the man does not take her ***1107** by the hand and lead her off to his own home, he is considered too weak to be a husband.

The prosecutor decided that it would be almost impossible to convince a jury that the girl really meant "no" and had been taken away against her will and raped. So he opted for a plea bargain.

"I went to the victim's family and said, 'How would you resolve this in the old country?"' [the prosecutor] said.

"The victim's aunt, who spoke English, told me $3,000 and no jail, $2,000 and 60 days, or $1,000 and 90 days, to restore the family honor and pride," he said.

The defendant was allowed to plead guilty to sexual intercourse with a child under the age of 12, and fined $1,000 with no jail time. [FN63] The prosecutor did not charge the man either with kidnapping or rape, turning instead to Hmong culture to craft a plea bargain. [FN64]

In both cases, the legal system--through prosecutors and judges--effectively applied the Laotian custom in the face of contrary United States law. Two aspects of this application of the cultural defense are critical. First, by assigning little or no jail time, and imposing fines in the form of reparations to the victims and/or their families, the system chose to "punish" the defendants according to foreign rather than domestic "rules." [FN65] Second, by choosing not to prosecute and punish to the full extent of United States law, the system chose to accept the custom's fiction of consent. [FN66]

### ***1108** B. Wife Beating and Killing

The cultural defense also has been used to reduce charges and limit punishment in cases where immigrant men kill or beat their wives. The particular customs vary, but generally they are premised upon an acceptance of the lower status of women, and men's concomitant right to enforce that subordination. [FN67] The fact patterns in these cases generally involve men who "discipline" their wives for various transgressions that are alleged to be of cultural import, particularly adultery. [FN68]

The paradigmatic case in this area is People v. Chen. [FN69] Chen immigrated from China and moved to New York one year before he killed his wife. Concerned about their relationship, Chen confronted his wife. During their conversation, she admitted that she had been unfaithful. A few weeks later, he bludgeoned her to death with a hammer. To thwart a charge of murder in the second degree, Chen's attorney argued that he had suffered from diminished capacity. [FN70] His attorney did not present the typical argument that Chen was insane, or even that he was irrational under the circumstances. Instead, Chen's attorney made the contorted argument that Chen had acted because of cultural pressures, which resulted in his diminished capacity. [FN71]

Chen's attorney presented an expert who testified in support of using cultural evidence. The expert testified that, in China, adultery by a wife brands the husband as weak. According to the expert, because of ***1109** this stigma, a husband who learns of his wife's infidelity would have violent impulses. Before she actually is killed, however, the community is meant to intercede. [FN72] Chen's expert testified that because the accused was in the United States and not China, and there was thus no community to intercede-- nobody to stop him--his rage was not moderated. [FN73]

The prosecution, believing that the court would reject the cultural evidence outright, did not challenge the expert on the substance of the custom. [FN74] This proved to be a gamble that went awry. Indeed, not only did the court accept the evidence as dispositive, but it tied its rationale for Chen's suspended sentence directly to the

custom. Specifically, the judge wrote that the defendant "was driven to violence by traditional Chinese values about adultery and loss of manhood," and that--and here is the connection of the defense to the plea of diminished capacity--these values made Chen more "susceptible to cracking under the circumstances." [FN75] Finally, the judge noted that if the crime had been committed by someone raised in America, he would have felt "constrained" to find the defendant guilty of first degree manslaughter. [FN76] Chen ultimately was found guilty of second degree manslaughter and sentenced to five years probation with no jail time. [FN77]

### C. Parent [Mother]-child Suicide

The cultural defense also has been used to reduce the charges and penalties imposed upon women who kill their children in the practice of an Asian custom known as "parent [mother]-child suicide." [FN78] This custom generally involves the following scenario: A woman learns that her husband has been unfaithful. This infidelity causes her shame, which in turn causes her to contemplate suicide, the culturally appropriate response to shame. However, because tradition also holds that it is an added shame for a mother to leave her children behind when she commits ***1110** suicide--because the mother and child are one--the custom of mother-child suicide evolved. The mother kills her children and then she kills herself. [FN79] The criminal cases arise, however, in circumstances where the mother, after killing her children, is either unsuccessful in her effort to kill herself, or she decides not to take her own life after all.

Although there have been a few notorious instances of this practice in California, the most noted case is People v. Kimura. [FN80] Kimura had been in the United States for twelve years when the events described in the introduction to this Article occurred. [FN81] Her actions were triggered by the discovery of her husband's adultery. [FN82] Initially, the State charged Kimura with first degree murder. [FN83] Kimura's attorney argued that, because his client was not able to think rationally, she did not have the requisite mental state. [FN84] However, during the course of the trial, "4,000 Japanese-Americans signed letters" stating that acts like Kimura's were common in Japan. [FN85] The letters noted that although this practice was now a crime in Japan, "it would be treated as no more than manslaughter." [FN86] "Under the auspices of the Fumiko Kimura Fair Trial Committee, her supporters . . . ask[ed] that the American legal system take Kimura's cultural heritage into consideration . . . . [The] petitions ask[ed] the district attorney to charge Kimura with involuntary manslaughter instead of first-degree murder, and to grant her a probated sentence . . . ." [FN87] The prosecution and the court obliged: They allowed Kimura to plead guilty to involuntary manslaughter. In so doing, the court expressly considered the punishment she would have received in Japan, where the practice of mother-***1111** child suicide is now against the law but still largely decriminalized. [FN88] Ultimately, Kimura served one year in jail--the year she was awaiting trial--and five years probation. [FN89]

### D. Female Genital Mutilation

Finally, culture has been used to excuse the actions of immigrants whose customs call for the genital mutilation of young girls and women. [FN90] In these cultures, girls in infancy through their teens, and sometimes even after the birth of their first child, are forced by a parent or other relative to undergo the cutting and scraping away of part or all of their external genitalia. In some instances, the procedure, which generally is performed without anesthetic by a layperson, involves sewing shut their vaginal opening so that only a small hole remains through which urine and menstrual fluid may pass. [FN91] A House Report on minority health ***1112** noted that "complications from [female genital mutilation] are common and include immediate shock, bleeding, infection, and death as well as delayed medical problems such as scarring, menstrual pain and blockage, pelvic and urinary

tract infections, severe injury and pain during intercourse, infertility, and difficulty with labor and delivery." [FN92]

The World Health Organization estimates that "over 80 million female infants, adolescents and women in over 30 countries of the world have been subject to female genital mutilation . . . . [It] is mainly practiced in Eastern and Western Africa . . . [but] is now found in countries such as Australia, Europe and North America among migrant groups." [FN93] Unlike the Western practice of circumcising male infants, female circumcision originated as an attempt "to ensure chaste or monogamous behaviors or as a means of suppressing female sexuality." [FN94] In cultures that practice the custom, "[f]emale circumcision is the physical marking of the marriageability of women, because it symbolizes social control of their sexual pleasure (clitoridectomy) and their reproduction (infibulation)," [FN95] by making "intercourse physically impossible for a woman until she is opened up by her husband, either through sex or with a knife or another sharp instrument." [FN96] For example, "[t] he African culture says if the girl is not circumcised, she will be crazy . . . . She will run and find men. If you don't cut this part, she will be a harlot." [FN97] It is estimated that over half of the women in Africa have been circumcised. [FN98]

The problem of what to do about immigrant communities that practice this ritual is not a theoretical one in the United States: "As growing numbers of refugees from parts of Africa and elsewhere settle in the United States, the genital cutting of girls--which affects some 100 million worldwide--is presenting medical, legal and ethical problems for American hospitals and courts." [FN99] This issue is particularly acute in the Atlanta, Georgia, area, where there are large Ethiopian and Nigerian communities that engage in the practice. [FN100] In that region, medical personnel frequently treat women who have been circumcised and who need substantial ameliorative surgery, particularly during childbirth. [FN101] In other instances, physicians actually have been asked to perform clitoridectomies.***1113** For example, at one area hospital, "a mother recently asked the head of obstetrics to amputate her little girl's genitals, in keeping with an ancient tradition of her homeland." [FN102]

Legal problems have followed. For example, in 1986, J. Tom Morgan, then a prosecutor in DeKalb County, Georgia, charged a Somali nurse under the Georgia child abuse statute for allegedly performing a clitoridectomy on her two-year-old niece. [FN103] Morgan, who is now the District Attorney for DeKalb County, noted that the baby's "clitoris had been cut, not totally, but it was kind of a botched-up job." [FN104] He lost the case at trial in part because it was not clear who had actually performed the circumcision. [FN105] Morgan is not sympathetic to the cultural argument; he continues to believe that such cases should be brought to trial: "We don't have to accept thousands of years' practice . . . . The child abuse statute is quite clear: Emotional, physical or mental pain to a child is illegal." [FN106]

Significantly, despite this clear law, Morgan's position on the criminalization of the practice is not universally held in Atlanta. For example, the man who founded the Somali Relief and Adjustment Organization in Atlanta has said that "[t]he Somali woman doesn't need an alien woman telling her how to treat her private parts . . . . The decision must come from the Somalis." [FN107] An employee of Georgia's refugee health program expressed a similar sentiment: "It's a cultural practice that's valuable to [the immigrants] . . . . You can't change the practice until you change the value." [FN108] Indeed, because of this reluctance to condemn foreign customs, "[o]fficials at three private Atlanta resettlement agencies said they avoid the controversial topic in their refugee orientation programs." [FN109]

## II. Individualizing Justice Through Multiculturalism

The immigrant cases discussed in Part I evoke two competing liberal legal traditions, one emerging and one well-established. The first, introduced in this Part, is the postmodernist, defense- oriented approach of individualizing justice for criminal defendants, and of infusing the analysis of a defendant's behavior with multicultural sensitivity. The competing tradition is the antidiscrimination principle which ensures that the government affords all members of society equal protection from criminal conduct. This doctrine is oriented more broadly toward society in ***1114** general and towards victims of crime in particular. It is discussed below in Part III.

### A. The Doctrine of Individualized Justice

At common law in both the United States and in England, mandatory sentences and punishments were imposed for some crimes, including first degree rape and murder. [FN110] Thus, for example, in the late eighteenth and early nineteenth centuries, most American sentencing judges and juries did not have the discretion to impose less than the death penalty for these crimes. Over time, because juries would not convict a defendant who they believed was guilty but undeserving of the death penalty, "the breadth of the common law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy." [FN111] As a result of this enlightened lawmaking, it is no longer true that " 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."' [FN112] Although recent sentencing reform efforts, including the Federal Sentencing Guidelines [FN113] and "three strikes and you're out" laws, are an indication that not all lawmakers support the trend toward individualized sentencing, criminal defendants today are frequently afforded a subjective evaluation of their conduct in the penalty phase of the criminal process. [FN114]

Individualized, or particularized, justice, [FN115] a doctrine which suggests that defendants at one or more stages of the criminal process should be "treat[ed] . . . as uniquely individual human beings," [FN116] stems from this evolution in sentencing philosophy. The Supreme Court, in the context of the penalty phase of capital cases, [FN117] has defined "individualized" or "particularized" sentencing to include the consideration of "any mitigating***1115** circumstances"; [FN118] " 'the circumstances of the offense together with the character and propensities of the offender"'; [FN119] and "the character and record of each convicted defendant." [FN120] In other words, the focus in this phase is on the degree of moral culpability of the defendant, rather than on the threshold question of whether he was responsible for the crime with which he was charged. [FN121]

While individualized determinations of culpability are not constitutionally required in other phases of capital proceedings or in any phase of noncapital cases, [FN122] the Court has found that "where sentencing discretion is granted [in other contexts], it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant--if not essential--[[[to the] selection of an appropriate sentence."' [FN123] The notion is that focusing on the defendant's personal history at this stage recognizes differences in moral culpability that may exist among defendants convicted of the same crime. [FN124]

Scholars and practitioners who advocate broadening the rights of criminal defendants have sought to convince legislators and courts to extend***1116** this particularized focus to other phases of the criminal process. [FN125] Such an extension would ensure not only that punishment is consistent with moral culpability, but also that charging decisions and convictions reflect these principles. Thus, advocates of individualized justice disagree with the Supreme Court's opinion that "[m]uch of the information that is relevant to the sentencing de-

cision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question." [FN126]

This movement to inject subjectivity into the guilt phase of proceedings has been somewhat successful in cases where battered women are tried for killing their abusers. Here, the "reasonableness" of the woman's belief that she needed to defend herself against an imminent attack is a material issue in the guilt phase of the proceedings. [FN127] Traditionally, the reasonableness of self-defense was viewed objectively; that is, the question was asked, how would a reasonable person have reacted in this situation? [FN128] Feminist jurisprudence has advocated a reformation of this standard that has been adopted by some jurisdictions; the question in these jurisdictions is now whether the defendant reacted as a "reasonable woman." [FN129] Unlike the reasonable person standard which is presented as ***1117** gender-, sex-, and race-neutral, this latter standard expressly directs the trier of fact to consider reactions that are alleged to be characteristic of women. [FN130]

Because the reasonable woman standard still focuses on the reasonableness of a group (women) rather than on the particular woman at issue in a given case, [FN131] it is not a perfect expression of the individualized justice doctrine. Nevertheless, it is better--that is, more subjective--for the female defendant than the ostensibly objective "reasonable person" standard.

Similar group-focused efforts to make the standard by which a defendant's conduct is judged more subjective have been propounded in other contexts, albeit unsuccessfully. For example, in Trujillo-Garcia v. Rowland, the court rejected the defense's argument that the accused's behavior should have been judged according to a "reasonable Mexican male" standard rather than the traditional reasonable person standard. [FN132] Other similarly unsuccessful efforts include arguments that a gay male defendant's conduct should be judged according to an "average servient homosexual" standard, [FN133] and that an American male defendant with Italian ancestry ought to be judged according to a "reasonable Italian-American" standard. [FN134] In each of these cases, the practical objective was to obtain individualized justice for the defendant through a more particularized,***1118** personal analysis of his conduct. Theoretically, this should ensure a truer, and hence fairer, evaluation of his moral culpability.

### B. Multiculturalism

As a matter of legal theory, postmodernism lies at the intersection of the two progressive traditions of individualized justice and multiculturalism. Postmodernists espouse the view that there is no objective truth in the law; rather, the law as it exists is the product of the particular minds and "voices" of those who drafted it. [FN135] Scholars in the fields of Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory in particular argue that American legal discourse historically has been conducted in a white, largely Anglo, male voice. [FN136] Some, if not all, of these scholars also advocate the view that legal discourse and practice should be changed to more accurately reflect the diverse voices of all members of society. [FN137] Indeed, it is argued that without such a transformation, the fairness and justice promised by a modern, liberal interpretation of our nation's founding documents cannot be achieved.

In a manner similar to that of scholars aligned with these postmodernist schools, advocates of multiculturalism argue that the law necessarily emerges from the particular cultural milieu and orientation of its authors and, therefore, that existing American jurisprudence is principally Anglo-American, rather than objective and true in any grander sense. [FN138]

As applied to the cultural defense, this doctrine suggests that where a defendant's otherwise criminal conduct is said to be prescribed by culture, the outcome of his case should be determined at least in part, if not entirely, by reference to evidence of that culture. According to ***1119** postmodern theory, such consideration would assure that the criminal laws are applied only to the extent of subjective moral culpability, which itself is to be evaluated according to multicultural rather than Anglo-or Eurocentric standards; that is, justice would be individualized through multiculturalism.

Multiculturalism has been defined as "aspiring toward 'a plurality of cultures with [all] members [of society] seeking to live together in amity and mutual understanding with mutual cooperation, but maintaining separate cultures."' [FN139] In its purest incarnation, multiculturalism is premised upon the belief that all cultures are of equal value, that no one culture is better than another. Professor Stanley Fish describes adherents of this school as "strong multiculturalists" who "want to accord a deep respect to all cultures at their core." [FN140] Professor Fish contrasts "strong multiculturalism" with "boutique multiculturalism," whose adherents " 'admire' or 'appreciate' or 'enjoy' or 'sympathize with' or (at the very most) 'recognize the legitimacy of' the traditions of cultures other than their own." [FN141] Unlike strong multiculturalists, boutique multiculturalists "will always stop short of approving other cultures at a point where some value at their center generates an act that offends against the canons of civilized decency as they have been either declared or assumed." [FN142]

Strong multiculturalists, those who most forcefully espouse the view that the cultural defense is appropriate, believe that ethnocentrism is wrong. [FN143] This view is based, in Professor Fish's words, on the notion that "each [culture] has the right to form its own identity and nourish its own sense of what is rational and humane." [FN144] As applied in the legal context, this means that a culture and its people may be judged fairly only according***1120** to its own standards. [FN145] Multiculturalists (both strong and boutique) have forced a reexamination of established legal doctrines including the reasonable person standard, [FN146] the objectivity of jurors, [FN147] what constitutes a jury of one's peers, [FN148] and what properly constitutes exculpatory evidence in a culturally pluralistic society.

Contemporary debate about these issues is largely the result of the relatively rapid expansion of non-european immigrant communities across the country, a phenomenon which began in 1965 with the passage of federal immigration laws which altered the historic preference for European immigrants. [FN149] For the first time in our nation's history, the ***1121** United States is faced with a cultural dilemma that pits entrenched citizens of European descent against some immigrants and descendants of immigrants who are not European. The appropriate scope of these groups' respective influence over American institutions is at the core of the debate over multiculturalism.

Multiculturalists share a threshold recognition that these modern immigrants and other nonmajority groups in our country have experiences and perspectives-- "voices" [FN150]--that are different from those of the majority. They also claim to share an unequivocal respect for the inherent value of these differences. [FN151] As we have seen, this recognition and respect leads multiculturalists to support social measures that would ensure***1122** that our cultural discourse, including our legal doctrines, is developed and applied in a manner that does not discriminate against people who are not a part of the majority culture. [FN152]

### C. Immigrant Cultural Evidence in the Very Best Defense Tradition

There is no question that the cultural voice of the immigrant defendant is heard, and influences the law, when courts and prosecutors accept evidence of culture and custom in criminal cases. Indeed, the decisions

made by state actors--prosecutors and judges--to minimize punishment or even to exonerate the defendants in the immigrant cases discussed in Part I are consistent with both the related liberal doctrines of individualized justice and strong multiculturalism. [FN153] Moreover, I would argue that these philosophies either actually informed or provided a publicly acceptable basis-- that is, external legitimacy--for the decisions that were made by the state in those cases.

In the marriage-by-capture cases, for example, permitting the defendant to bypass the conventional analysis of the crimes of rape and kidnapping--an analysis that includes questions about the defendant's specific, lucid intent to do exactly as he did [FN154]--and instead have his actions ***1123** judged according to a "reasonable Hmong" standard, is squarely in line with individualized justice, multiculturalism, and postmodernism. Indeed, because marriage-by-capture is an accepted practice among the Hmong, a reasonable Hmong presumably would not find the defendant's behavior morally culpable. Indeed, a reasonable Laotian Hmong probably would do exactly as the defendant in People v. Moua did. [FN155] Thus, criminalizing Moua's conduct would not accurately reflect his moral culpability, which, according to progressives, should be a principal objective of the criminal law. Furthermore, because an accurate reflection of moral culpability requires a subjective--at least in the group voice of the Hmong, if not in the particular defendant's voice--evaluation of Moua's conduct, applying the existing standard to his culturally-dictated acts would be ethnocentric, and thus contrary to fundamental principles of multiculturalism.

The same analysis obtains when the custom at issue is wife abuse, mother-child suicide, or female genital mutilation. In those cases where cultural evidence is accepted as dispositive, the state effectively scraps conventional assault, battery, murder, and abuse analysis--all of which should result in a finding that the defendant had the requisite specific intent to commit the crime at issue [FN156]--and is guided instead by a relative standard that denies moral culpability to some significant extent. And so, consistent with strong multicultural doctrine, ethnocentrism is written out of the law in these cases, and the defendant is judged according to his own cultural standards. As we have seen, this sometimes is done awkwardly, under the guise of traditional defenses, or it is done ultra vires, expressly applying the laws of the defendant's homeland in lieu of applicable state law. [FN157]

***1124** The judge in People v. Chen, [FN158] for example, was quite unabashed in his express, unequivocal adoption of the alleged Asian custom at issue in that case. Having heard throughout the trial from the defense expert that Chen acted as a "normal person from mainland China"--in other words, as a "reasonable Chinese man"--when he bludgeoned his wife to death several weeks after learning that she had been unfaithful, [FN159] the judge stated that "[w]ere this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court [sic] would have been constrained to find the defendant guilty of manslaughter in the first degree." [FN160] Additionally,

[i]n his decision to grant probation rather than impose a jail sentence, [the judge] also took other unrelated "cultural" considerations into account. [He] believed that the possible effect of Chen's incarceration on his daughters' marriage prospects should be a factor in determining Chen's sentence. [The judge] told a reporter, "Now there's a stigma of shame on the whole family. They have young, unmarried daughters. To make them marriageable prospects, they must make sure he succeeds so they succeed." [FN161] In this case, the judge wholly adopted the alleged custom, infusing both the guilt and sentencing phases of the proceedings with multicultural individualized justice. [FN162]

The prosecution and court in People v. Kimura did the same, albeit with somewhat more sympathetic facts. [FN163] In that case, despite early efforts***1125** by the prosecution to apply the full force of California law to what appeared to be a clear case of premeditated murder, [FN164] Kimura, like Chen, received the full benefits of a particularized, group-subjective analysis of her moral culpability.

Some prosecutors and judges in cases involving Laotian Hmong immigrants similarly have been swayed in their decisionmaking by the particular defendant's culture. For example, in the Moua case, despite unequivocal evidence that the defendant had the specific intent to commit the kidnapping and rape, the judge noted that he thought the "cultural defense could go all the way to acquittal, although as a practical matter, [he didn't] think that would happen." [FN165] The same sensitivity was demonstrated by the prosecutor in Minneapolis who, on substantially similar facts, chose not to pursue rape and kidnapping charges against a Hmong immigrant. Despite the fact that the defendant had in fact intended to do exactly as he did, he was permitted to plead guilty to sexual intercourse with a minor, and served no jail time. [FN166]

Our last example involves the practice of female genital mutilation. Clearly, there is sensitivity among some immigrant groups who fear and ***1126** even disdain any sort of condemnation of the practice. [FN167] The sensitivity of some non-immigrant progressives is similar, although not quite so categorical. Thus, rather than excluding the possibility of debate outright, these progressives talk about a possible, gradual change in the cultural "value" that underlies the practice, seemingly mindful of the ethnocentrism embedded in this intellectual obfuscation. [FN168] These varying sensitivities reflect a desire to protect and respect cultural pluralism and yet not to indict (morally or legally) those who practice female genital mutilation. However, they have resulted in practical and legal responses to the issue that include, as we have seen, the decision simply to "avoid the controversial topic" in resettlement orientation programs, [FN169] and to mandate education without punishment for practitioners of the custom. [FN170]

Although these cases are steps in the right direction for proponents of individualized justice and multiculturalism, there remain two concerns for defense-oriented liberals. First, as with the battered women's defense, because the cultural defense continues to focus on reasonableness in terms of a subgroup in society rather than on the particular defendant at issue, it does not fulfill the pure subjective component of the doctrine of individualized justice. [FN171] Indeed, in this respect, multiculturalism and individualized justice differ, since multiculturalism seeks to answer the question "how culpable?" by resort to a subgroup's cultural consensus, ***1127** whereas pure individualized justice requires that this analysis be undertaken by resort to the particular individual's beliefs. [FN172]

Second, because no state has yet formally made the use of cultural evidence an affirmative defense, prosecutors and judges who credit such evidence are required to do so in a manner that is either disingenuous or that can be characterized as ultra vires. Formalization of the doctrine would be in keeping with the defense- oriented agenda, and would assure that the many components of the doctrines of individualized justice and multiculturalism, including a subjective, non-ethnocentric evaluation of moral culpability, were reflected in the letter, as well as in the application, of the criminal laws. [FN173]

## III. The Criminal Law as Guarantor of Life and Liberty, the Equal Protection Doctrine, and the Antidiscrimination Principle

Individualizing justice has long been a part of the liberal agenda's focus on individual rights. At the same time, progressives historically have sought to protect the liberty interests of members of society who are not

criminal defendants, particularly those, including women, children, and minorities, who have not traditionally had significant access to the political process. In this regard, liberal allegiances split, for individualizing justice through the use of dispositive cultural evidence in immigrant cases does irreparable harm to the liberty interests of these groups.

### A. The Criminal Law as Protector of Life and Liberty

As a matter of Lockean political theory, on its most fundamental level government exists to protect the life, liberty, and property interests of the people who have consented to its jurisdiction. [FN174] Indeed, the philosophical foundations of both international law and natural law hold that "citizens owe allegiance to their government in exchange for the government's grant of protection to them . . . [and therefore that] one of the most important rights of citizenship is the right to receive such protection." [FN175]

The criminal law is one tool government uses to serve this protective function. As such, it is designed "to make people do what society regards ***1128** as desirable and to prevent them from doing what society considers to be undesirable." [FN176] Encompassed in this design are the general classifications of crimes that exist in all criminal codes, including "protection from physical harm to the person . . . [and] safeguards against sexual immorality." [FN177] It is within these general classifications that we find specific crimes--including murder, manslaughter, assault, battery, kidnapping, rape, and abuse [FN178]--each of which exists so that the citizenry may be protected from specific kinds of conduct. [FN179]

The various theories that justify criminal punishment are consistent with this fundamental theme of protection. Thus, general deterrence, restraint or incapacitation, rehabilitation, specific deterrence, and education all attempt to assure that the individual criminal, and sometimes those with the potential for criminal behavior, are discouraged from engaging in such conduct in the future. [FN180]

Because this criminal law philosophy is part of our fundamental liberty-- indeed, it permits liberty to exist to the extent that it does--it is an integral part of the liberal tradition. The development of child abuse statutes, marital rape laws, and the battered women's defense all form part of this evolving, progressive notion of liberty.

The contemporary political debate about crime has obscured liberals' allegiance to this doctrine. It is true, as the conservatives have noted, that liberal politics strongly support a defendant's right to fairness in criminal proceedings. To some extent, this support, in connection with the conservatives' politics of crime, has made it appear that the crime victim is exclusively the protege of conservatives. Despite this political maneuvering, concern about fair allocation of the protections afforded by the criminal law to crime victims remains part of both political traditions. In particular, the protection of the liberty interests of women, children, and minorities is a principal part of the liberal agenda.

### ***1129** B. The Equal Protection Doctrine and the Antidiscrimination Principle [FN181]

The Fourteenth Amendment's Equal Protection Clause was intended "to do away with all governmentally imposed discrimination based on race," [FN182] and specifically to ensure that recently liberated black men, women, and children would be afforded legal equality with regard to natural, or fundamental, rights. [FN183] In particular, the Republican abolitionist members of Congress who framed the Amendment shared a "desire to secure freedom and safety . . . for freed black persons." [FN184] While these congressmen intended the Amend-

ment to redress more than the disparate application of the criminal laws, this was certainly one of their primary concerns. Their intent in this regard was twofold: to safeguard the rights of black defendants in the criminal process, and to protect black victims from white crime, particularly lynchings. [FN185]

Senator Howard addressed the breadth of the Due Process and Equal Protection Clauses during the Senate debates on the Fourteenth Amendment. He noted that together, they

abolish[ ] all class legislation in the States and do[ ] away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. [FN186]

Senator Howard thus described the Due Process and Equal Protection Clauses as eliminating the "black codes" enacted by several southern states immediately after the Civil War, in an attempt to perpetuate the dual system of laws that existed before the Emancipation. Under this de jure apartheid system, a crime committed by a white person was punishable under the general criminal code, but a crime committed by a black person was punishable under the separate, more severe black code. [FN187] Concomitantly,***1130** if a crime was committed against a white person, the recourse under the codes was different than if the crime was committed against a black person.

Thus, for example, the general code made it a crime for anyone to rape a woman. Because this code was, by legal definition, inapplicable either to the punishment of a black defendant or to sexual offenses against black victims, the effect of the provision was to make only the rape of a white woman an actual criminal offense. Analogous provisions generally did not exist in the slave code, so that black women were not protected against rape, either by white or black men. [FN188]

***1131** The framers of the Fourteenth Amendment intended to render precisely these bifurcated criminal systems unconstitutional, systems that placed a higher value on the life and liberty of a white person than on the life and liberty of a person of color; this concern has survived the one-hundred year evolution of the Equal Protection Clause. [FN189] Thus, while the Supreme Court has repudiated the natural law idea that holds that government is required constitutionally to protect its citizenry from crime, [FN190] it has recognized that when government decides to provide protection, it "may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." [FN191] ***1132** As Judge Sarokin noted in a case involving the disparate provision of police services, "[i]f law enforcement turns away from a victim solely because of the victim's race, religion, or national origin, equal protection of the laws is rendered meaningless." [FN192]

The Fourteenth Amendment, which has its roots in what the Supreme Court has called the "doctrine of equality," [FN193] embodies Dean Paul Brest's "antidiscrimination principle," [FN194] by "guarantee[ing] that similar individuals will be dealt with in a similar manner by the government." [FN195] Whenever the government makes choices that are based on race or ethnicity, the antidiscrimination principle requires that we ask two essential questions: how are these decisions made, and what harm results from them? Because of our history of discrimination, the principle also requires that suspect decisions be closely examined even when--or perhaps particularly when-- the intent of the decisionmakers appears or is alleged to be legitimate. [FN196]

Contemporary equal protection doctrine incorporates this antidiscrimination principle by requiring courts to scrutinize carefully classifications and decisions by state actors that are "suspect". [FN197] Distinctions ***1133** based on race and national origin are suspect, and will trigger strict scrutiny analysis. [FN198]

The official acts of prosecutors unquestionably constitute state action. [FN199] Thus, while prosecutors have relatively unfettered discretion in individual cases to decide whom to prosecute and for what offense, [FN200] this discretion is not absolute: "[T]he exercise of prosecutorial discretion is subject to constitutional constraints under the Equal Protection Clause: 'the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. " '" [FN201] Communities that suffer under general policies and practices ***1134** that are based on race or national origin may challenge them--and the prosecutors who develop them--on equal protection grounds. [FN202]

The actions of judges in their official capacities similarly are subject to equal protection constraints. These constraints are applicable in the context at issue in this Article, where judges essentially alter the substantive criminal law by ruling in individual cases: "[T]he action[s] of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment . . . ." [FN203]

Because the government is charged with ensuring the equal protection of the laws, it is required, in the first instance, to ensure that judges and prosecutors do not make decisions that are based on race or ethnicity. Legislation and executive or administrative policy are among the ways the government can preclude official violations of the Equal Protection Clause. [FN204] To the extent that the government fails to police itself through legislative or executive efforts, persons who are victims of state-***1135** sponsored discrimination based on race or national origin may, in appropriate circumstances, seek judicial relief. [FN205] Such relief properly is sought when it can be demonstrated that prosecutors and judges are making race-or national origin-based decisions of general application, [FN206] either because they wish to individualize justice through multiculturalism, or because they just do not care as much about crime among immigrants as they do about crime in the majority community. [FN207]

### C. The Doctrine Applied and The Philosophy Undermined

Tolerance of the use of immigrant cultural evidence in criminal proceedings fundamentally conflicts with the principle that "the protections given by the laws of the United States shall be equal in respect to life and ***1136** liberty . . . [for] all persons." [FN208] Indeed, permitting cultural evidence to be dispositive in criminal cases violates both the fundamental principle that society has a right to government protection against crime, and the equal protection doctrine that holds that whatever protections are provided by government must be provided to all equally, without regard to race, gender, or national origin.

As we have seen, scholars who support the use of cultural evidence in criminal proceedings do so based upon the belief that it is a good thing to afford defendants individualized justice, and, where immigrants are concerned, to do this with a particular sensitivity toward multiculturalism. The weight and persuasiveness of this position is severely diluted, however, by the short shrift these commentators give to the effect of this approach on the victims of immigrant crime, and, more broadly, on society at large. In fact, advocating the use of the cultural defense is problematic precisely because it focuses exclusively on the rights of the defendant, and thus fails entirely to consider the primary function of the criminal law, that is, the protection of victims and the public generally from criminal conduct. [FN209]

It is axiomatic that a principal purpose of government is to protect the people from criminal acts. Implementation of the criminal code in a way that denies some individuals its protection subverts this purpose. For example, we do nothing to further a general interest in life and liberty (both terms read literally rather

than constitutionally) for all (including immigrants) when we exclude premeditated but culturally-motivated killings from the definition of murder; or when we exclude premeditated but culturally-motivated "captures" from the definition of kidnapping; or when we exclude premeditated but culturally-motivated forced intercourse and sexual mutilation from the definitions of rape and battery.

Moreover, the traditional theories of punishment underlying the criminal laws also are inconsistent with the dispositive use of cultural evidence. Failure to punish a defendant for his intentionally criminal act on the basis of an expert's testimony that "his culture made him do it" does little to deter others in the defendant's circumstances from committing the same act; or to deter the defendant himself from repeating his offense; or to assure the victims and potential victims of such criminal conduct that society is willing to protect them; or to punish the defendant for the harm created by his act. What distinguishes the cultural defense cases from others where an apparently guilty defendant is exonerated or is leniently punished, is the race-or ethnicity-based rationale for the treatment.

***1137** In fact, officially treating such evidence as exculpatory sends bad messages to everyone, but especially to those in the affected communities. The message is sent that if you are an immigrant, you are not guaranteed the right to choose to escape those aspects of your culture (or those stereotypes about your culture) that collide with the criminal law. The victim in People v. Moua [FN210] is a perfect example of this point. She was an employee at Fresno State University who, like many other young people her age, had left her community to work in an office on campus. [FN211] Had her parents not been Laotian, the California penal code would have demanded serious punishment for Moua. Instead, simply because the victim could be identified as Laotian by the defendant, the state denied her the protection afforded by its penal code. Her own decision to reject the aspects of her parents' culture that are alleged to invite rape was irrelevant. Most frightening in this particular case is the fact that because the court adopted the defendant's view of the victim as a member of an immigrant group (of Laotians) rather than as an individual (who may or may not have accepted that culture), she was deprived of the choice to say "No" to her rapist. [FN212]

The poignancy of this result is reinforced by the more general cultural views about rape that are evidenced in another case involving a Hmong immigrant, Minnesota v. Her. [FN213] In that case, the defendant himself testified on cross-examination that rape as it is conceived in the United States does not exist in Hmong culture. [FN214] While the court in Her chose not to accept the defendant's cultural explanation, the case clearly demonstrates the problems inherent in accepting the cultural defense in Hmong marriage-by-capture cases: Not only would rape in the guise of the marriage-by- capture custom not be subject to prosecution, but the state's definition of rape would be generally subject to contention.

Other equally disturbing messages are sent by recognition of the cultural defense, including the message that some immigrant men will not and cannot be taught to treat women in the manner we are now accustomed to being treated here in the United States, and that it is the height of ethnocentrism to require that these men conform to our criminal laws. This particular message is implicit, for example, in the reaction of relief workers in the Atlanta area who avoid the topic of female genital mutilation with Somali refugees who engage in the practice. [FN215]

***1138** The message is sent that, although European-American women, like Nicole Brown Simpson, [FN216] and children, like Michael and Alexander Smith, [FN217] are deemed worthy of legal concern, non-european immigrant women and children are not similarly worthy. Indeed, the irony for liberals is that it is possible that everyone involved in the proceedings will conclude that our government, through the cultural defense, has given

its imprimatur to the defendant's otherwise criminal acts.

Thus, whatever the particular custom at issue, a message is sent to the affected communities that men can continue to subordinate women and children as they allegedly were accustomed to doing in their country of origin. [FN218] This is precisely what occurred, for example, in the aftermath of the New York state court's decision in the Chen case:

The Chen decision sent a message to battered immigrant Asian women that they had no recourse against domestic violence. One battered Chinese woman told a worker at the New York Asian Women's Center, “Even thinking about that case makes me afraid. My husband 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.”’ . . . The New York Asian Women's Center co-director reported that battered women who had previously threatened their husbands with legal sanctions also lost this threat as a means to stop the abuse: “For some women this has worked, but no more. They tell me their husbands don't buy it anymore because of this court decision.” [FN219]

What is particularly disturbing about this “urge to preserve culture”, is that it “can function as a sanction of [future] violence.” [FN220] As commentator***1139** Nilda Rimonte has noted in the context of cultural evidence produced by men from the Pacific-Asian community,

[w]hile the cultural defense is based upon a laudable respect for the worth of all cultures, it results in a validation of Pacific-Asian patriarchal values which promote, or at least facilitate, crimes against women. . . .

Accepting [the evidence as dispositive of outcomes], especially as it relates to certain features of [a man's] culture that are oppressive of, or dangerous to other people, is equivalent to complicity. [FN221]

And what are these “patriarchal values” that our legal system is impliedly validating when it accepts dispositive cultural evidence? In the context of the immigrant cases, these values include “a belief in male privilege, authority, and superiority . . . [that] invests men with enormous power and control over women and makes women very susceptible to abuse.” [FN222] For example, one commentator, discussing the cultural practice at issue in a case involving a Vietnamese defendant who killed his unfaithful wife, [FN223] noted that in Vietnamese culture, husbands are “traditionally . . . regarded as the strongest person in the household, the master and religious head of the family.” [FN224] In these households, not surprisingly, there are “differential rates of acculturation [to American society] in husbands and wives, with rapid change likely in the latter case. Such differences portend major problems, perhaps violence, if traditional means of social control have been eroded.” [FN225]

***1140** One scholar asserts that this phenomenon of differential acculturation rates among men and women from traditionally patriarchal societies strongly supports the argument that these men ought to be afforded the protection of a formalized cultural defense. [FN226] Clearly, as we have seen, doing so would give these defendants individualized justice. The inescapable difficulty with this position, however, is that it does nothing to protect immigrant women who seek to break this oppressive and sometimes violent cultural mold, and who want to become educated, work outside of the home, and have equal rights in other respects.

If this all sounds distantly familiar, it is not a coincidence. For just as American law and culture once stood as a barrier to the advancement of American-born women in these areas, [FN227] so too the patriarchal values brought to our country by some immigrants serve as a barrier to the advancement of women from these cultures. Moreover, to the extent that the cultural defense serves as the government's seal of approval of these values, it is

complicit in a process that effectively returns immigrant women in the affected communities to a place European-American women began leaving in the mid-to-late nineteenth century.

Equal protection doctrine is implicated by these circumstances because this anachronism exists only for certain groups that are expressly defined by the state on the basis of race, gender, and national origin. These classifications may be made benevolently, by well-meaning liberals who simply wish to individualize justice through multiculturalism, or they may be made, consciously or subconsciously, for more invidious reasons, including because of racist and/or sexist views. [FN228] Whatever the reason, the discrimination that results from these classifications violates equal protection principles. [FN229]

***1141** For example, when the judge in People v. Chen relied upon the cultural evidence presented by the defense because the Chens were from China, he effectively carved out a group--"people from China"--and distinguished them from others in society for purposes of applying the state's criminal laws. The result of this classification was that, at least in that courtroom on that day, the state's criminal code did not apply to "people from China" in the same manner as it applied to others. [FN230]

This same equal protection analysis obtains in the other immigrant defense cases we have discussed. Thus, in the marriage-by-capture cases, the state singles out "people who are Hmong from Laos" for discriminatory treatment; in the mother-child suicide cases, the state singles out "people from Japan or Asia" for discriminatory treatment; and in the female genital mutilation cases, the state singles out "people from mostly Asia and Africa" for discriminatory treatment. In all of these cases, different (lesser) punishment is given to immigrant defendants than would be given to people who are not immigrants. And in all of these cases, the immigrant victims are effectively denied the protection and vindication provided by the criminal laws to similarly-situated victims who are not immigrants. [FN231]

Significantly, this discrimination results from a state's ancestry-based classification despite the fact that, for example, a battered wife from China and a battered wife from Texas may be similarly situated with regard to the facts (e.g., adultery) that allegedly provoke their husbands to beat or kill them. The counter-argument, that culture distinguishes the two women so that they are not similarly situated for purposes of equal protection analysis, is weak in at least two respects.

First, the argument assumes incorrectly that "people from Texas," unlike "people from China," do not have a culture. They do. Indeed, Texan culture, like the culture of much of the United States, has historically been lenient towards men who have beaten or killed their adulterous wives. [FN232] Moreover, the patriarchal cultural norms that underlie the alleged custom at issue in Chen--the same norms that underlie most of the customs at issue in this Article--are strikingly similar to those that underlie the analogous American view that men are prone to violence ***1142** when their wives commit adultery. [FN233] Women's rights advocates who have been battling this aspect of American culture have, to a large extent, succeeded in altering relevant law to reflect more egalitarian ideals. Thus, generally speaking, the law of homicide no longer automatically permits men to plead to manslaughter instead of murder when they kill their wives.

The second problem with the argument that a battered wife from China and a battered wife from Texas are logically separated by culture flows from these developments. Namely, the argument assumes that, in the name of cultural pluralism, a part of the law should take two steps back in this area of women's rights. As we saw earlier in this section, acceptance of these cultural norms forces immigrants, and most often immigrant women, to go back to a time when American law formally discriminated against women and people of color, a time to

which most would agree we as a society do not want to return. [FN234]

Revisiting the Kimura case in light of the recent Susan Smith case perhaps best illustrates this point. If the Kimura case is divorced from its cultural context, what is left is a woman who was so despondent about her personal circumstances that she wanted to die, but not without her children. Having this in mind, she carefully planned their deaths (and hers) by drowning. She took them by bus to the ocean at Santa Monica, walked them into the water, and held them struggling beneath the surface until they finally died. Afterwards, Kimura claimed that she thought she was sending them to a better place. [FN235] Apart from the doctrinally inconsequential fact that Susan Smith drowned her two children by sending a car into lake water in South Carolina, rather than by holding them physically under ocean water in California, the facts of the Smith case were, in all relevant aspects other than culture, the same as those in Kimura. [FN236]

***1143** Despite these essential similarities, the States' reactions to the two cases were markedly different. Both Kimura and Smith were initially charged by the prosecution with first degree (premeditated) murder. In Kimura, however, pursuit of the charge was abandoned after the defense and the Japanese-American community educated and sensitized the prosecution and the judge about Japanese culture. Ultimately, Kimura spent only one year in jail.

Susan Smith was not so fortunate. For a similar drowning of two young children, Smith received the penultimate punishment, life in prison. Unlike Kimura, Smith could not get the charges of first degree murder reduced; indeed, throughout the trial, the prosecutor continued to pursue the death penalty. And throughout the trial, although there was much discussion of Smith's psychological history and unfortunate personal circumstances, the focus both of the public and of the criminal proceedings remained on her victims, her two young sons. Even her defense did not seriously attempt to obscure this focus. In the end, Smith was found guilty of the children's murders, and although she was spared the death penalty, she was sentenced to life in prison and will spend at least thirty years there. [FN237]

Thus, when Kimura is set free at least in part because drowning her children is consistent with her native cultural practices, while Smith is charged with capital murder for essentially the same act, there is a troubling disparity in the way the legal system is responding to the substantially similar actions of the two women. A similarly troubling disparity is revealed when the focus is shifted to the child-victims of the two crimes.

The drowning of the Kimura children was not vindicated by the system; furthermore, the message about the value the system places on other, still-breathing, Japanese-American children is dismal: In the name of rejecting cultural relativism in the law, child-victims of immigrant crime (victims, essentially, of cultural pluralism) have been--and, if the cultural defense continues to be accepted, will continue to be--left without protection by the criminal law. This result serves neither the intent of deterrence nor that of retribution, two principal penological purposes of the criminal law. The children are thus victims twice, once physically, and then legally.

On the other hand, there is no doubt of the legal system's intent to vindicate fully the drowning of the two Smith children. The message in this latter case is clear and very different: We do value these children's ***1144** lives, and the lives of others like them; i.e., other American children and even more narrowly, other white American children. [FN238]

As a theoretical matter, the choice reflected in the use of the cultural defense--whatever motivates it--is problematic not merely because it violates equal protection principles, but also, and perhaps principally, because it re-institutes a bifurcated criminal code that is frighteningly similar to the old slave codes and to the black

codes that briefly existed after the Civil War. [FN239] Section One of the Fourteenth Amendment was intended to ensure that the same crime would beget the same punishment, regardless of the race of the defendant or the victim. With the practice in some state courts of individualizing justice through multiculturalism, where the same crime once again begets different punishments because of the ancestry of the defendant and his victim, this original intent is largely, if not completely, eviscerated. [FN240]

More practically, the cultural defense, a modern cultural code, devalues the lives of immigrant victims of immigrant crime in the same way that the slave codes and black codes devalued the lives of blacks in the nineteenth century. Applying Brest's antidiscrimination principle, such "unequal treatment could be justified only if one group were in fact more worthy than the other. This justification failing, such treatment violates the cardinal rule of fairness--the Golden Rule." [FN241] Ultimately, although the goal of a society that is welcoming of immigrants from everywhere is a laudable one, I do not believe that it can justify violating this "Golden Rule."

## IV. With Individualized Justice for All

The preceding parts of this Article established both that the cultural defense is consistent with individualizing justice through multiculturalism, and inconsistent with applying the criminal laws in a nondiscriminatory manner. Because these two themes clash in the cases at issue, the question is thus posed: As a matter of policy, and leaving aside the equal protection problem, how should the law resolve this tension? This part of the Article addresses this question. I first discuss existing commentary on ***1145** the cultural defense and conclude that it fails to address adequately the problems inherent in its use. Next, I suggest that recent federal legislation and administrative action addressing the problem of violence against women may, as a policy matter, resolve the tension in favor of victims of immigrant crime. To the extent the dilemma remains, I conclude that it may be resolved using the balancing doctrine.

### A. Existing Commentary on the Cultural Defense

The best piece to date on the cultural defense, by Nilda Rimonte, comprehensively explores the patriarchal values in Asian cultures and rejects the use of the defense because it incorporates and perpetuates these values. Rimonte is the director of a community-based legal organization whose principal function is to assist immigrant women. She writes from the perspective that she practices, i.e., that the best way to help her clients is to help their community by reconciling--whenever possible, in a nonconfrontational manner-- the inconsistencies between their culture and the dominant United States culture. [FN242]

In this regard, Rimonte's piece is especially good because it recognizes the merits of each of the relevant interests. This is an attribute I believe to be essential as we seek to resolve the problems inherent in the use of the defense. Nevertheless, she leaves us with only a policy basis to resolve these problems. For example, although Rimonte's analysis of patriarchal customs is consistent with antidiscrimination themes, she never squarely discusses the equal protection issues raised by the use of cultural evidence. Most significantly, Rimonte never takes a categorical position on the dispositive use of cultural evidence.

A more recent piece, authored by Leti Volpp, also seeks to accommodate both feminist and multicultural interests in her solution to the issues raised by use of the cultural defense. Necessarily, like Rimonte, Volpp also addresses the patriarchal customs at issue in most if not all cultural defense cases. [FN243] Her conclusion rejects the use of the defense, but only for those in the culture who are subordinators (men). [FN244] Although

Volpp's article does not otherwise mention the Equal Protection Clause, it is based expressly on the antisubordination principle. [FN245] Thus, despite the absence of an equal protection discussion, this related theoretical foundation makes Volpp's piece the most relevant to my analysis.

Volpp's solution--she would allow the defense for Kimura but not for Chen-- although intellectually interesting, is not viable for three essential reasons. First, her conclusion--that cultural evidence ought to be permitted for female defendants but not for male defendants--is based ***1146** only upon the antisubordination principle, [FN246] and that principle cannot support this immense distinction. [FN247] As a preliminary matter, I note that Volpp herself never expressly states that immigrant women should be permitted to use culture as a criminal defense while immigrant men should be precluded from doing so. Nevertheless, her argument effectively leads to this result. In the cultural defense cases, Volpp's principle of antisubordination results in a finding that it is primarily immigrant women who are subordinated and oppressed, both by their own men and also by the majority. [FN248]

In this regard, Volpp asks "[h]ow can one argue that the 'cultural defense' for Dong Lu Chen [the male defendant in the Chen case] was inappropriate while approving the use of cultural information for women like Helen Wu [who killed her children]?" [FN249] Volpp goes on to say that she "reconcile[s her] divergent positions on the two cases by proposing that the value of anti-subordination must be a criterion in the decision as to when and how cultural factors should be presented as a defense." [FN250] Volpp's position is that the subordinated individual is to be afforded special treatment by the law (in these cases the special treatment includes being permitted to use "cultural information") whether she is the victim or perpetrator of the crime. [FN251]

Second, Volpp commits a disturbing version of the cardinal sin she critiques in other writing: She fails to value or even to discuss male victims. At the end of her article, where she primarily discusses the Chen and Wu ***1147** cases, Volpp writes that her "evaluation reveals these cases to be about Jian Wan Chen and Helen Wu," [FN252] that is, the women in the cases. In Chen, Jian Wan Chen was the female victim of murder perpetrated by her immigrant husband. In Wu, Helen Wu was the female perpetrator of the murder of her son. Volpp never discusses this son, or the effect of her conclusion that his mother--because she was subordinated and oppressed by her culture--deserved to be allowed to use cultural information as part of her defense. This same omission, this outright disregard of the physical victim in the case, is the principal subject of Volpp's attack on the Chen case: "[W]here was Jian Wan Chen in this story?" Volpp asks angrily. [FN253] And she continues:

> [Jian Wan Chen] was most notably present in the testimony as a dead body and as a reputed 'adulteress,' bringing a 'stain' upon her husband. Jian Wan Chen did not exist as a multi-faceted person but was instead flattened into the description 'adulteress.' . . . How should this flattening be interpreted? This invisibility and erasure of the woman, Jian Wan Chen? [FN254] It is my view that no victim deserves to be rendered "invisible" or "flattened" in this way, and that to the extent the criminal laws continue largely to be about protecting victims, such protection simply cannot be afforded in a discriminatory manner.

Third, while Volpp rejects arguments that the cultural defense ought to be formalized, [FN255] she proposes to continue to permit its use throughout the proceedings "informally" as cultural information that would go to "state of mind," [FN256] a procedure that does no more than reflect current practice. [FN257] Indeed, Volpp does not propose anything that departs from current practice apart from calling cultural evidence by another name--"cultural information"--and suggesting that only those who are subject to subordination should be permitted to use the evidence. The result of her proposal is to leave things otherwise as they stand.

The latest article on the subject, written by Holly Maguigan, takes the position that most uses of cultural evidence are not intended to rise to the level of an actual defense to criminal conduct. [FN258] Maguigan argues that existing scholarship fails to address the more prevalent and practical ***1148** issue, how to assist litigants and courts to distinguish properly admissible evidence from inadmissible evidence. [FN259] To fill this gap, she proposes a model rule that would assure the introduction of cultural evidence only when it is consistent with existing law. [FN260]

To the extent that Maguigan's proposal would accomplish this end, it would resolve the issues I raised in the introduction to Part I of this Article, concerning the disingenuous use of cultural evidence in the context of traditional state of mind analyses. [FN261] What her approach fails to accomplish, however, is a resolution to the problem posed by cases where cultural evidence is presented, either subtly or overtly, as a defense to criminal conduct. Indeed, it is only Maguigan's threshold rejection of the commonly-held view that the kinds of cases discussed in this Article are intended to act as an informal defense that permits her to take the position she takes, that a rule distinguishing admissible from inadmissible evidence is all that is required to address the concerns scholars have raised about those cases. Moreover, even if Maguigan is correct that in most cases where cultural evidence is at issue, there is no cultural defense problem, her work still fails to address those cases where the defense is an issue, including, I submit, the cases discussed herein. Most importantly, perhaps, because of Maguigan's practical perspective, her work does not seek to address the larger policy question whether a cultural defense should exist in our laws.

A few other articles, some in the popular press, have included a recognition that there may be a need to restrict in some instances the scope and applicability of the defense. Proposals include allowing the use of the defense only for refugees, or only when consensual members of the same community are involved, or when immigrants have not been in the country for long. [FN262] However, as I discuss below, these restrictions all are flawed in important respects, not least because they neglect to address the practical question of how society can function in an orderly way when there is a balkanization of the criminal law. Similarly, the equal protection problems inherent in the use of cultural evidence also are not addressed. Indeed, these solutions place so much weight on the merits of what I have called pure multiculturalism, with its attendant defense-oriented, individualized justice concerns, that they fall flat, failing to resolve very much.

One of the proposals that is particularly culpable in this regard would permit only those immigrants who are not in this country voluntarily to use the defense. [FN263] Native Americans (on reservations), African-Americans, and refugees (including Laotian Hmong) have been included in this category. Alison Dundes Renteln has argued that groups who are ***1149** not in the United States voluntarily should not have to adhere to the same “when in Rome” standard as do others who live in the United States. [FN264] While this proposal certainly would prevent certain immigrant groups from using the defense, it does nothing to resolve the equal protection and related legal issues with respect to those defendants who still would be permitted to use it. There is no logical coherence to this distinction.

It also has been suggested that use of the cultural defense be permitted only where consensual members of the same immigrant community are involved. [FN265] As it has been presented, this proposal appears to require that consent be determined by objective reference to the victim's identity as a member of the same immigrant community as the defendant, rather than by the victim's subjective and voluntary retention or adoption of the community's culture. Professor Villareal, for example, discussing the Chicano community, has described this option as follows: A defendant who has “consented to belonging to [the] Chicano group and [who has] subscribed to Chicano tenets . . . should [have his conduct evaluated] pursuant to standards as defined by Chicano

cultural values." [FN266]

Thus, for example, this proposal appears to suggest that a Laotian Hmong man who kidnaps (captures) and rapes (marries) a Hmong girl will have committed no crime, or his culpability for the crime will be reduced, because the law will find that when the girl otherwise chose (expressly or impliedly) to remain a member of the larger Hmong community, she also impliedly consented to the custom of marriage-by-capture. As an initial matter, taking an objective view of the victim's consent but making a subjective inquiry about the defendant is inherently unfair, and compounds the physical injury suffered by the victim in the first instance. Furthermore, there does not appear to be a mechanism for the girl to "opt out" of Laotian Hmong culture for purposes of this particular custom, short of forcing her to opt out of that culture for all purposes. Presumably she could do this only by expressly denying her heritage and assimilating completely into the majority group. [FN267]

***1150** People v. Moua [FN268] is a particularly poignant example of how even this would, in practice, fail to ensure fairness and justice for the victim. From all objective appearances, the woman, who happened to be Hmong, had expressed her wish in some manner to become part of the larger American community--by choosing to work on the campus of Fresno State. However, a knock at her door in the middle of an otherwise normal American working person's day reunited her with Hmong culture in all of its aspects, and united her with a man who embodied it. That she later reported the incident as a rape suggests her apparent desire to disassociate herself from aspects of Hmong culture. Our laws ought not to force potential victims to accept their native culture in the United States, especially as they may have come to our country precisely because of the freedoms our society is thought to provide.

It also has been proposed that the length of time immigrants have been in the United States should be considered in deciding whether to allow the use of the cultural defense. [FN269] The concerns discussed above apply with equal force here. In addition, this solution is inconsistent with the pluralist positions that are advanced in these cases and in support of the defense generally; first, that immigrants would practice their customs even if they knew the law--as in parent-child suicide cases--precisely because cultural dictates are so strong; and second, that in the interest of multiculturalism, we should embrace their right to do so.

### B. The Violence Against Women Act, and Department of Justice Asylum Guidelines

Allowing the cultural defense in the cases described in Part I conflicts with the policies of recent federal legislation and administrative guidelines for the Immigration and Naturalization Service (INS) that seek to protect women from gender-motivated violence. In particular, the Violence Against Women Act--part of the 1994 Crime Bill--for the first time seeks to address comprehensively, as a matter of federal law, the problem of gender-motivated violence. [FN270] The Act was followed in 1995 by a Memorandum from the Department of Justice that interprets existing INS asylum rules to permit the introduction of evidence relating to gender-motivated political crimes in hearings where the petitioners are women. [FN271] Together, the Act and the INS Guidelines reflect the notion that the right to be free from gender-related violence is universal, even ***1151** where the violence is an acceptable norm in the woman's culture. This suggests that, at least as a matter of policy, state courts should not accept the cultural defense when the effect of its use is to incorporate gender-discriminatory customs, or to exonerate gender-motivated violence.

The Violence Against Women Act, for example, includes the Equal Justice for Women in the Courts Act, [FN272] which provides funding for the education and training of state court judges and personnel on relevant topics including:

(1) the nature and incidence of rape and sexual assault by strangers and nonstrangers, [and] marital rape . . .; (5) the historical evolution of laws and attitudes on rape and sexual assault; (6) [sex and race] stereotyping of rape victims and defendants, and the impact of such stereotypes on credibility of witnesses, sentencing, and other aspects of the administration of justice; . . . (11) the physical, psychological, and economic impact of domestic violence on the victim, the costs to society, and the implications for court procedures and sentencing; . . . (13) sex stereotyping of female and male victims of domestic violence, myths about presence or absence of domestic violence in certain racial, ethnic, religious, or socioeconomic groups, and their impact on the administration of justice; (14) the historical evolution of laws and attitudes on domestic violence . . . . [FN273]

The Violence Against Women Act also provides for a "[f]ederal civil rights cause of action for victims of crimes of violence motivated by gender." [FN274] This right of action establishes that women "within the United States shall have the right to be free from" such crimes, and that anyone who commits gender-motivated violence "shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and other such relief as a court may deem appropriate." [FN275]

The INS Guidelines are directed to "[a]ll INS Asylum Office[s and Officers]" and are intended to provide "guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender." [FN276] They recognize that women and girls across the ***1152** world in many instances suffer because of their gender--examples provided in the Guidelines include "sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion" [FN277]--and require asylum adjudicators to review petitions with a particular sensitivity to such claims, as they "may serve as evidence of past persecution." [FN278] Successful petitioners for asylum are required to provide such evidence.

The Guidelines note specifically that "[t]he laws and customs of some countries contain gender-discriminatory provisions," and that as a result of these laws and customs, "the civil, political, social and economic rights of women are often diminished." [FN279] Finally, the Guidelines state that "[w] omen who have been raped . . . are viewed as having brought shame and dishonor on themselves, their families, and their communities," and that gender-related violence itself is viewed by some cultures "as a failure on the part of the woman to preserve her virginity or marital dignity." [FN280]

The Guidelines establish that these gender-discriminatory laws, customs, and beliefs are antithetical to a woman's universal rights, which the United States Government has already recognized, to equality and freedom from gender-motivated violence. [FN281] Significantly, to the extent that the United States continues to adhere to United Nations and related conventions in this area, these universal principles likely will result in efforts to make federal law consistent with those principles, and to include expressly that they "supersede [conflicting] national traditions." [FN282] Such extensions would, at the very least, be inconsistent with the states' use of the cultural defense. Depending upon the manner in which these universal norms are incorporated into domestic law, i.e., if they are adopted in ***1153** compliance with an Article VI treaty, they may go so far as to preempt use of the cultural defense altogether.

Although the universal principles that underlie the INS Guidelines are not binding on courts adjudicating individual asylum claims, they nevertheless have begun to receive judicial recognition. For example, in 1995 "for the first time, an immigration judge granted political asylum to a Jordanian woman on the ground that her Government had failed to protect her from her husband's physical assaults." [FN283] The court in that case found that "the woman should not be forced to live 'in a harem completely "protected" by her husband, his society and his government."' [FN284] Also, several courts recently have had occasion to address the problem of returning

women and girls back to their native countries where they are certain to be genitally mutilated. While the results in those cases are split, there is a clear trend--particularly since the promulgation of the new asylum guidelines--toward granting immigration status to those in jeopardy of this procedure. [FN285]

While there is nothing in the Violence Against Women Act that indicates congressional intent to preclude the states from exercising their traditional police power role in the area of domestic violence, it is equally clear that the Act and the Guidelines signal, at the very least, a federal intent to participate actively and concurrently in the effort to reduce gender-related crime. [FN286] This coherent, consistent federal response to the problem based upon broad notions of the universality of women's rights and of the particular right of women to be free from gender-based violence--even as against national customs [FN287]--flies squarely in the face of the ***1154** state action at issue in the cultural defense cases. In those cases, sensitivity is exhibited not to women and girls, the victims of gender-based crime, but rather to the defendant and to the notion that United States law should respect the diversity of national traditions, i.e., to multiculturalism. [FN288]

Indeed, while formal preemption analysis is not at issue, there nevertheless is a strong argument that the policies underlying recognition of the cultural defense--either the promotion of multiculturalism, or racism and sexism-- "produce a result inconsistent with the objective of the federal statute," [FN289] and thus "stand[ ] as an obstacle to the accomplishment and execution" [FN290] of those objectives. Moreover, in practice, it sometimes would be the case that "compliance with both federal and state regulations [[[would be] a physical impossibility." [FN291] For example, as noted, the Equal Justice for Women in the Courts Act provides for the sensitization of state court judges and related officials the issue of gender-based violence. State officials who permit use of the cultural defense are engaging in the opposite process; that is, they are seeking to incorporate the discriminatory cultures of the defendants into the application of the criminal law. For example, "understanding" that Chinese culture may in certain circumstances permit men to be violent toward their women, and incorporating that "understanding" into the application of the criminal laws so as to endorse the violence conflicts with this Act's goal of educating state court judges and personnel about myths concerning the "presence or absence of domestic violence in certain . . . ethnic . . . groups." [FN292]

Moreover, since the INS Guidelines allow the admission of women to the United States on gender-based asylum claims, it would be inappropriate for states to weaken their protections against gender-based violence. Indeed, women or girls who suffered or feared domestic violence, genital mutilation, forced marriage, or marital rape in their native countries, and who came to the United States hopeful that they might find a haven here, may have their expectations dashed by the states if the cultural defense is allowed.

***1155** Whether or not the women and girls at issue entered the United States as refugees, it is not difficult to argue that to the extent they immigrate in part to achieve a better life, including protection against gender-related violence, use of a cultural defense that allows discriminatory, violent customs to exist in the United States conflicts with both the rules and underlying policies established by the federal government in this area. Thus, for example, the fact that the victim in People v. Moua was subjected to rape and forced marriage (marriage-by-capture) here in the United States, and that she was not vindicated in any substantive way by state law, is fundamentally irreconcilable with the position of the federal government that there is a universal right, respected in this country, to be free from these gender-related acts.

Thus, while there is at present no dispositive argument to be made that federal law preempts the development of the cultural defense by the states, there certainly is a strong position to be taken based on comity, including respect for the federal government's role in advancing women's rights in the international arena, that the

states should refrain from adopting the cultural defense formally or informally.

### C. Balancing

To the extent that the tension raised by the cultural defense is not negotiated as suggested in the preceding section, it must be negotiated otherwise. [FN293] The reactions of most commentators on the cultural defense appear to be politically motivated: either defendants' rights to individualized justice are paramount because it is in the larger interests of society to have the criminal process function subjectively, or the rights of crime victims are paramount because it is victims that the criminal law ultimately seeks to protect. [FN294] Even this characterization of the literature may be too coherent. It may well be the case that this choice of sides results from the fact that some people are defense- oriented even if in any given case their rationale falls apart, while others favor victims over defendants in cases where the victims are perceived as legally or politically weaker than the defendants, or where they can see themselves as the victims. These competing reactions may be evidence of different moral positions, or it may simply be that the conflict has not been addressed squarely and comprehensively by those who care about the interests of both defendants and victims.

***1156** Whatever the case, the law ought to be based upon more than which side is up on any given day in any given jurisdiction. Rather, it ought to be based upon a rational process that weighs the relative merits of both positions, taking into account the general interests of society. While the balancing doctrine is not flawless, [FN295] it provides us with an analytical tool that addresses these concerns. Balancing is popular with the courts; moreover, it is inherently more objective, and thus more legitimate, than the political instincts that appear to have guided most prior discussions about the cultural defense.

Indeed, the balancing approach serves a substantial and important function when courts struggle to resolve "clash[es] of competing constitutional claims of a high order." [FN296] It serves this function because it requires everyone concerned to articulate expressly and comprehensively their respective arguments, as well as the social utility of those arguments. Thus, the balancing approach is preferable to a battle of competing emotions and politics that may or may not involve such concerted deliberation. At its best, this approach can provide a framework for resolving difficult social and legal problems that considers in a relatively fair way the many sides of a debate, and reconciles them (perhaps ultimately through compromise) in a manner that we as a society have come to accept.

It is essential, both to a practical and to a theoretical resolution of the liberal dilemma, that such an apparently fair and objective tool be used. As a practical matter, the benefits of achieving a coherent solution using the tools of existing jurisprudence are evident: when courts reach decisions in cases presenting unprecedented fact patterns using familiar doctrine, the decisions are accorded wide legitimacy. As a theoretical matter, it is important that law be developed using an interpretive methodology that is not, or at least does not appear to be, political or emotional. The balancing approach provides a familiar and apparently objective methodology, and thus can be especially helpful in the complicated, often emotional context of the cultural defense cases.

***1157** While different versions of the balancing approach have been formulated by different courts in the context of different doctrines, [FN297] the broader outline of the doctrine is constant; balancing requires analysis and weighing of the various interests being asserted, including an examination of alternatives and of the interests of society in the process and the outcome of the analysis. It is this broad outline that I suggest is useful to resolve the liberal dilemma that is presented by the cultural defense cases.

The respective interests of the two principal "parties" in the cases, immigrant defendants and their victims, already have been discussed at length throughout this Article. Thus, we have seen that victims of immigrant ***1158** crime have an important interest in ensuring that the criminal justice system works both to protect them from immigrant-on-immigrant crime in the same way that others in society are protected from the same kinds of crimes, and to vindicate them where those protections are ineffectual. On the other hand, we have seen that defendants in the cultural defense cases have a substantial interest in having their initial culpability as well as any ultimate sentence determined subjectively, with express consideration of the cultural factors that might be relevant to these separate analyses.

For conservatives and, ironically, some feminists, these competing interests and burdens are easily reconciled. "When in Rome, do as the Romans do!," is the conservative cry whenever multiculturalism appears to threaten established institutions in American society. The response to the cultural defense has not been different. [FN298] Feminists generally do not align themselves with conservatives; however, because our "Rome" is a better place for women from the Western perspective, they do stand aligned--at least for the moment that it takes to articulate the anti-multicultural position--in regard to the cultural defense cases. [FN299] Because this position inherently incorporates the judgment that the (female) victim's rights are paramount, it neither addresses nor solves the liberal dilemma.

However, as I have noted, for many liberals who do face the dilemma, including feminists of color, a full discussion of the competing positions in the cultural defense cases does not easily dispose of the problem. For this group, the evidence of interest and burden might be said to be more-or-less in equipoise. Further analysis focusing on the last two components of the balancing doctrine--namely possibly less burdensome alternatives and the best interests of society--is thus necessary to reach a consensus on the cultural defense cases. It is my view that this further discussion and analysis tips the scales in favor of the victims of immigrant crime.

As to the question whether less burdensome alternatives exist or could be developed, the answer is that at least one substantial, less burdensome alternative already exists for defendants, while there does not readily appear to be any solution for victims short of eliminating the option of the cultural defense. As we saw earlier in this Article, the Supreme Court has recognized, in some contexts, the defendant's right to present mitigating evidence during the sentencing phase of the proceedings. [FN300] Information about how the defendant's culture would view his conduct could be considered in this context, and could lead to a reduced sentence. [FN301] ***1159** For example, it is not difficult to imagine that a court or a sentencing jury, after hearing evidence about the custom of marriage-by-capture, might set a relatively low term of incarceration for Mr. Moua, the Laotian Hmong refugee who abducted his victim from the Fresno State University campus. The rationale for this reduction would be the sentencing authority's determination that, taking subjective factors into consideration, Mr. Moua is less morally blameworthy than a European-American defendant who has committed the very same crime, and whose explanation is, for example, that he was fulfilling a fraternity hazing rite. This alternative would not, of course, remove the stigma of a conviction, but the conviction's practical effect would be reduced significantly. It also has the advantage of being consistent with existing approaches to mitigation.

The criminal law also provides established defenses that in many cases allow the defendant to make culture-neutral arguments that are based on the same facts that would be used to establish the cultural defense. For example, a defendant who killed his wife upon discovering that she had strayed from the marital bed could interpose the traditional defense of provocation that is used--and that has been used since time immemorial--in the Anglo-American legal system in these circumstances. [FN302] Of course, the defendant would not get the benefit of arguing that in his particular culture, the shame and devastation is elevated; nevertheless, the basic argu-

ment could be made. [FN303] The defense of diminished capacity when properly used, that is, when not controverted by an effort to transform it into the cultural defense, also provides a viable option for immigrant defendants who commit crimes when they are despondent. Thus, for example, the defense of diminished capacity could, depending upon the circumstances, be used in mother-child suicide cases.

***1160** Relatedly, as a statutory and constitutional matter, cultural evidence may be used properly to negate mens rea. That is, the defendant still may use cultural evidence to show that he did not commit the crime or crimes at issue. This is very different from the way in which cultural evidence is used in the cultural defense cases where, as we have seen, it serves not as an argument that the defendant did not commit the act or acts complained of, but rather that he has an excuse or a reason for having done so that the criminal law should recognize. [FN304]

On the other hand, there is no analogous option for victims when the cultural defense is used to exonerate immigrant defendants. These defendants are returned to their communities with the imprimatur of what is in essence a multicultural law, a law that incorporates the custom or cultural practice at issue. The victims simply are left dead, beaten, raped, and mutilated, and potential victims may be convinced that the United States is not a place where they can hope to be protected from discriminatory culture-based crimes.

Indeed, other than the federal civil rights cause of action created by the Violence Against Women Act discussed earlier in this Part, there is no legal recourse for victims in these cases. [FN305] The argument that these remedies constitute a viable alternative to eradicating the cultural defense from the strategic arsenal of defendants is not viable for one critical reason: The federal remedy clearly is meant to supplement existing state criminal laws. Because of this, the federal statute does not contain a criminal component, and thus is not sufficient to provide female victims and potential victims with either strong protection or vindication. In addition, by its very nature this remedy does nothing to protect children or other victims of immigrant crime who are not women.

Finally, the education option that has been suggested by one commentator, Nilda Rimonte, [FN306] is also necessarily supplementary. While it may be true that educating immigrant communities about inconsistencies between their culture and United States law is ultimately necessary, I do not agree that alone it is sufficient to resolve the issues presented in the ***1161** cultural defense cases [FN307] for the simple reason that the defense is premised on the notion that our law ought not be ethnocentric in its application. Thus, while education may be helpful for those immigrants who wish to assimilate into the larger American culture, it is not likely to help with those individuals who have no desire to do so. A perfect example of this flaw in the education option is the response some Somalis give to the suggestion that immigrants who genitally mutilate their girls should be counseled against the customary practice: “The Somali woman doesn't need an alien woman telling her how to treat her private parts . . . . The decision must come from the Somalis.” [FN308] Another flaw in this option is that the failure to criminalize immigrant conduct that contravenes the criminal laws itself teaches immigrants the wrong lesson about the United States legal system. [FN309] The Chinese-American community's reaction to the decision in the Chen case--women expressed fear that the decision would be read as an official sanction of gender-motivated violence--highlights this function of the law. [FN310] A formal educational program seeking to teach immigrants the converse message would be hard-pressed to counter the powerful signal sent by the law's silence.

An evaluation of the social utility of the competing interests also supports the victims' position. The defendants' argument is based on the pure multiculturalist position that it is in society's interests to move toward true cultural pluralism in all institutions. [FN311] The victims' argument is that a cultural pluralism that involves in-

corporating discriminatory cultural practices into the criminal laws will lead to a balkanized legal system that is inconsistent with equal protection principles we otherwise espouse. [FN312] Leaving aside the relative constitutional merits of these conflicting***1162** positions, I do not believe that it is in the interests of society to reform our laws in a manner that is so eerily reminiscent of our history of gender and racial apartheid. [FN313]

For those who do not believe that adopting the cultural defense would have this effect, and thus who believe that my analogy is overly dramatic, I would simply suggest that they look carefully at the cases where a version of the cultural defense has been effective, and ask themselves both about the results of those decisions, and how they would be compounded if the defense were formally to become law in jurisdictions across the United States. Such a transformation in the law would create, on a large scale, the very sort of legal distinctions we have only recently rejected.

Finally, an end note: Pure or strong multiculturalists may not be persuaded by this analysis. They may argue that, contrary to the view of conservatives and some feminists, a "Rome" where only Western values are prized is not a better place; and that contrary to the view of some liberals and feminists of color, there is no equipoise between immigrant defendants and victims of immigrant crime, because the goal of a multicultural society is always paramount. It is to these adherents of multiculturalism that I address this note and its caveat: Although my reasons may be slightly different, I, like Stanley Fish, believe that this strong adherence to multiculturalism eventually breaks down. [FN314] In the cultural defense context, the strong multiculturalist position breaks down in at least three ways.

First, the notion that a culture or a cultural norm or practice can be identified objectively is simply anthropological and legal fiction. Second, the notion that culture is permanent is also fiction. Using these fictions to decide cases where lives--both physical and emotional, of individuals and communities--are at stake is no more true to the objective of ultimate justice than is a system that does not permit the use of cultural evidence. Third, we--and here I include strong multiculturalists--are not seriously willing to extend the cultural defense to non-immigrant Americans. However, there is simply no viable rationale for carving out this distinction, at least not one that will support the heavy burden the cultural defense would place upon our legal institutions and the people they are intended to protect and govern.

The first point, that we cannot objectively and precisely define culture, raises two sets of problems. First, there is the problem of the existence***1163** of the custom or practice--that is, does it exist at all, and if it does, is it culturally acceptable in the minds of all or merely some segments of the foreign society at issue; second, there are difficulties in interpreting the custom or practice--that is, is the custom or practice as the defendant has described it, or are there nuances that he has not described that are relevant to a full understanding of its value for purposes of legal analysis. If, for example, it could be demonstrated that a substantial portion of a foreign society did not accept a custom or practice--mother-child suicide in Japan is one such example, wife beating and killing in various parts of the world are another--how should an American court rule when asked to accept the practice as part of a cultural defense? And if customary views about a practice such as forced sexual relations or rape vary within a culture--for example among men and women within Hmong culture--how should a prosecutor and/or a court view a particular defendant's argument that his personal rendition of the practice should govern? [FN315] This last example is made poignantly in Minnesota v. Her, where the parties and the witnesses disagreed on the question of whether rape was even a concept in Hmong culture. [FN316]

The second point, that culture is incapable of being defined permanently, is equally troublesome. It is an anthropological fact that almost every culture is being modified, constantly. As one scholar has noted, "[c]ultural

identities come from somewhere, have histories. But, like everything which is historical, they undergo constant transformation. Far from being eternally fixed in some essentialised past, they are subject to the continuous 'play' of history, culture and power." [FN317] Another scholar has described culture as "a force that . . . shapes and is shaped by its members." [FN318] Culture is thus neither stagnant nor immutable; rather, it evolves over time to adapt to changing historical, political, and social circumstances. And while certain ingrained aspects of a culture may be said to withstand such evolution, even at its core a culture will be different in one historical period than in another. [FN319] Put another way, culture "consists of the learned ways of behaving and adapting, as contrasted to inherited***1164** behavior patterns or instincts. A change in culture can be conscious and directed. People have the capacity to react to their culture." [FN320]

Given these anthropological explications of the nature of culture, it should not be viewed as antithetical to strong multiculturalism for Americans to engage in a debate about the substance of a culture when we are asked through the criminal laws to make aspects of that culture part of our own. The contrary argument, that it is only legitimate for the substance of a culture to be debated among members of the culture itself, necessarily falls apart when elements of that culture are imposed upon a broader society. [FN321] The justification for this inquiry is not founded in cultural elitism, but rather upon the truism that all culture is always changing, and that customs come and go depending upon various societal forces.

We have engaged in this cultural debate and selection process on many occasions in our own history, a clear example being the evolution of the role of women in society. While American culture during the nineteenth century provided a limited role for women, [FN322] our culture has since evolved to provide a more expansive one. Our culture has evolved in this respect, for the most part leaving behind conventions, traditions, and customs--all derived from the various cultures that make up the American anthropological landscape--that subjugated and dehumanized women. It is significant that changes in our legal culture in the area of women's rights played a substantial part in the transformation of our broader culture, much in the same way that the Supreme Court's decision in Brown v. Board of Education to integrate the public schools [FN323] is said to have paved the way for the integration of other public facilities. [FN324] In both instances, the law was instrumental in instigating a cultural evolution (some would say revolution) that allowed us to parse out and reject many oppressive aspects of the culture.

This leads me to my third point: Based upon our evolution in the area of gender equity in particular, I surmise that even the purest and strongest of multiculturalists would recoil at a cultural defense case where ***1165** the defendant was not an immigrant, but a European-American who argued that in his mind and in the community where he is from--"in his culture"--it continues to be appropriate for men to beat and rape their wives. This in fact may be true, as true as the same argument when made by the immigrant defendant. However, I do not believe that it would occur either to liberals generally, or to multiculturalists in particular, to believe in the inherent value of this argument. [FN325] The reasons for this distinction are unclear; indeed, I am unable to conceive a basis for it that could survive scrutiny. It may be that most Americans expect conformity to contemporary legal principles from those we consider to be "our own," in a way that some of us may not from "others." And yet from the multicultural perspective, this distinction is not a viable one. If you respect cultural diversity, there simply is no coherent rationale for making the ad hoc decision to exclude certain cultures from pluralism's embrace. In the end, the decision may turn more on the value we place on the victim or on our higher expectations for the defendant.

## Conclusion

It is estimated that at least 7,000 women and girls immigrate to the United States each year from countries where at least a majority of females, if not all of them, are circumcised. Most of these new immigrants ***1166** live in California, New York, and the Washington, D.C. area. . . . Even if only a small percentage of newly arrived families from . . . countries [where females are circumcised] maintain the tradition . . ., [available] figures suggest that hundreds of young girls either brought here or born here are in danger each year. [FN326]

[A] Laotian immigrant who felt disgraced over a daughter's failed marriage plans hacked his wife to death, sliced off a younger daughter's hand and killed himself by plunging the knife into his chest. . . . The father was depressed by "kids doing things not typical of Hmong culture." [FN327]

Wisconsin has about 40,000 Hmong and Laotian residents . . . [at least one county in that state] has about 3,000 Southeast Asians. Southeast Asian parents often cling to their customs and culture, while their children quickly adopt American ways . . . The conflicts can become deadly. [FN328]

These illustrations, and the vast numbers of non-european immigrants that have come to the United States in the last thirty years, leave no doubt that there will continue to be culture clashes of the sort described throughout this Article. Respect for these newcomers requires that we view multiculturalism as a positive and even necessary factor in the debate about how to resolve these conflicts. Without the sensitivity that multiculturalism injects into the debate, we have little hope of understanding the social obstacles immigrants face, or of ensuring their successful integration into American society. Indeed, multiculturalism's twin caveats--that we recognize our natural tendency toward ethnocentrism, and that we tread gently if at all upon that which is at the core of immigrant cultures--are essential to the attainment of these objectives.

Nevertheless, multiculturalism should not be permitted either intentionally or incidentally to erode the progress we have made as a culture in protecting the rights of minorities, women, and children, or to reverse our relative success in elevating the rights of these groups to the level traditionally enjoyed by propertied men of European descent. The antidiscrimination principle responsible for this progress is at the core of the broader American culture, a culture which logically also should enjoy multiculturalism's embrace.

The cultural defense is irreconcilable with this core because it permits customary practices such as female genital mutilation, mother-child suicide, marriage-by-capture, and other gender-motivated violence to escape the full sanction of the criminal law. For that reason, it must yield. Indeed, it is difficult to re-conceive our society and its laws in a way that would allow both the antidiscrimination principle and these practices to coexist. The cultural defense thus forces a choice between competing cultural values. In the end, however, the choice is not a difficult one, for ***1167** cultural pluralism loses its appeal when it requires some immigrants to sacrifice the protections of the antidiscrimination principle. Ultimately, for progressives especially, moving away from the antidiscrimination principle in these cases is fatally anachronistic because it inevitably would result in the evolution of "culture codes"--a legal system that would provide for different responsibilities and protections depending upon the national origin of the persons at issue--a notion that after a long and unfortunate history with slave and black codes and gender discriminatory laws, we properly have rejected.

[FNa]. On the phrase "individualizing justice," see generally Andrew E. Taslitz, Myself Alone: Individualizing Justice Through Psychological Character Evidence, 52 Md. L. Rev. 1 (1993) (investigating whether there are ways to move judges and juries closer in practice to the "individualized justice" required by the basic tenets of criminal law). The phrase describes the process by which criminal and constitutional law doctrine affords defendants a subjective evaluation of their moral culpability. See id. at 24.

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[FN1]. See Myrna Oliver, Immigrant Crimes: Cultural Defense--A Legal Tactic, L.A. Times, July 15, 1988, at 1, 30.

[FN2]. See Cathy Young, Equal Cultures--or Equality? Wash. Post, Mar. 29, 1992, at C5 (noting that Chen received five years probation on the lesser charge of manslaughter).

[FN3]. See Oliver, supra note 1, at 1.

[FN4]. See Jane Hansen & Deborah Scroggins, Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues, Atlanta J. & Const., Nov. 15, 1992, at A1, A11; Richard Lacayo, The “Cultural” Defense, Time, Fall 1993, at 61, 61 (special issue).

[FN5]. See Leti Volpp, (Mis)Identifying Culture: Asian Women and the “Cultural Defense,” 17 Harv. Women's L.J. 57, 57 (1994) (defining the cultural defense as a “legal strategy that defendants use in attempts to excuse criminal behavior or to mitigate culpability based on a lack of requisite mens rea”); Oliver, supra note 1 at 30 (judge noting that in a special intent crime like murder the cultural defense could “go all the way to acquittal”).

[FN6]. See, e.g., Michael Lind, The Next American Nation: The New Nationalism and the Fourth American Revolution 259 98 (1995) (discussing the issue generally, and concluding that while America is now in a multicultural phase, a new phase that incorporates a unifying cultural concept of “American liberal nationalism” can and should be reached).

[FN7]. See infra Part III.B (discussing antidiscrimination principle).

[FN8]. The words “progressive” and “liberal” are used interchangeably throughout this Article. They are used in the very best sense of the New Deal democratic tradition. In doing so, I reject the pejorative cast that conservatives recently have tried to give to the words, and to adherents, including myself, of their underlying political philosophies. Cf. Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 8 (1991) (using the words “liberal” and “conservative” to characterize participants in the contemporary debate about constitutional interpretation).

[FN9]. The fact that the defendants may receive a black mark on their records (such as a suspended sentence) ultimately is of little practical consolation. While I conclude that cultural evidence should play a role in the sentencing process, my view is that this role should be limited to reducing, not to eliminating completely, any sentence imposed or time actually served. See infra text accompanying note 300.

[FN10]. See infra text accompanying note 219 (discussing reaction of Chinese-American community to decision in Chen).

[FN11]. I use the word “agenda” here in its classic sense, rather than in any pejorative way. See Webster's New Twentieth-Century Dictionary, Unabridged 35 (2d ed. 1983) (defining “agenda” as “things to be done”). I argue that the cultural defense is consistent with, and hence a part of, the liberal agenda because it is a legal tool that is used to individualize justice for the defendant, a goal that is commonly associated with liberal, rather than conservative, political philosophy.

[FN12]. No. 87-774 (Sup. Ct. N.Y. County Dec. 2, 1988).

[FN13]. See supra text accompanying note 2; see also infra Part I.B (discussing Chen and immigrant spousal abuse cases generally).

[FN14]. Dick Polman, After a Killer Eludes Jail, a ‘Cultural Defense’ Is on Trial, Phil. Inquirer, July 2, 1989, at 1-A, 4-A (quoting Margaret Fung).

[FN15]. Cathy Young, Feminists' Multicultural Dilemma, Chi. Trib., July 8, 1992, at 15 (quoting Margaret Fung).

[FN16]. For a further discussion of this tension among feminist groups, see Volpp, supra note 5, at 77 84. Volpp makes the compelling argument that women of color, and perhaps particularly immigrant women of color, are uniquely situated at the intersection of race, ethnicity, national origin, and gender, and thus that this dilemma appears to be more poignant for these women. The result, according to Volpp, is that they are more likely than other (white) women scholars to attempt a reconciliation of culture and gender-based oppression and violence that does not completely deny culture. See id. at 81.

[FN17]. See infra notes 234 236 and accompanying text (discussing different treatment of Kimura and Susan Smith cases.)

[FN18]. See infra note 276 (discussing universal declarations concerning women's right to be free from gender-related violence).

[FN19]. Cathy Young, a reporter, has called this tension the “Feminists' Multicultural Dilemma.” Young, supra note 15, at 15; see also 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, 38 39 (1995) (noting tension between the values of multiculturalists and feminists). This dilemma is not unique to the United States, although our history as a multinational, multi-ethnic nation certainly makes the United States a prime ground for social and legal experimentation in this area. See, e.g., Marlise Simons, African Women in France Battling Polygamy, N.Y. Times, Jan. 26, 1996, at A1, A6 (discussing French experience with immigrant custom of polygamy that conflicts with existing French law).

[FN20]. Most articles and student notes discussing the cultural defense take a position in favor either of precluding it or of formalizing its use, without addressing the problems those positions create. The few articles that have squarely noted the dilemma have failed to address comprehensively the merits of both sides of the debate, or to try to resolve the dilemma in the context of existing legal doctrine and history. For a further discussion of this literature, see infra note 35 and text accompanying notes 242 260.

[FN21]. For the most part, other writing in this area has not addressed the legitimate tension between the interests of defendants and their victims. See, e.g., Nilda Rimonte, A Question of Culture: Cultural Approval of

Violence Against Women in the Pacific-Asian Community and the Cultural Defense, 43 Stan. L. Rev. 1311, 1315 17 (1991) (discussing victimization of Asian women without mentioning interests of defendants); Volpp, supra note 5, at 99 101 (arguing for a middle ground between formalized cultural defense and complete disregard of culture, without considering the position of victims). Thus, the authors' conclusions have tended not to be based upon any real comparison of the respective values inherent in the two positions.

[FN22]. While the criminal justice system is structured so that society (as represented by the prosecution) and the defendant are the two relevant parties or adversaries, the purposes and philosophy underlying that system focus on the interest of victims and potential victims in being protected from criminal activity. See infra Part III.A. This interest is sometimes, but not always, consistent with that of society as a whole. My approach seeks to determine whether the law currently does enough to support the system's underlying focus on victims' interests, and whether those interests are consistent or inconsistent with those of the larger society.

[FN23]. This Article and my views are not part of the conservative “victims' rights” movement that recently has surfaced in legal literature and popular political discourse. See generally Bill Boyarsky, Hearing Represents Important Moment in Victims Rights Movement, L.A. Times, Jan. 18, 1995, at A13 (giving brief history and description of the “victims' rights” movement). While I certainly share that movement's general concern for victims, I disagree with its focus--particularly in capital cases--on retribution for retribution's sake, and on “relief” for the families of victims rather than for the victims themselves. See, e.g., Colman McCarthy, Crime, Punishment and Victims, Wash. Post, Dec. 17, 1983, at A19 (describing victim's family members' relief upon hearing of defendant's execution). I especially disagree with the movement's apparent denial of the substantial interest defendants have in full and fair criminal proceedings. See generally John J. Goldman, Victims Emerge as Key Force for Criminal Justice Reform, L.A. Times, May 13, 1994, at A20 (describing reforms sought by victims' rights movements without mentioning rights of defendants).

[FN24]. Given my premise that the two interests are fundamentally irreconcilable, it is also my view that it is not possible, either theoretically or practically, for the liberal agenda to embrace both simultaneously.

[FN25]. U.S. Const. amend. XIV, s 1.

[FN26]. 481 U.S. 279, 334 (1986) (Brennan, J., dissenting) (quoting Turner v. Murray, 476 U.S. 28, 35 (1985) (Opinion of White, J.)).

[FN27]. See Alice S. Gallin, Note, The Cultural Defense: Undermining the Policies Against Domestic Violence, 35 B.C. L. Rev. 723, 724 (1994).

[FN28]. 42 U.S.C. ss 13931 14040 (1994).

[FN29]. See 42 U.S.C. ss 13991 13992 (1994).

[FN30]. U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995) [hereinafter INS Guidelines] (on file with the Columbia Law Review).

[FN31]. See infra note 276.

[FN32]. A review of the cases has revealed no instance where an immigrant defendant successfully interposed the cultural defense in a crime against a non-immigrant victim.

[FN33]. The first use of the term “cultural defense” in legal scholarship that I have found is in Note, The Cultural Defense in the Criminal Law, 99 Harv. L. Rev. 1293, 1293 (1986). The term is used to describe evidence of culture or custom that is introduced by the defense to explain “foreign” or immigrant conduct which ordinarily would be considered criminal. Despite the phraseology, however, no jurisdiction has yet accepted the use of cultural evidence in this manner as a formal affirmative defense. See infra notes 50 51 and accompanying text.

The commentator who has most recently addressed this issue found the characterization in the “scholarly debate” of the use of cultural evidence as a “defense” to be “misguided.” Maguigan, supra note 19, at 40. Professor Maguigan argues that while a few defendants, prosecutors, and courts are misusing cultural evidence, the vast majority of cases involve the appropriate use of what she calls “defense cultural evidence” as a rebuttal to the prosecution's mens rea case. Id. at 40, 79. While I agree with Maguigan that there is currently no record of vast numbers of cultural defense cases, I do not believe that these cases involve an appropriate use of cultural evidence in a mens rea context. See infra notes 47 51 and accompanying text. Ultimately, however, Maguigan and I apparently do not disagree about the outcome of this debate, i.e., that cultural evidence ought not to be permitted unless it is proffered to develop mens rea or the traditional defenses, or in mitigation of sentence. See Maguigan, supra note 19, at 87 97. I believe also that her development of a set of rules for the proper and uniform use of cultural evidence will be of great practical value as the legal system struggles to address the conflicting needs of defendants and prosecutors. See id. at 86 98.

[FN34]. The fact that there are probably many more incidents that do not result in published opinions, e.g., where prosecutors simply decide not to charge a potential defendant after an investigation of the alleged crime, reinforces my view in this regard. See infra notes 41 42 and accompanying text.

[FN35]. Melissa Spatz, Note, A “Lesser” Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives, 24 Colum. J.L. & Soc. Probs. 597, 620 (1991) (discussing the cultural defense in an international context). Several student notes and a few articles have addressed the cultural defense. For literature written from the feminist perspective that condemns the use of cultural evidence, see Rimonte, supra note 21, at 1312, 1317 (arguing that the cultural defense facilitates decriminalization of violence against women and results in the “legitimate” victimization of women); Carolyn Choi, Note, Application of a Cultural Defense in Criminal Proceedings, 8 UCLA Pac. Basin L.J. 80, 88 (1990) (arguing that there is no need for a “formal” cultural defense because the cultural factors behind a defendant's criminal behavior are already considered by prosecutors and courts); Gallin, supra note 27, at 741 44 (arguing that use of cultural defense undermines progress made in reducing violence against women); John C. Lyman, Note, Cultural Defense: Viable Doctrine or Wishful Thinking?, 9 Crim. Just. J. 87, 115 (1986) (arguing that criminal liability should “not be negated by a subjective belief, nor by cultural traditions or heritage”); Julia P. Sams, Note, The Availability of the “Cultural Defense” As an Excuse for Criminal Behavior, 16 Ga. J. Int'l & Comp. L. 335, 353 (1986) (concluding that difficulties associated with cultural defense outweigh potential benefits to foreign-born defendants); Malek-Mithra Sheybani, Comment, Cultural Defense: One Person's Culture Is Another's Crime, 9 Loy. L.A. Int'l & Comp. L.J. 751, 783 (1987) (arguing that the Model Penal Code's “flexible approach [would] lead to clearer precedents and more just results since factors such as the [defendant's] cultural background [would] be considered”).

For literature that argues that cultural evidence should be admitted in defense of immigrants, see Anh T. Lam, Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders, 1 UCLA Asian Am. Pac. Islands L.J. 49, 50 (1993) (“in certain cultural defense cases ... a subjective reasonable person standard should be used”); Note, supra note 33, at 1307 (arguing that individualized justice and cultural pluralism support making immigrant culture a formal defense to criminal conduct).

Finally, two commentators have written from the feminist perspective, but nevertheless have concluded

that the use of cultural evidence should be permitted. See Maguigan, supra note 19, at 36 (arguing that the goals of feminists and multiculturalists can be accommodated in a compromise in which cultural evidence is relevant to proof of mens rea); Volpp, supra note 5, at 59 (arguing that cultural defense should be available only for defendants who have been subordinated within culture at issue, thus generally defense would be available only for female defendants).

[FN36]. See Note, supra note 33, at 1299.

[FN37]. See, e.g., Alison D. Renteln, A Justification of the Cultural Defense as Partial Excuse, 2 S. Cal. Rev. L. & Women's Stud. 437, 483 (1993) (discussing the argument that "such a defense should exist at least for the newly arrived who are truly unfamiliar with the law of the new country"); cf. Glanville Williams, Textbook of Criminal Law 451, 463 (2d ed. 1983) (noting that "there are certain exceptions to the rule excluding mistake of law from consideration"); Bruce R. Grace, Note, Ignorance of the Law as an Excuse, 86 Colum. L. Rev. 1392, 1412 (1986) (arguing that due process should require an ignorance of law defense for laws that criminalize common behavior).

[FN38]. See, e.g., Renteln, supra note 37, at 505 ("[I]t is ... important that we have a cultural defense in a ... pluralistic society.").

[FN39]. Note, supra note 33, at 1311.

[FN40]. See Maguigan, supra note 19, at 62.

[FN41]. See Oliver, supra note 1, at 29. The prosecutor in that case said: "I went to the victim's family and said, 'How would you resolve this in the old country?' ... The victim's aunt, who spoke English, told me $3,000 and no jail, $2,000 and 60 days, or $1,000 and 90 days, to restore the family honor and pride." Id.

[FN42]. See id. The prosecutor asserted that his decision not to charge stemmed from perceived difficulties in convincing a jury that the defendant was guilty of rape. See id.

[FN43]. The admissibility of expert testimony on culture (generally from anthropologists and social scientists) was addressed in People v. Aphaylath, 499 N.Y.S.2d 823 (App. Div.), rev'd 502 N.E.2d 998 (N.Y. 1986). There, the dissent argued that expert testimony on the stress and disorientation felt by Laotian refugees was relevant and admissible. See Aphaylath, 499 N.Y.S.2d at 824 (Schnapp, J., dissenting). The dissent's rationale focused on the perceived inability of American jurors to relate to an immigrant defendant's conduct:

The feelings of isolation, fear and insecurity which must be experienced by persons transported into an alien culture, particularly where the original and adopted cultures are so dissimilar, are not part of a juror's common experience. The understanding of these emotions presents a subject beyond the ken of the ordinary juror for which expert testimony is needed .... This excluded testimony would have been highly probative of whether there was a reasonable explanation for defendant's conduct from the perspective of his internal point of view. Id. at 824 25 (Schnapp, J., dissenting) (citations omitted). This approach was endorsed by the New York Court of Appeals, which held that the evidence should be admitted. See Aphaylath, 502 N.E.2d at 999.

[FN44]. No. 87-774 (N.Y. Sup. Ct. Dec. 2, 1988). A related example is the now infamous theft case in which two Native American boys argued that they should be sentenced according to their tribal custom rather than as provided by state law. In that case, an "expert" was permitted to testify that the traditional tribal punishment for the crime of theft required that the two boys be banished to a deserted island for one year. See Timothy Egan, Indian Boys' Exile Turns Out to Be Hoax, N.Y. Times, Aug. 31, 1994, at A12. In this case, the judge agreed that

the tribal custom should prevail, and placed the boys in the custody of the tribal "expert," who turned out to be a fraud. His rendition of tribal custom was equally fraudulent. True experts from the boys' tribe only surfaced after the boys had disappeared with their patron. See id.

While it obviously is not the case that experts generally lie about cultural evidence, this case demonstrates that such evidence can be controverted, even in cases where there is no fraud but simply disagreement about the precise nature, scope, and application of the custom at issue. See also infra text accompanying notes 314 321 (discussing the instability of definitions of culture). This lesson was discovered too late in Chen, where the prosecution, believing that evidence of custom would be ruled irrelevant to the merits of the case, did not call its own expert to testify. The court did allow the defense's testimony and the resolution of the case was based in large part on that testimony. See Maguigan, supra note 19, at 95 n.226.

[FN45]. Record of Court Proceedings, No. A-091133 (Super. Ct. L.A. County Nov. 21, 1985).

[FN46]. See infra notes 85 87 and accompanying text.

[FN47]. Although some defense attorneys and at least one commentator, Professor Maguigan, argue that it is possible that custom or tradition could lead someone to lose control in a way that would constitute provocation or negate mens rea, see Maguigan, supra note 19, at 79, I do not believe this to be true in the categories of cases discussed in this Article. Indeed, as I note throughout, my discussion and analysis applies only to those instances where cultural evidence is proffered for the purpose of exonerating an otherwise criminal defendant.

[FN48]. It is my contention that, in most cases, the use of cultural evidence as part of traditional doctrine is disingenuous because it relies upon an illogical and contorted analysis of the mens rea requirement at issue. For example, when lawyers for immigrant defendants use cultural evidence to counter charges of first-degree murder, they generally do not argue expressly the multiculturalist position that the law should permit immigrants to engage in wife-killing and parent-child suicide, etc. Rather, when a custom has been introduced, it has been in the context of an argument that the custom caused a mental disease or defect, or something short of that, that impaired the defendant's ability to think rationally, and most importantly, precluded him from having the requisite mens rea. See, e.g., infra Parts I.B and C (discussing Kimura and Chen cases); Bui v. State, 551 So. 2d 1094, 1099 (Ala. Crim. App. 1988) (testimony of psychiatrist and cross-cultural examiner presented to support insanity plea).

The immutable flaw in this argument is that cultural evidence of a custom conflicts with the impaired state of mind paradigm of these doctrines. See Model Penal Code s 4.01(1) (Proposed Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."). By definition, the custom is alleged to be the normal, traditional, sane practice under the circumstances. Indeed, in most cases defendants present evidence that their actions were planned and executed in full compliance with an established custom. See Rimonte, supra note 21, at 1324 (arguing that culture is persistent and that men who abuse their wives are "acting out of sound mental health"); cf. Lam, supra note 35, at 55 57 (advocating a separate cultural defense because diminished capacity and insanity defenses are awkward frameworks for sane defendants with specific intent to commit the criminal act at issue).

[FN49]. See infra text accompanying notes 65 66, 88 89 (discussing conflict and choice of law(s) analyses in context of marriage-by-capture and mother-child suicide cases). But see Lam, supra note 35, at 60 (arguing that the cultural defense should be recognized, even in some cases where the crime would be illegal in the de-

fendant's home country or culture).

[FN50]. U.S. Justice System Called Ambivalent on Use of “Cultural Defense” by Immigrants, L.A. Times, Dec. 13, 1987, s 2, at 6 [hereinafter System Called Ambivalent] (quoting Alison Renteln).

Professor Maguigan agrees that the use of cultural evidence in insanity and diminished capacity defenses is complicated by the fact that defendants and their experts often allege the rationality of their cultural practices, and of the defendant's belief in those actions, at the same time that they allege irrationality as an overall defense. See Maguigan, supra note 19, at 67 68, 73 75.

[FN51]. Cf. Lam, supra note 35, at 54 55 (arguing for formalization of cultural defense, and recognizing that cultural evidence is often determinative of case outcomes); Choi, supra note 35, at 36 (arguing that “the cultural defense would operate formally as an excuse for an otherwise criminal act, because the act would be recognized as wrongful, but the actor would be excused because he or she lacked [the mens rea] for the crime”).

[FN52]. The descriptions that follow are, to the extent possible, objective. That is, they state the facts necessary to an evaluation of the cases according to standard legal analysis, rather than those that might apply if the cultural defense were formalized. I am fully cognizant of the argument made by many postmodernists that most law is not purely objective because it reflects Anglo-American, often male, cultural values. See infra text accompanying notes 135 137 (discussing postmodernism in context of immigrant cases). However, because a principal objective of this Article is to demonstrate the many reasons why, in these particular cases, a standard legal analysis ought to be applied, I believe that the approach I use is both appropriate and necessary.

[FN53]. See Susan Brownmiller, Against our Will: Men, Women and Rape 17 18 (1975).

[FN54]. See Rimonte, supra note 21, at 1319 20.

[FN55]. See id. at 1318, 1320.

[FN56]. See id. at 1320 & n.29.

[FN57]. See Deirdre Evans-Pritchard & Alison D. Renteln, The Interpretation and Distortion of Culture: A Hmong “Marriage By Capture” Case in Fresno, California, 4 S. Cal. Interdisciplinary L.J. 1, 14 16 (1995); Sheybani, supra note 35, at 774.

[FN58]. See Choi, supra note 35, at 83 84.

[FN59]. Record of Court Proceedings, No. 315972-0 (Super. Ct. Fresno County Feb. 7, 1985).

[FN60]. See Evans-Pritchard & Renteln, supra note 57, at 9 13.

[FN61]. See Rimonte, supra note 21, at 1311.

[FN62]. Oliver, supra note 1, at 28 (quoting Judge Gene M. Gomes). Evidently, Judge Gomes believed that if intent were driven by cultural dictates, the specific intent required by the statute would somehow be vitiated. Given that the cultural intent at issue in these cases is generally to do exactly as the defendants do, however, it is difficult to see how Judge Gomes believed an acquittal could be legally accomplished.

[FN63]. Id. at 29 30; see also Rimonte, supra note 21, at 1312 (noting that “some Pacific-Asian societies[ ] use

‘marriage by capture’ to cope with rape outside of the formal criminal justice system”).

[FN64]. The prosecutor's approach--borrowed from the Hmong community--was strikingly similar to the rationale underlying antebellum laws that effectively denied black women equal protection against rape. See infra note 188 and accompanying text (discussing antebellum slave codes). In both instances, cultural ideas about sexuality were presented as theories of effective consent to thwart rape prosecutions. See infra note 187 (discussing rationale underlying slave codes' treatment of rape of black women).

The notion put forth by the prosecutor that he could not possibly win such a case, because of the custom, borders on the absurd. Whatever the custom, the fact that the girl was under twelve-years old in and of itself likely would have resulted in a successful prosecution. Indeed, other Minnesota prosecutions of Laotian Hmong men for sexual offenses have been successful despite cultural evidence. See, e.g., State v. Lee, 494 N.W.2d 475, 475 (Minn. Ct. App. 1994) (upholding conviction of Hmong man for rape despite conflicting evidence on Hmong community's practice regarding an accusation of rape).

[FN65]. Significantly, these conflict and choice of law(s) analyses by state actors likely are an inappropriate and perhaps ultra vires exercise of power. See supra note 49 and accompanying text (discussing de facto choice and conflict of law(s) analyses by state actors).

[FN66]. On its face, this custom makes it difficult for prosecutors to counter defense claims of consent, although this would not likely have been a problem in the Minnesota case because of the victim's young age and the possibility of statutory rape charges that explicitly make consent irrelevant to a finding of guilt. See supra note 64. On the other hand, it is likely that the issue of consent was at least one, if not a principal, factor in the State's ultimate position in Moua. (The sources I have been able to uncover say little or nothing about the victim herself, and what she actually may have thought about the crime.) It would be relatively easy in such circumstances for the prosecution to claim to be sensitive to multiculturalism--to how the immigrants (both the victim and the perpetrator) would have dealt with the problem “back home.” Whatever the motivation, however, the result of such exercises of prosecutorial discretion is to leave the actual victims and future victims in their communities in an impossible situation where there was and is simply no legal protection against rape by a fellow Hmong, except in the unusual circumstance where a rape could not be characterized as consistent with the custom of marriage-by-capture.

The case which perhaps best illustrates the seemingly unresolvable problem is Minnesota v. Her, 510 N.W.2d 218, 220, 224 (Minn. Ct. App. 1994) (affirming defendant's rape conviction over his argument that in addition to the intercourse being consensual, there was no such thing as rape in his culture).

[FN67]. See, e.g., Rimonte, supra note 21, at 1315 18 (discussing sex roles in Asian culture).

[FN68]. It is important to note that there is a critical difference between these immigrant cases and analogous cases involving non-immigrants. In the latter, it is critical that the defendant produce evidence that would tend to prove that he actually was provoked to commit the violent act. This implies a heightened emotional state that itself is caused by something the victim did. In the former, this evidence may or may not exist; for purposes of the cultural defense, it is irrelevant since the allegation is that the act at issue was culturally dictated, rather than an emotional response to anything done by the victim.

[FN69]. No. 87-7774 (Sup. Ct. N.Y. County Dec. 2, 1988). For a thorough description of Chen from the perspective of a woman of color, see Volpp, supra note 5, at 64 77.

[FN70]. See Volpp, supra note 5, at 64 67.

[FN71]. See Spatz, supra note 35, at 622.

[FN72]. See Maguigan, supra note 19, at 95.

[FN73]. See id. at 37.

[FN74]. See id. at 95 n.226.

[FN75]. Spatz, supra note 35, at 622 (quoting Judge Edward K. Pincus).

[FN76]. See Volpp, supra note 5, at 73.

[FN77]. See id. at 64 & n.26.

[FN78]. This custom usually is called “parent-child suicide.” See, e.g., Volpp, supra note 5, at 84 87; Choi, supra note 35, at 82 83. However, because I have been unable to find any cases where a father has engaged in the custom, I have chosen to call it “mother-child suicide.” Furthermore, as a prominent feature of the custom is the subordinate role of the wife that allegedly causes her to feel shamed when her husband is unfaithful, it seems internally inconsistent to use the custom to explain crimes by fathers against their children. The idea of father-child suicide is also inconsistent with the custom's underlying principle that the mother and child are one. See infra note 79. But see Lam, supra note 35, at 59 (citing Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988), cert. granted and judgment vacated, 111 S. Ct. 1613 (1991), as example of father-child suicide). However, although Bui may have been influenced by cultural values which treat suicide as an honorable response to a spouse's infidelity, it does not appear that custom required him to kill his children.

[FN79]. The Japanese term for mother-child suicide is “oya-ko shinju.” It implies that the mother and child are one. See generally Taimie L. Bryant, Oya-ko Shinju: Death at the Center of the Heart, 8 UCLA Pac. Basin L.J. 1 (1990) (discussing Japanese custom of mother-child suicide); Yuko Kawanishi, Japanese Mother- Child Suicide: The Psychological and Sociological Implications of the Kimura Case, 8 UCLA Pac. Basin L.J. 32 (1990) (same).

[FN80]. Record of Court Proceedings, No. A-091133 (Super. Ct. L.A. County Nov. 21, 1985). For another case involving mother-child suicide, see People v. Wu, 286 Cal. Rptr. 868 (Ct. App. 1991) (Chinese mother kills son in attempt to commit mother-child suicide after discovering husband's adultery). For a thorough discussion of the Wu case from the perspective of a woman of color, see Volpp, supra note 5, at 84 91.

[FN81]. See supra text accompanying note 1.

[FN82]. See Choi, supra note 35, at 82; Leslie Pound, Mother's Tragic Crime Exposes a Culture Gap, Chi. Trib., June 10, 1985, s 5, at 1.

[FN83]. See Pound, supra note 82, at 1. Under the Model Penal Code, “[a] person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.” Model Penal Code s 210.1(1) (1985). And, “criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life ... .” Id.

[FN84]. See Maguigan, supra note 19, at 67 68.

[FN85]. Oliver, supra note 1, at 30.

[FN86]. Id. at 30.

[FN87]. Pound, supra note 82, at 1, 7.

[FN88]. It has been described as the near-equivalent of involuntary manslaughter. See Choi, supra note 35, at 83.

[FN89]. See id.

[FN90]. See generally Alison T. Slack, Female Circumcision: A Critical Appraisal, 10 Hum. Rts. Q. 437, 439 (1988) (the "heart of the controversy lies in finding a balance between a society's cultural self-determination, and the protection of individuals from the violation of their human rights"); Robyn C. Smith, Female Circumcision: Bringing Women's Perspectives into the International Debate, 65 S. Cal. L. Rev. 2449, 2449 (1992) (defining the debate surrounding female circumcision as the "woman's individual right to be free of [the practice] versus the tribal group's right to maintain its tribal identity through [the practice], free from state interference"); Note, What's Culture Got To Do With It?: Excising the Harmful Tradition of Female Circumcision, 106 Harv. L. Rev. 1944, 1946, 1958 59 (1993) (arguing that traditions which violate universal human rights lack legitimacy in contemporary society).

[FN91]. See Nahid Toubia, Female Circumcision as a Public Health Issue, 331 New Eng. J. Med. 712, 712 (1994). Four different types of female circumcision have been identified in the medical literature: A type I clitoridectomy "involves the removal of a part of the clitoris or the whole organ. This is what is commonly referred to as a 'Sunna circumcision."' Id. A type II clitoridectomy,
or excision, involves excision of the clitoris and part of the labia minora. Bleeding from the raw surfaces and from the clitoral artery may be halted with a few stitches of catgut or thorn or by the application of homemade poultices. After healing, the clitoris is absent, but the urethra and the vaginal introitus are not covered. Id. A type III "or modified (sometimes called intermediate) infibulation, is a milder form of infibulation, which involves the same amount of cutting, but in which only the anterior two thirds of the labia majora are stitched, thus leaving a larger posterior opening." Id. A type IV,or total infibulation, involves the removal of the clitoris and the labia minora, plus incision of the labia majora to create raw surfaces ... that are stitched together to cover the urethra and the entrance to the vagina with a hood of skin, leaving a very small posterior opening for the passage of urine and menstrual blood. Id. See generally Alice Walker, Possessing the Secret of Joy (1992) (novel about life of circumcised African woman); Alice Walker & Pratibha Parmar, Warrior Marks: Female Genital Mutilation and the Sexual Blinding of Women (1993) (nonfiction account of trip to Africa to film documentary about female genital mutilation).

[FN92]. H.R. Rep. No. 501, 103d Cong., 2d Sess. 66 (1994).

[FN93]. World Health Org. Office of Info., Press Release, Female Genital Mutilation: World Heath Assembly Calls For The Elimination Of Harmful Traditional Practices, May 12, 1993, at 1 (on file with the Columbia Law Review).

[FN94]. Id. at 2 ("[O]thers believe that it served to protect adolescent girls against rape.").

[FN95]. Toubia, supra note 91, at 714. For clinical definitions of "clitoridectomy" and "infibulation," see id. at 712.

[FN96]. Hansen & Scroggins, supra note 4, at A10.

[FN97]. Id. (quoting Eritrean man who lives in DeKalb County, Georgia).

[FN98]. See Linda Burstyn, Female Circumcision Comes to America, Atlantic Monthly, Oct. 1995, at 28, 33.

[FN99]. Hansen & Scroggins, supra note 4, at A10.

[FN100]. See id.; see also Burstyn, supra note 98, at 33 (discussing prevalence of practice in other urban areas where African and Asian immigrants are concentrated).

[FN101]. See Hansen & Scroggins, supra note 4, at A10 A11.

[FN102]. Id. at A1.

[FN103]. Id.

[FN104]. Id. at A11.

[FN105]. See id.

[FN106]. Id.

[FN107]. Id. at A10.

[FN108]. Id. at A11.

[FN109]. Id. at A11.

[FN110]. See, e.g., Gregg v. Georgia, 428 U.S. 153, 176 77 (1976).

[FN111]. Id. at 177 (citing McGautha v. California, 402 U.S. 183, 197 98 (1971)).

[FN112]. Woodson v. North Carolina, 428 U.S. 280, 296 97 (1976) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

[FN113]. See, e.g., United States Sentencing Commission, Guidelines Manual (1992) (“goals of reducing disparity and permitting individualization ... have simultaneously been pursued”).

[FN114]. See, e.g., Lockett v. Ohio, 438 U.S. 586, 602 (1978) (“[T]he concept of individualized sentencing in criminal cases generally ... has long been accepted in this country.”).

[FN115]. The Supreme Court has used the words “individualized” and “particularized” interchangeably in important cases. See, e.g., Woodson, 428 U.S. at 304 (noting “prevailing practice of individualizing sentencing determinations”); Gregg v. Georgia, 428 U.S. 153, 199 (1976) (jury must focus on “particularized circumstances of the crime and the defendant” at sentencing in capital case).

[FN116]. Woodson, 428 U.S. at 304.

[FN117]. The question of individualized or particularized justice at other phases of the criminal process, and in

noncapital cases, has not received constitutional scrutiny. See infra note 122 and accompanying text.

[FN118]. Gregg, 428 U.S. at 164.

[FN119]. Id. at 189 (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937)).

[FN120]. Woodson, 428 U.S. at 303.

[FN121]. In Gregg, for example, the Supreme Court upheld the constitutionality of the Georgia capital sentencing statute at issue, in part because it appropriately required the jury to "focus[ ] on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)." 428 U.S. at 197.

Moral culpability is not the same thing as guilt. That one may in fact be guilty of a crime does not explain completely the level of moral responsibility one has relative to others who also may be guilty of the same crime. It is this latter question of moral responsibility that proponents of individualized justice seek to have answered.

[FN122]. See Woodson, 428 U.S. at 304 ("the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative"). "Individualized" or "particularized" sentencing is constitutionally required in capital cases. See Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson, 428 U.S. at 303 (death penalty statute unconstitutional because it "fail[s] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Gregg, 428 U.S. at 199 (Eighth and Fourteenth Amendments require jury to focus on "particularized circumstances of the crime and the defendant" at sentencing in capital case).

[FN123]. Lockett, 438 U.S. at 602 03 (quoting Williams v. New York, 337 U.S. 241, 247 (1949) (alteration in Lockett)); see also Gregg, 428 U.S. at 203 ("[U]nnecessary restrictions [should not be imposed] on the evidence that can be offered at [a pre-sentencing] hearing"; "far-ranging argument" can be useful as evidence.). Legislatures "remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." Lockett, 438 U.S. at 603.

[FN124]. See, e.g., Kip Schlegel, Just Deserts for Corporate Criminals 75 (1990) ("The concept of just deserts is grounded in notions of individual justice.").

[FN125]. See, e.g., Taslitz, supra note *, at 4 (arguing that psychological character evidence can help determine defendant's subjective state of mind and ultimately to individualize the justice he receives). While other phases of the process--including the prosecution's evaluation of the defendant's state of mind, and the defense's affirmative case--have subjective elements, the approach taken by proponents of individualized justice is unique because of its emphasis on the personal history and psychology of the defendant. This approach recognizes that a subjective evaluation of these characteristics is required, but argues that the law, both substantive and procedural, also contains impediments that preclude this subjective evaluation from being carried out. See, e.g., id. at 6 30 (discussing ways that contemporary criminal procedure impedes thorough evaluation of defendant's personal characteristics).

[FN126]. Gregg, 428 U.S. at 190.

[FN127]. The defendant seeks to prove her reasonableness in the context of a self-defense claim:
One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 454 (2d ed. 1986) (emphasis added).
[FN128]. See, e.g., id. at 457 (The law generally requires "that the defendant's belief ... be a reasonable one, so that he who honestly though unreasonably believes in the necessity of using force in self-protection loses the defense."). The reasonable person has been defined as "an average or typical person possessing all of the shortcomings and weaknesses tolerated by the community." Kellie A. Kalbac, Through the Eye of the Beholder: Sexual Harassment Under the Reasonable Person Standard, 3 Kan. J.L. & Pub. Pol'y 160, 167 (1994) (defining objective standard) (quoting Robert S. Adler & Ellen R. Pierce, The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases, 61 Fordham L. Rev. 773, 807 (1993)).

[FN129]. See, e.g., State v. Wanrow, 559 P.2d 548, 558 59 (Wash. 1977) (reasonable woman standard applied to review self-defense claim in murder case); see also Robert Unikel, Comment, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 Nw. U. L. Rev. 326, 337 (1992) (discussing criminal cases that have used reasonable woman standard). The debate in the literature over using the reasonable woman standard in other contexts continues. See, e.g., Saba Ashraf, Note, The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act, 21 Hofstra L. Rev. 483 (1992) (debating the continued usage of the reasonable woman standard by the courts); Lisa N. Birmingham, Note, Closing the Loophole: Vermont's Legislative Response to Stalking, 18 Vt. L. Rev. 477, 521 25 (1994) (arguing for subjective, reasonable woman standard in state stalking law).

[FN130]. See, e.g., Wanrow, 559 P.2d at 559. The court in Wanrow rejected the prosecution's position that the State's ostensibly objective statutory jury instructions were appropriately applied, in part because that standard did not "consider [the defendant's] actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination."' Id. (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)). The instructions also were unconstitutional because "through the persistent use of the masculine gender [they] le[ft] the jury with the impression that the objective standard to be applied is that applicable to an altercation between two men." Id. at 558.

[FN131]. See Unikel, supra note 129, at 329 30, 340 (discussing reasonable woman standard's focus on group, rather than individual, rights).

[FN132]. No. 93-15096, 1993 WL 460961, at *1 (9th Cir. Oct. 10, 1993).

[FN133]. See People v. Washington, 130 Cal. Rptr. 96, 98 (Ct. App. 1976) (rejecting applicability of "average servient homosexual" standard to defendant who murdered his homosexual partner after a quarrel provoked by the victim's alleged unfaithfulness and desire to end the relationship).

[FN134]. See People v. Natale, 18 Cal. Rptr. 491, 494 (Cal. Ct. App. 1962) (rejecting applicability of subjective Italian-American standard to defendant convicted of second degree murder of his wife and daughter).

[FN135]. See Tribe & Dorf, supra note 8, at 15 19 (describing constitutional views of postmodern legal theorists); see also Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's End (1995) (exploring the innovations of the postmodernist legal movement); Patricia J. Williams, The Alchemy of Race

and Rights 8 9 (1991) (analyzing Anglo-American jurisprudence from postmodernist perspective); infra note 150 (defining postmodernist concept of “voice”).

[FN136]. See, e.g., Katharine T. Bartlett, Gender and Law: Theory, Doctrine, Commentary 589 670 (2d. ed. 1993) (discussing feminist legal commentary on the difference of women's voices); Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007, 2009 10 (1991) (arguing that even scholars of color can lack “the voice of color”--“[o]nly when a scholar of color draws on her experience and the insight gained from living as a person of color does she speak with the voice of color”).

[FN137]. Multiculturalists, feminists, and liberal African-Americans share both an opposition to cultural dominance by men of European descent and an interest in ensuring that American culture changes, not only to accommodate, but also to accept as equal the different voices of immigrants, women, and native minority groups. Necessarily, these groups also share an opposition to the view that the majority's constructs reflect an “objective truth.” See Tribe & Dorf, supra note 8, at 19 (discussing postmodernist rejection of idea that law contains “the timeless, the universal, and the unquestionable”).

[FN138]. See infra note 150 and accompanying text (discussing postmodernist concept of “voice”).

[FN139]. Robert C. Post, Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment, 76 Cal. L. Rev. 297, 302 n.29 (1988) (quoting R. Havighurst, Anthropology and Cultural Pluralism: Three Case Studies, Australia, New Zealand and USA 3 (1974)). The terms “multiculturalism” and “cultural pluralism” are used interchangeably throughout the legal literature. See, e.g., Paula Dressel et al., The Dynamics of Homosocial Reproduction in Academic Institutions, 2 Am. U. J. Gender & L. 37, 44 (1994) (using the word “multiculturalism” and “cultural pluralism” interchangeably); Barbara J. Flagg, The Algebra of Pluralism: Subjective Experience As a Constitutional Variable, 47 Vand. L. Rev. 273, 277 (1994). The word “multiculturalism” often is used loosely in contemporary discourse to describe a superficial interest in diversity. See, e.g., Stanley Fish, Boutique Multiculturalism or Why Liberals Are Incapable of Thinking About Hate Speech 1 3 (unpublished manuscript, on file with the Columbia Law Review) (describing superficial appreciation of diversity as “boutique multiculturalism”).

[FN140]. Fish, supra note 139, at 8.

[FN141]. Id. at 1.

[FN142]. Id.

[FN143]. Ethnocentrism is defined as a view that is “characterized by or based on the attitude that one's own group is superior.” Webster's Ninth New Collegiate Dictionary 427 (Frederick C. Mish et al. eds., 1985).

[FN144]. Fish, supra note 139, at 8.

[FN145]. See, e.g., Cathy Young, Feminism and Multiculturalism: An Uncomfortable Coexistence, Phil. Inquirer, Apr. 2, 1992, at A21 (“The central premise of the multiculturalist credo ... is that all cultures are created equal. To judge other cultures by Western standards is unforgivably ethnocentric.”); Young, supra note 15, at 15 (one aim of multiculturalists is “to promote the idea that every culture should be judged on its own terms”).

[FN146]. See supra notes 127 134 and accompanying text (discussing alternatives to the traditional reasonable person standard).

[FN147]. See, e.g., People v. Wheeler, 583 P.2d 748, 761 62 (Cal. 1978) (“use of peremptory challenges to remove prospective [black] jurors on the sole ground of group bias violates [defendant's] right to trial by a jury drawn from a representative cross-section of the community”).

[FN148]. See Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial by Jury De Medictate Linguae: A History and a Proposal for Change, 74 B.U. L. Rev. 777, 815 (1994) (advocating a jury selection process that “provid [[[es] all litigants with the power to define their peers and create a jury that includes them”).

[FN149]. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). See generally Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 Cal. L. Rev. 863, 865 66, 915 19 (1993) (discussing history of United States immigration laws). Before passage of the Immigration Amendments of 1965, immigrants from Asia and other parts of the Third World were all but statutorily precluded from immigrating to this country. Indeed, prior to 1965, American law consistently and expressly restricted non-European immigration. See id. at 918. For example, a 1790 federal law limited citizenship privileges to whites. See John Elson, The Great Migration, Time, Fall 1993, at 26, 33 (special issue). Blacks (including slaves and free blacks) as well as Chinese immigrants who came to work in the United States in the 1840s were not accorded rights of citizenship. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 27 (1857) (blacks excluded from citizenship); Elson, supra, at 33 (nineteenth-century Chinese immigrant ineligible for citizenship). In 1882, the Chinese Exclusion Act barred Chinese workers even from entering the United States. See Chinese Exclusion Act, ch. 126, ss 1, 14, 22 Stat. 58, 59, 61 (1882), repealed by Recision of Chinese Exclusion Act, Pub. L. No. 51-90, 57 Stat. 600 (1943).

These early statutes were bolstered by national origin laws passed during the 1920s which established an annual immigration quota of 150,000, and which expressly gave preference to established European groups. Japanese immigration was barred entirely. See Hing, supra, at 915 19; Leo Gross & Eisuke Suzuki, Legal Problems of Japanese-Americans: Their History and Development in the United States, 76 Am. J. Int'l L. 911, 911 (1982) (book review) (discussing legal problems encountered by Japanese immigrants in the United States). The 1952 McCarran-Walter Act preserved this national origins system and guided American immigration policy until 1965. See Immigration and Nationality (McCarran-Walter) Act, ch. 477, s 202, 66 Stat. 163 (1952) (current version at 8 U.S.C. s 1152 (1995)).

The result has been that, since 1965, immigration from non- European countries has predominated. In 1992, 29% of immigrants came from Asia, and 44% came from Latin America and the Caribbean. See Bruce W. Nelan, Not Quite So Welcome Anymore, Time, Fall 1993, at 10, 10 tbl. (special issue). The Refugee Act of 1980 expanded the definition of eligibility for political asylum, reinforcing immigration policies first adopted in the 1965 Act. See John Elson, Sometimes the Door Slams Shut, Time, Fall 1993, at 33, 33 (special issue). Today, more than 20 million Americans were born in another country. See America's Challenge, Time, Fall 1993, at 3, 3 (special issue). By virtue of sheer numbers, if not political clout, non- European immigrants have begun to force their voice upon the national discourse.

[FN150]. In the 1892 work A Voice from the South, Anna J. Cooper wrote, “as our Caucasian barristers are not to blame if they cannot quite put themselves in the dark man's place, neither should the dark man be wholly expected fully and adequately to reproduce the exact Voice of the Black Woman.” Amii L. Barnard, The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892 1920, 3 UCLA Women's L.J. 1, 1 & n.1 (1993) (quoting Anna J. Cooper, A Voice from the South i, iii (1892)). These words, set down over a century ago, identified the uniqueness of the black female voice and foreshadowed a theme of postmodern legal discourse.

The postmodern concept of voice holds that individuals within a subgroup of society share a unique view of social, economic, and legal constructs that is different from the view of individuals in other subgroups; moreover, that unique view is the product of an equally unique, and morally equivalent, cultural background. See Jerome M. Culp, Jr., Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy, 38 Loy. L. Rev. 61, 63 64 (1992); see also id. at 70 (listing scholars who have "form[ed] this intellectual community, [and] made various claims about the need for a black voice or a voice of color in legal debate and scholarship" including Taunya Banks, Derrick Bell, Paulette Caldwell, Kimberle Crenshaw, Richard Delgado, Angela Harris, Linda Greene, Dwight Greene, Charles Lawrence, Mari Matsuda, and Patricia Williams).

A single person has different voices that inform his or her thoughts and reactions depending upon the context. For example, a wealthy Latino man has three potential voices, each defined by one of these adjectives: He has a voice of wealth, a Latino voice, and a man's voice. See, e.g., Johnson, supra note 136 (discussing the notion of a voice of color). It is a thesis of some liberals in the legal academy that these unique views, these voices, should be considered in the development and application of laws. See supra notes 143 148 and accompanying text.

[FN151]. Cf. Fish, supra note 139, at 9 (arguing that where compelling dilemma exists, this respect breaks down and people ultimately are forced to make moral evaluations of cultures).

[FN152]. See, e.g., Stuart Biegel, Bilingual Education and Language Rights: The Parameters of the Bilingual Education Debate in California Twenty Years After Lau v. Nichols, 14 Chicano-Latino L. Rev. 48 (1994) (discussing the bilingual education debate); Dressel et al., supra note 139 (discussing debate in academy about diversity of faculty); Larry Kaggwa, 'Voice' From the Grave: Howard to Study Bones of Colonial African-Americans, Wash. Post, Aug. 19, 1993, at J1 (reporting on controversy over racial composition and leadership of team excavating pre-Civil War African-American burial site in downtown Manhattan); Jeff Leeds, Blacks Protest Excavation Team, All-White Group Inappropriate for Charlottesville Dig, Some Say, Wash. Post, Jan. 18, 1994, at D4 (reporting on racial composition and leadership of team excavating site in Charlottesville, Virginia, where prominent, free African-American woman lived in pre-Civil War times).

[FN153]. This consistency has not gone unrecognized. Indeed, the practice of using cultural evidence in defense of immigrants accused of crimes has been lauded in the legal literature and by practitioners as evidence of multiculturalism's positive influence on our jurisprudence. It promotes cultural pluralism in the application of the criminal laws and, as a bonus, ensures that the criminal defendant receives individualized justice. See Lam, supra note 35, at 53 60. For example, Margaret Fung, then the Executive Director of the Asian-American Defense and Education Fund, argued that to bar the cultural defense "would promote the idea that when people come to America, they have to give up their way of doing things." Young, supra note 15, at 15 (quoting Margaret Fung). Clearly, forcing immigrants to give up their traditions would be inconsistent with individualizing justice through multiculturalism.

[FN154]. Model Penal Code s 213.1(1) provides:

Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose or preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old. Model Penal Code s 213.1 (1985). Section 212.1 provides:

Kidnapping. A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes: (a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function. Id. s 212.1.

[FN155]. See supra text accompanying notes 57 64.

[FN156]. The Model Penal Code provides: “Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act. (1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.” Model Penal Code s 2.01(1) (1988).

[FN157]. See supra note 49 and accompanying text.

[FN158]. No. 87-774 (Sup. Ct. N.Y. County Dec. 2, 1988).

[FN159]. As Leti Volpp correctly notes in her analysis of the case, this time delay should have precluded a successful provocation defense. See Volpp, supra note 5, at 68 n.48.

[FN160]. Id. at 73 (quoting trial transcript).

[FN161]. Id. at 73 74. Volpp's analysis is important both because she is a woman of color who speaks from the intersection of race and gender, and because her unusual situation compels her to face and to attempt to resolve the dilemma with more attention to both interests than have other scholars.

[FN162]. Professor Maguigan argues that this case “demonstrates simply that unrebutted defense cultural evidence can operate to raise a reasonable doubt about the prosecution's proof of the mens rea requisite for convicting the defendant of a more serious offense.” Maguigan, supra note 19, at 78. I disagree that Chen stands only for this meager proposition. Maguigan is correct that the outcome of the case might have been different had the prosecution presented a rebuttal expert on the cultural questions. See id. However, the prosecution's failure to do so does not resolve the problem that the evidence that the defendant committed culturally- dictated, premeditated murder is wholly inconsistent with the notion that the murder was committed with less than this level of intent. Thus, I do not agree that this evidence alone can raise reasonable doubt about the prosecution's mens rea case. See supra note 48 (discussing disingenuous use of cultural evidence in context of traditional defenses). Indeed, the only thing the cultural evidence may legitimately do is show that the defendant did not have the same evil motive that someone outside of his culture may have had under similar circumstances. But again, the prosecution is not required to prove evil motive in the guilt phase of the process.

[FN163]. I say “sympathetic” here as it is easier to see Kimura as a victim than it is to see Chen as a victim, because Kimura's actions easily can be interpreted as the result of a subordinating patriarchal custom that caused her to feel shame about her husband's infidelity; and also because she almost died herself, having been lifted unconscious from the ocean. In this latter sense, Kimura also is quite a bit more sympathetic than Susan Smith who, as far as we know, was not acting under the influence of a culturally- dictated patriarchal directive, who did not appear to have made any serious effort to kill herself, and who lied intentionally, repeatedly, and very

publicly about her role in the killings. See Tamara Jones, From the Smith Trial, A Town's Secrets Emerge, Wash. Post, July 30, 1995, at A1.

[FN164]. Because I have rejected the argument that a coherent insanity-custom defense can exist, and because the court's decisions about guilt and sentencing appeared to rely principally upon the custom evidence presented by the defense and by the Japanese-American community, I believe that Kimura's actions--divorced from any legally significant notion of impaired mental state--could constitute the elements of premeditated murder. See supra note 48 and accompanying text (discussing illogic of arguing custom and impaired mental state); see also Robert W. Stewart, Accused Mother Preoccupied by Death, Friend of Woman Whose Children Drowned Testifies at Hearing, L.A. Times, Mar. 29, 1985, s 2, at 3 (neighbor testified that, on the night before the drownings, Kimura spoke of her "willingness to sacrifice herself and her children for her husband's sake.").

[FN165]. See Oliver, supra note 5, at 28.

[FN166]. See supra text accompanying note 63. Prosecutorial discretion permits the state to decline to prosecute even cases where there is clear evidence of intent. I do not argue that it is unusual for prosecutors to make this choice or to enter into plea bargains with defendants they do not wish to take to trial. What I do argue, however, is that it is important to probe the reasons for this choice when it is made in circumstances that implicate anti-discrimination principles, even when the motivation for the distinction appears benevolent rather than invidious. Moreover, I argue that in the immigrant cases discussed in this Article, the prosecutorial choice likely is based either on a sensitivity to multiculturalism or on racism, both of which motives result in balkanized justice. Thus, while the State does have the right not to prosecute, this right is circumscribed by the equal protection doctrine.

[FN167]. See supra text accompanying notes 103 109.

[FN168]. See supra text accompanying note 108. This equivocal position also clearly reflects the "Liberals' Dilemma" that I have posited in this Article.

[FN169]. See supra text accompanying note 109.

[FN170]. See, e.g., Minority Health Improvement Act of 1994, H.R. 3869, 103d Cong., 2d Sess. (1994) (proposed legislation providing for gathering of information and establishment of educational measures in communities practicing female genital mutilation).

[FN171]. While the cultural defense cases and the battered women's cases are not at all alike in many significant respects (not least of which being that the battered women's cases seek enhanced legal protections for women from abusive men), the cases do share the objective of individualizing justice for the defendant: Just as the reasonable battered woman sees no other way out of her predicament than to kill her abuser, so too the reasonable Hmong man allegedly knows of no other way to choose a woman and to marry her. And so, the argument goes, it is appropriate to treat these defendants as we treat battered women, not only because they know of no other way, but also because the system only can judge them fairly by standing in their shoes. The argument that the cultural defense cases cannot be distinguished in any significant respect from battered women's cases has been rejected and refuted by at least one feminist scholar. See Gallin, supra note 27, at 741 44. It is clear that feminists need to divorce the cultural defense cases from the battered women's cases since the defense is antithetical to their efforts to enhance the protections afforded women against violence by men, and against patriarchal customs generally. See infra Part III.B (discussing inconsistency of cultural defense cases with established liberal interpretations of equal protection doctrine and of philosophy underlying criminal law generally).

[FN172]. Nevertheless, in this respect, the cultural defense cases are like the battered women's cases in that they afford the defendant a more subjective and particularized analysis than the ostensibly objective standard codified in the penal codes.

[FN173]. See Lam, supra note 35, at 50 52 (proposing formalization of the defense); Note, supra note 33, at 1298 1307 (same).

[FN174]. See Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 9 10 (1990).

[FN175]. Id. at 302. During the debates over the Civil Rights Act of 1866 (which contained the language that ultimately became section 1 of the Fourteenth Amendment), Senator Johnson argued that "it is a necessary, incidental function of a Government that it should have authority to provide that the rights of everybody within its limits shall be protected, and protected alike." Id. at 303.

[FN176]. LaFave & Scott, supra note 127, at 22.

[FN177]. Id.

[FN178]. See, e.g., Model Penal Code art. 210 (1980) (criminal homicide); id. art. 211 (assault, reckless endangering, and threats); id. art. 212 (kidnapping and related offenses, and coercion); id. art. 213 (sexual offenses).

[FN179]. Criminal procedure, on the other hand, has evolved to ensure that in its zeal to protect the citizenry, the criminal law does not cause individuals who are accused of crimes to lose their lives, liberty, or property unfairly, i.e., without "due process." Thus, the criminal law and criminal procedure work in tandem to protect society from crime in a manner that also assures the fair treatment of criminal defendants. As we have seen, the doctrine of individualized justice seeks to assure that relative, subjective moral culpability is a factor in evaluating the kind and amount of punishment that is imposed in any given case. See supra Parts II.A and B.

[FN180]. See LaFave & Scott, supra note 127, at 23 26. While retribution, another principal rationale justifying criminal punishment, is not designed to ensure protection, like the others it is victim-oriented.

[FN181]. On the "antidiscrimination principle," see generally Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 1 (1976) (defining the "antidiscrimination principle" as that "principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected").

[FN182]. Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (footnote omitted).

[FN183]. See Farber & Sherry, supra note 174, at 305 15.

[FN184]. John E. Nowak & Ronald D. Rotunda, Constitutional Law 643 (5th ed. 1995).

[FN185]. See id. at 644 (discussing lynching problems unresolved by Fourteenth Amendment that led to passage of Civil Rights Act of 1871); see also infra note 204 (discussing legislative history of Act).

[FN186]. Farber & Sherry, supra note 174, at 314 (quoting Senator Jacob Howard's presentation of joint resolution on text of Fourteenth Amendment).

[FN187]. See generally Mark V. Tushnet, The American Law of Slavery, 1810 1860: Considerations of Human-

ity and Interest 71 156 (1981) (describing emergence of bifurcated legal system). Professor Tushnet explains that the doctrinal rationale for the antebellum division between the general code and the slave code was that the criminal law had its origins in the common law of England, a country which did not know slavery "as it exists in this country." Id. at 85 (quoting George v. State, 37 Miss. 316 (1859)). Because of this, United States common law and its derivative criminal codes were said to be "inapplicable to injuries inflicted on the slave." Id. Only an affirmative act by the legislature, therefore, could make "slave activity"-- i.e., activity relating to or affecting a slave--a crime.

Justice Brennan described this balkanized system in his dissent in McCleskey v. Kemp:

By the time of the Civil War, a dual system of crime and punishment was well established in Georgia. The state criminal code contained separate sections for "Slaves and Free Persons of Color," and for all other persons.... The code established that the rape of a free white female by a black "shall be" punishable by death. However, rape by anyone else of a free white female was punishable by a prison term not less than 2 nor more than 20 years. The rape of blacks was punishable "by fine and imprisonment, at the discretion of the court." McCleskey v. Kemp, 481 U.S. 279, 329 30 (1987) (Brennan, J., dissenting) (citations omitted); see also Tushnet, supra, at 84 85 (describing similar bifurcated system in ante-bellum Mississippi). After the Civil War, slave codes were replaced in most southern jurisdictions with black codes which effected some of the same results:

The codes 'perpetuated or created many discriminations in the criminal laws by applying unequal penalties to Negroes for recognized offenses and by specifying offenses for Negroes only.... Examples of discriminatory penalties were the laws which made it a capital offense for a Negro to rape a white woman, or to assault a white woman with intent to rape ....' Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking: Cases and Materials 408 (2d ed. 1992) (quoting John Frank & Robert Monro, The Original Understanding of "Equal Protection of the Laws," 1972 Wash. U. L.Q. 421, 445 46 (1972)). These black codes were a primary impetus for both the Civil Rights Act of 1866 and the Fourteenth Amendment. See id.

[FN188]. Amii Larkin Barnard has addressed the rationale underlying the determination not to view rapes of black women as criminal violations:

White Supremacist theory implicitly sanctioned the possession of a Black woman by a white man. This was legitimized by a white cultural belief that Black women were promiscuous and sexually demanding. In keeping with True Womanhood ideology, men were morally weak creatures; women were the keepers of sexual virtue. White culture therefore viewed Black women as outside the Victorian ideal of True Womanhood--" 'a Negro woman could not be a lady."' ... White Supremacists asserted that just as slavery had restrained the criminal nature of Black men, it had held the natural immorality of Black women in check. Some argued that after the Civil War the entire Black race had reverted back to its original primitive state.

...

Because Black women had abdicated their moral and sexual responsibility, white men could not be held liable for the rape of Black women. White men blamed their victims and were exonerated for their crimes. Undeserving of respect and incapable of virtue, Black women were continually and systematically raped by white men. Barnard, supra note 150, at 11, 12 (emphasis added) (citations omitted).

[FN189]. Though the formally balkanized system was abolished by the Fourteenth Amendment, its vestiges continue to influence the American legal system so that punishment continues to depend, to some extent, upon the race of the victim and the defendant. See, e.g., Craig R. Roecks, Comment, Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged with a Capital Crime, 25 Cal. W. Int'l L.J. 189, 223 24 (1994) (discussing 1990 General Accounting Office conclusion "that those who murdered whites were found more likely to be sentenced to death than those who murdered blacks," and that " 'race of the victim' influence was consistent in all states analyzed and was found at all stages of the criminal justice sys-

tem.")

The white views of black female sexuality, as well as their implications for black rape victims, described by Barnard, outlived the Civil War and Reconstruction periods. In 1918, for example, one commentator wrote that

[a]lthough the regulations adopted by masters for the control of the Negroes during slavery times may have served as a check upon their natural sexual propensities, however, since emancipation they have been under no such restraint and as a consequence they have possibly almost reverted to what must have been their primitive promiscuity. Barnard, supra note 150, at 10 (quoting Winfield H. Collins, The Truth About Lynching and the Negro in the South 95 (1918)). These views may be one reason for the problems black women historically have had getting the state to take seriously their charges of rape. Indeed, a subtler yet perhaps more disturbing (because contemporary) quote from a federal judge in a 1971 study echoes these same historical sentiments: "With the Negro community, you really have to redefine the term rape. You never know about them." Carol Bohmer, Judicial Attitudes Towards Rape Victims, 57 Judicature 303, 307 (1974).

[FN190]. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195, 198 (1989) (holding that government has no affirmative duty under Due Process Clause of Fourteenth Amendment to protect citizens from crime committed by private actors unless special relationship is established).

[FN191]. Id. at 197 n.3; see also Mody v. City of Hoboken, 758 F. Supp. 1027, 1031 (D.N.J. 1991), aff'd on other grounds, 959 F.2d 461 (3d Cir. 1992) (recognizing cause of action under 42 U.S.C. s 1983 for disparate provision of police services). After the Court's recent decisions in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that local governments have to make a factual determination, rather than a generalized assertion, of past discrimination before they can impose race based remedies) and Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995) (holding that strict scrutiny should be used in all cases involving racial classifications), it appears that the government may not discriminate on the basis of race or national origin against any citizens in the provision of its services.

[FN192]. Mody, 758 F. Supp. at 1028.

[FN193]. Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)) ("Over the years, th [[[e Supreme] Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality."').

[FN194]. Brest's "antidiscrimination principle" is applicable equally to race-and ethnicity-based classifications:

By the "antidiscrimination principle" I mean the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected. The anti-discrimination principle guards against certain defects in the process by which race-dependent decisions are made and also against certain harmful results of race-dependent decisions.... [It] is designed to prevent both irrational and unfair infliction of injury.

Race-dependent decisions are irrational insofar as they reflect the assumption that members of one race are less worthy than other people. ... The anti-discrimination principle fills a special need because--as even a glance at history indicates--race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference. Brest & Levinson, supra note 187, at 437 38 (quoting Brest, supra note 181, at 6 11).

The "denial of the opportunity to secure a desired benefit," and "the infliction of psychological injury

[that] stigmatiz[es] ... victims as inferior" are the two principal harmful effects of race-dependent decisions. Id. at 644.

[FN195]. Nowak & Rotunda, supra note 184, at 597.

[FN196]. See Brest & Levinson, supra note 186, at 438.

[FN197]. See id. at 602. This standard was announced in Korematsu v. United States, 323 U.S. 214 (1944). "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect.... [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." Id. at 216. Strict scrutiny analysis may also be triggered by state action that "classifies people in terms of their ability to exercise a fundamental right." Nowak & Rotunda, supra note 184, at 602; see also United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that classifications which discriminate against "discrete and insular minorities" violate the Equal Protection Clause); Gerald Gunther, Constitutional Law 603 (11th ed. 1985) (discussing Carolene Products' footnote 4).

[FN198]. See, e.g., Palmore v. Sidoti, 466 U.S. 429, 432 33 (1984) (race); Hernandez v. Texas, 347 U.S. 475, 477 79 (1954) (national origin).

Under Chief Justice Warren Burger, the Court added distinctions based on gender, alienage, and illegitimacy to the list of classifications deserving "heightened" scrutiny. See Craig v. Boren, 429 U.S. 190 (1976) (gender); Gunther, supra note 197, at 642 (cases on gender); id. at 670 (cases on alienage); id. at 678 (cases on illegitimacy). Although this scrutiny is not quite as exacting as traditional strict scrutiny--it often is called "intermediate scrutiny"--it nevertheless requires a state to demonstrate that a "classification[ ] ... serve[s] important governmental objectives and ... [ [ [is] substantially related to achievement of those objectives." Craig, 429 U.S. at 197.

State-sponsored discrimination against a suspect class may be express, as in statutory language granting benefits or preferential treatment to certain categories of persons. See, e.g., Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding that Virginia statute expressly prohibiting marriage between persons of different races violated the Fourteenth Amendment). Or, of more relevance to this Article, racially-neutral statutes may be enforced or administered in a discriminatory manner. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that discriminatory application of facially-neutral laundry licensing permit law violated Equal Protection Clause). While only intentional state-sponsored discrimination violates the Equal Protection Clause, it is not necessary for a plaintiff to prove malevolent discriminatory intent on the part of officials charged with administering facially neutral legislation. Moreover, as the Court noted in Hernandez, an Equal Protection violation may be proven "whether or not [the suspect classification] was a conscious decision on the part of any individual." 347 U.S. at 482 (emphasis added).

[FN199]. See Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (this "is a proposition which has long been established by decisions of th[e] Court").

[FN200]. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (prosecutor's "decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion").

[FN201]. Porter v. Walters, No. 94-6252, 1994 WL 622461, at *3 (10th Cir. Nov. 1, 1994) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985) (citations omitted)); see also United States v. Redondo-Lemos, 955 F.2d 1296, 1300 02 (9th Cir. 1992) (discussing claim and remedy for selective prosecution that violates Equal Protection Clause); United States v. Bernal-Rojas, 933 F.2d 97, 99 (1st Cir. 1991) (discussing prima facie equal

protection claim for national origin-based exercise of prosecutorial discretion).

[FN202]. Although members of such communities--including victims of criminal acts--do not have standing to challenge the decision of the prosecutor to forego pursuing criminal charges in a particular case, see Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973), courts have recognized the right of citizens to challenge prosecutorial policies or practices that deny them equal protection of the laws. See Nader v. Saxbe, 497 F.2d 676, 681 n.27 (D.C. Cir. 1974) (“Thus one injured by a general noncompliance, rather than by the noncompliance of a particular individual, might still have standing to challenge the deficient enforcement policy responsible for the noncompliance.”); NAACP v. Levi, 418 F. Supp. 1109, 1114 16 (D.D.C. 1976) (civil rights organization had standing to challenge Justice Department policy of deferring to state investigations of constitutional and civil rights violations rather than instituting its own investigation); see also Smith v. Meese, 821 F.2d 1484, 1492 n.5 (11th Cir. 1987) (“ ‘Although prosecutorial discretion is very broad under our system, it is obvious that the government cannot selectively enforce a law by prosecuting only Republicans, or only Caucasians, or only Southerners who violate the law.”’ (quoting United States v. Schumucker, 721 F.2d 1046, 1049 (6th Cir. 1983) (citations omitted), vacated without reaching merits, 471 U.S. 1001 (1985))); Linda R. S., 410 U.S. at 621 (White, J., dissenting) (“If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them.”); cf. Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 810 (5th Cir. 1980) (four identifiable groups in community may challenge their alleged systematic exclusion from consideration for jury service, even though composition of each jury panel was left to discretion of jury commissioners, and thus plaintiffs did not have right to be on any particular panel). But see Heckler v. Chaney, 470 U.S. 821, 838 (1985) (“No colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents ....”).

[FN203]. Shelley, 334 U.S. at 117.

[FN204]. The Civil Rights Act of 1871 is perhaps the classic example of such legislation. See Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. s 1983 (1994)). The Act was promulgated once “Congress realized that the passage of the [Reconstruction] Amendments alone would not secure equality for blacks or stop the atrocities committed against them.” Nowak & Rotunda, supra note 184, at 644. Indeed, the Act was commonly known as the “Ku Klux Klan Act.” Id. Northern congressmen were particularly concerned with providing remedies to blacks subjected to lynching campaigns by angry southern whites. Id. Thus, section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. s 1983 (1994). See also Charles F. Abernathy, Civil Rights and Constitutional Litigation: Cases and Materials 2 355 (2d ed. 1992) (material on s 1983).

[FN205]. See supra notes 201 202 and accompanying text (discussing circumstances under which citizen complaints may be filed for disparate treatment by prosecutors and judges). Citizen complaints arising from deprivations of rights by Federal governmental actors may be raised directly under the Due Process Clause of the Fifth Amendment, which has been held to incorporate the Fourteenth Amendment's Equal Protection Clause. 42 U.S.C s 1983 is the vehicle for such complaints against state governmental actors. See supra note 204.

[FN206]. By definition, formal recognition of the cultural defense would be a decision of general application,

since all defendants in the jurisdiction would be entitled to use the defense.

[FN207]. The phenomenon of “racially selective sympathy and indifference,” was described by Brest as “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group.” Brest & Levinson, supra note 187, at 438. This selective process of sympathy and indifference that is sometimes at play in prosecutorial decisions recently received substantial attention in the popular press:

He was a white 10-year-old who disappeared from a riverbank. She was a black 13-year-old suspected of running away from home. Different race, different families, same fate: Both ended up on the police blotter as young murder victims.

Christopher Meyer's case riveted the region for two weeks, prompting an extensive search and relentless news coverage. Ophelia Williams's death barely raised a cry.

In a candid assessment, Police Chief William Doster said his community is simply “numb” when it comes to black victims.

“Christopher was white, and Ophelia was black. That in itself is enough reason for shame. But in a broad sense this racism has brought about in the community a more tragic attitude--indifference” .... “The disease of racism has brought about the cancer of indifference.” Ed White, Police Chief Says Illinois Town Ignored Murder of Black Girl: Killing of White Youth Raised a Hue and Cry, Wash. Post, Aug. 30, 1995, at A2.

[FN208]. Farber & Sherry, supra note 174, at 309 (quoting Representative John Bingham on principle underlying Equal Protection Clause).

[FN209]. See, e.g., Lam, supra note 35, at 58, 67 68 (finding without analysis that benefits of cultural defense for defendant simply outweigh all other considerations); Note, supra note 33, at 1298 1308 (cursorily rejecting traditional objectives of criminal law in favor of individualized justice for defendant and respect for American tradition of cultural pluralism).

[FN210]. Record of Court Proceedings, No. 315972-0 (Super. Ct. Fresno County Feb. 7, 1985).

[FN211]. See Oliver, supra note 1, at 1.

[FN212]. Cf. Volpp, supra note 5, at 76 (describing problems resulting from lack of individual, female perspective in analysis of Chen case).

[FN213]. 510 N.W.2d 218 (Minn. Ct. App. 1994).

[FN214]. See id. at 220 (responding to the prosecutor's suggestion that the Hmong blame the victim, the defendant answered, “ ‘In my culture there is no such thing as rape.”’).

[FN215]. See supra text accompanying notes 108 109.

[FN216]. Nicole Brown Simpson, an American woman of European descent, was the wife of Orenthal James Simpson, an African-American former football star. Mr. Simpson was charged with first degree murder by the State of California after Mrs. Simpson was found slashed to death outside her home in 1994. See Prosecutor in Simpson Case Moves to Close Information, Wash. Post, June 24, 1994, at A23. While the jury in the Simpson case ultimately exonerated Mr. Simpson of her murder, the State appears to have done everything in its power to achieve a different result.

[FN217]. Michael and Alexander Smith, two young boys of European descent, were drowned to death in 1994. Their mother, Susan Smith, confessed to their murder. She was charged by the State of South Carolina with first degree murder, and the state asked for the death penalty. See Jurors Vote Life for Susan Smith, St. Louis Post-dispatch, July 29, 1995, at 1.

[FN218]. The fact that the defendant in People v. Kimura was a woman does not change this analysis because the cultural value that is reflected in the custom of mother-child suicide is inherently patriarchal: According to that tradition, Mrs. Kimura was supposed to kill herself and her children because she was no longer worthy of this life, not because of anything she had done, but because she was shamed by her husband's affair with another woman. See supra notes 78 79 and accompanying text. As we saw in the Chen case, the alleged corresponding "custom" for men who are placed in Mrs. Kimura's situation calls for men to be similarly shamed. However, the way they rid themselves of this shame is different: They are not asked by their culture to kill themselves, but rather, to attack their unfaithful spouse. See supra text accompanying notes 72 73.

[FN219]. Volpp, supra note 5, at 77.

[FN220]. Rimonte, supra note 21, at 1317.

[FN221]. Id. at 1321, 1324 25. Rimonte has written the best expose of how the cultural defense, as used in the Asian-American community, incorporates and perpetuates patriarchal values. Her thesis is that the defense should therefore be barred. See id. at 1312. Although Rimonte does not expressly address equal protection doctrine, her thesis implicitly is based on the antisubordination principle, an alternative to the related antidiscrimination principle. See, e.g., Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. Rev. 1003, 1007 10 (1986) (stating that the antisubordination principle seeks to achieve gender and racial parity in the law by identifying people in society who are subordinated by the relevant majority, and affirmatively elevating their legal status to eliminate subordination). Rimonte's work is one of the two pieces in the legal literature addressing the cultural defense that evidences a real sensitivity to the plight both of defendants and victims in these cases. Her perspective in this regard appears to be born of her own membership in the affected community. See Rimonte, supra note 21, at 1312; cf. Volpp, supra note 5, at 97 101 (reflecting similar sensibilities, but using anti-subordination principle to reject use of cultural defense only by cultural subordinators).

[FN222]. Rimonte, supra note 21, at 1318.

[FN223]. See Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988). The defendant in Bui argued that "Vietnamese culture stresses that children should be raised by both parents, and that if one spouse is unfaithful the other often commits suicide or other violence to 'save face.'" Maguigan, supra note 19, at 73.

[FN224]. Lam, supra note 35, at 61.

[FN225]. Id. (quoting Joseph D. Bloom et al., Halfway Around the World to Prison, Vietnamese in Oregon's Criminal Justice System, 4 Med. L. 563, 569 71 (1985)).

[FN226]. See id. at 61 62.

[FN227]. See generally Bartlett, supra note 136, at 2 25, 50 54 (discussing laws that prohibited women from voting, owning property, prosecuting husbands for sexual crimes, etc.).

[FN228]. Scholars who study the confluence of racism and sexism and its effect on the laws have described themselves as working at the "intersection" of race and gender. See generally Jerome M. Culp, Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims, 69 N.Y.U. L. Rev. 162 (1994) (arguing that "colorblindness" is an inadequate remedy for racism because the "intersection" of gender and class oppression complicates the problem); Volpp, supra note 5, at 59 (intersectional analysis is essential to an understanding of the relationship of the "cultural defense" to Asian women).

[FN229]. Indeed, writing in 1995, it would seem evident that the discriminatory cultural evidence discussed in this Article is constitutionally impermissible. Equal protection doctrine as written, and as applied beginning in the 1950s, has been unequivocal that the law cannot, without a very good reason (i.e., without either an important or a compelling basis), make distinctions among the citizenry on the basis of race or national origin. See supra Part III.B. And yet despite this, perhaps because the issue of multiculturalism currently is so diverting, the constitutional question has not been an issue in the literature or cases that address immigrant cultural evidence.

[FN230]. Despite the fact that this ruling was made in an individual case, common law principles of precedent would permit the ruling to guide future decisions--at least until a higher authority intervened--and thus to be of more general applicability.

[FN231]. Proponents of the cultural defense would not, of course, agree with this characterization of the effects of the defense. Indeed, they argue that it is used for the opposite reason, i.e., out of respect for the inherent worthiness of the foreign culture. This may be true. However, the effect of the evidence on victims of immigrant crime is not different because of this benevolence. Whatever the motivation, immigrant victims are protected to a lesser degree than others who are not members of the groups at issue.

[FN232]. See, e.g., Menez v. State, No. 01-92-00825CR, 1993 WL 112912, *1 (Tex. App. Apr. 15, 1993) (describing the doctrine of provocation and sudden passion that reduces murder to manslaughter where the husband learns of his wife's adultery).

[FN233]. See, e.g., Richmond v. State, 623 A.2d 630, 634 (Md. 1993) ("[H] ot-blooded response to adultery is well-known factor mitigating murder to manslaughter."); Dennis v. State, 661 A.2d 175, 179 (Md. Ct. Spec. App. 1995) (at common law, observing spouse in an act of adultery was legally adequate provocation to reduce murder to manslaughter).

[FN234]. See supra note 227 and accompanying text.

[FN235]. See supra Part I.C (discussing the custom of mother-child suicide).

[FN236]. Although Smith was without question less appealing--Smith did not, for example, attempt suicide at the time she drowned her sons, and she deceived the public about the circumstances of the boys' disappearance, claiming that a black man had kidnapped them--after her personal circumstances and history came to light, she became more human, more vulnerable, and hence for many, more sympathetic.

In fact, the similarities between the two cases are quite remarkable. For example, Smith, like Kimura, claimed that she had wanted to kill herself after she killed her children. See Lawyer Denies Report Smith Saw Son Struggle, Seattle Times, Nov. 7, 1994, at A2 (quoting Smith's written confession that she had also intended to kill herself). She also claimed that she believed she was "protect[ing herself and them] from any grief and harm." David Finkel, Haunted Waters, Wash. Post Magazine, June 25, 1995, at 25 (quoting Smith's written confession). And both women were apparently despondent because they had been rejected by someone they loved

or felt allegiance to--Kimura by her husband and Smith by her lover.

Thus, it is my view that, to the extent there are differences between the two cases that might account for the divergent results, those differences lie primarily in culture, and specifically in the cultural argument Kimura was able to mount in her defense, an argument that was not available to Smith.

[FN237]. See Jurors Vote Life for Susan Smith, supra note 217 at 1A.

[FN238]. See supra note 207 describing phenomenon of "racially selective sympathy and indifference" to crime).

[FN239]. The fact that the discrimination in these cases may be benevolent rather than racist in the traditional sense is not likely to change the circumstances for victims of immigrant crime who are denied physical protection or retribution. As the Supreme Court wrote in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), "it is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." Id. at 725.

[FN240]. There is much debate about the merits of originalism and original intent as tools for interpreting constitutional provisions. Notwithstanding this, the doctrines continue to be vital and often dispositive in the resolution of questions about the meaning of the Constitution, including the Equal Protection Clause.

[FN241]. Brest & Levinson, supra note 187, at 439 (quoting Brest, supra note 181, at 6 11).

[FN242]. See Rimonte, supra note 21, at 1322 23.

[FN243]. See Volpp, supra note 5, at 93 94.

[FN244]. See id. at 97 98.

[FN245]. See supra note 221 (discussing Ruth Colker's work on the antisubordination principle).

[FN246]. See Volpp, supra note 5, at 97 101. Although Volpp never expressly defines "antisubordination," her general discussion, involving identifying the subordinated or oppressed individual in the case and granting that individual special legal consideration, is consistent with the way Ruth Colker has described the equal protection principle. See id.; Colker, supra note 221, at 1007 10. My conclusion that Volpp likely is talking, albeit indirectly, about equal protection principles, is based upon this comparison.

[FN247]. When I say this distinction cannot be supported, I do so in the context of our existing legal tradition. There simply is no basis in that tradition for the argument that individuals who are subordinated or oppressed must have an evidentiary advantage over those who cannot articulate such a handicap. See Volpp, supra note 5, at 97. Given this, Volpp needs to do much more to support her view that this tradition is erroneous; that is, she must do more than merely set forth the antisubordination principle and declare in conclusory fashion that it "must be a criterion in the decision as to when and how cultural factors should be presented as a defense." Id.

Professor Maguigan, while not expressly arguing that cultural evidence ought to be permitted only for women, does focus on the fact that because women-- Kimura, for example--may be defendants in actions that involve the defensive use of cultural evidence, it behooves feminists not to reject it completely, lest they risk "silencing or distorting women's voices." Maguigan, supra note 19, at 82 83; see also id. at 98 (noting that not all women's advocates reject the cultural defense).

[FN248]. In this regard, I also note that a further effect of Volpp's gender-neutral characterization of the principle of antisubordination is to permit use of the cultural defense in circumstances where immigrant men commit crimes outside their own communities, i.e., where the victim is not an immigrant.

[FN249]. Volpp, supra note 5, at 97.

[FN250]. Id.

[FN251]. See id. at 98 99.

[FN252]. Id. at 98.

[FN253]. Id. at 86.

[FN254]. Id. at 74 75.

[FN255]. She does so because it would encourage the law to develop a “model” of the cultural type at issue--e.g., a “reasonable Asian woman”--that in many cases would deny individual defendants who do not precisely fit this model the benefit of cultural evidence. See id. at 91 97. Volpp points to the evolution of the battered women's defense as an example of the law creating a “reasonable woman” standard that excludes worthy women who do not fit this ostensibly objective stereotype. See id.

[FN256]. See id. at 91.

[FN257]. By “current practice,” I mean the way lawyers and judges already are using culture, i.e., as evidence relating to the defendant's state of mind. See supra text accompanying notes 43 52.

[FN258]. See Maguigan, supra note 19, at 42.

[FN259]. See id. at 87.

[FN260]. See id. at 90 91.

[FN261]. See supra note 48 and accompanying text.

[FN262]. See infra note 264 and accompanying text.

[FN263]. See infra notes 265 266 and accompanying text.

[FN264]. See System Called Ambivalent, supra note 50, at 6 (quoting Renteln as saying “the law should bend, at least in nonviolent cases, for indigenous people, like American Indians, who are forced to live under the domination of an alien culture”).

[FN265]. See Carlos Villareal, Culture in Lawmaking: A Chicano Perspective, 24 U.C. Davis L. Rev. 1193, 1238 (1991).

[FN266]. Id.

[FN267]. It is questionable, however, whether it would be possible in most cases to accomplish such self-ostracism. There is no practical way completely and publicly to leave one's immigrant community short of

“divorcing” irrevocably one's entire family. Moreover, to the extent that membership in the culture is determined by the beholder rather than by each individual for herself, the question whether the individual “consented” to depart is not answered subjectively anyway.

[FN268]. Record of Court Proceedings, No. 315972-0 (Super. Ct. Fresno County Feb. 7, 1985).

[FN269]. See Renteln, supra note 37, at 496 (noting that period of acculturation is one issue that would need to be resolved in implementing the cultural defense); but see Sams, supra note 35, at 347 (noting that determining a cut-off point at which responsibility for United States law should apply is difficult, and thus one reason why there should not be a cultural defense).

[FN270]. See 42 U.S.C.A. ss 13931 14040 (1995).

[FN271]. See INS Guidelines, supra note 30.

[FN272]. 42 U.S.C.A. ss 13991 14002 (1995).

[FN273]. Id. s 13992.

[FN274]. Id. s 13981(a).

[FN275]. Id. ss 13981(b), 13981(c). Other relevant parts of the Act include those that provide for the safety of women in public transit and public parks, id. s 13931; confidentiality for abused women, see id. s 13951; and for rural domestic violence and child abuse enforcement, see id. s 13971.

[FN276]. INS Guidelines, supra note 30, at 1. This new interpretation of existing asylum and refugee law is based upon conclusions and guidelines issued by the United Nations Human Rights Commission (UNHRC), the Canadian government, and the Women's Refugee Project of the Harvard Immigration and Refugee Program, which themselves reflect an “understanding [that] gender-related violence in general is increasing,” and that a woman's right to be free from such violence is a universal human right. Id. at 1 2. On this subject, and of particular relevance to this Article, the recent United Nations Women's Conference included in its platform the “affirmation that women's rights should supersede national traditions.” Seth Faison, Women Carry Hopes As Conference Ends, N.Y. Times, Sept. 16, 1995, at A5 (emphasis added). The INS Guidelines also reflect international obligations the United States assumed pursuant to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (that “prohibits actions by States which are discriminatory and requires States to take affirmative steps to eradicate discriminatory treatment of women”), the 1993 United Nations Declaration on the Elimination of Violence against Women (that “recognizes violence against women as both a per se violation of human rights and as an impediment to the enjoyment by women of other human rights”), as well as the UNHRC Conclusions and Guidelines mentioned above (that “not[e] that refugee women and girls constitute the majority of the world refugee population,” and that “recognize[ ] that asylum seekers who have suffered sexual violence should be treated with particular sensitivity.”). INS Guidelines, supra note 30, at 2 3.

[FN277]. INS Guidelines, supra note 30, at 9.

[FN278]. Id. at 4.

[FN279]. Id.

[FN280]. Id. at 5 6.

[FN281]. See supra note 276.

[FN282]. Faison, supra note 276, at A5 (emphasis added).

[FN283]. Ashley Dunn, U.S. to Accept Asylum Pleas for Sex Abuse, N.Y. Times, May 27, 1995, at 1, 7.

[FN284]. Id. at 7; Pamela Constable, Togolese Teen Criticizes Detainment: Female Circumcision Focus of Asylum Fight, Wash. Post, Apr. 30, 1996, at A3 (reporting Board of Immigration Appeals Can Be Precedent for All Issues).

[FN285]. See, e.g., Burstyn, supra note 98, at 32 (discussing the "well-publicized court case of a Nigerian woman living in Oregon who won asylum in this country by pleading that her daughters would be in grave danger of being forcibly circumcised if they were sent back to their homeland").

[FN286]. The policies that underlie these closely-linked federal actions are themselves tied to the antidiscrimination principle that underlies the equal protection doctrine. Indeed, the Equal Protection Clause is the source of statutory and judge-made law that has held state action which discriminates against individuals on the basis of race and gender to be unconstitutional.

[FN287]. See Faison, supra note 276, at A5 (noting that United Nations Conference on Women in Beijing announced that women's rights "should supersede national traditions"). It is not a leap for me to assert that this position is consistent with the reading that the Clinton Administration intends for the INS Guidelines. Not only were those guidelines promulgated pursuant to prior consistent obligations the United States had under various United Nations conventions, but they also expressly incorporate the very same notion that is urged on member states by the United Nations platform, namely that states should not honor the cultural mores of other societies who accept or even dictate gender-based violence. Despite the fact that conservatives have not traditionally been supportive of the universal women's platform--see, e.g., id. at A5 (noting that Republicans have challenged aspects of the United Nations Conference platform, charging that, inter alia, "a woman's right to say no to sex [is] 'anti-family"'), the fact that they also tend not to be supportive of multiculturalism leads me to believe that a Republican administration might not change United States policies on this subject radically.

[FN288]. Again, this Article allows, for purposes of evaluating the cultural defense, that the motivation of the state actors at issue is multicultural rather than racist or sexist. Nonetheless, I continue to caution that racism and/or sexism should not be neglected as possible rationales for the decisions to allow the cultural defense.

[FN289]. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (discussing preemption analysis).

[FN290]. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (state law requiring alien registration preempted by national policies concerning aliens).

[FN291]. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 43 (1963).

[FN292]. 42 U.S.C.A. s 13992(13) (1995).

[FN293]. This section also is relevant to the extent that the reader is interested in a resolution that questions the merits of the existing law that might preclude the cultural defense, and that weighs the relative benefits of both

interests at stake with equivalent respect. I note, however, that because equal protection doctrine and the process of developing legislation and executive rules themselves involve a balancing of competing interests, it would be incorrect to assume that existing law does not at least to a certain extent reflect such a resolution.

[FN294]. See supra note 35 (setting out articles and student notes addressing the cultural defense and identifying their positions as pro-defendant or pro-victim).

[FN295]. The balancing doctrine has received extensive and sometimes critical attention in the legal literature. See generally Symposium, When Is a Line As Long As a Rock Is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication, 45 Hastings L.J. 707 (1994) (providing varied critiques of the balancing doctrine). Yet, without question, the doctrine is alive and well in our jurisprudence. Indeed, the Supreme Court and lower federal and state courts continue to use it both to develop rules or principles of general applicability, and to determine results on a case-by-case basis. See, e.g., Andrew E. Taslitz & Margaret Paris, Introductory Constitutional Criminal Procedure: A Lawyering Perspective (forthcoming 1997) (manuscript at 60 61, on file with author). “Two uses may be made of balancing. First, balancing may be used simply to decide the case before the Court.... Second, balancing can be used to arrive at a principle or rule which then no longer requires balancing in future cases.” Id. (manuscript at 60 61, on file with author).

[FN296]. Peterson v. Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring and dissenting in the judgment).

[FN297]. Courts have used the balancing approach in a number of varied and unrelated areas that are illustrative of the ways in which the approach might be used to resolve the dilemma posed by the cultural defense. For example, in the civil context, a preliminary injunction may be granted when the interests of the plaintiff outweigh those of the defendant, also taking into consideration the interests of society at large. Thus, a court must “balance the relative inconveniences to the parties” of an injunction. The court also will “consider injury to the public welfare as well as to the parties” when it “analyz[es] this relative-injury calculus in a particular case.” Jack H. Friedenthal et al., Civil Procedure 704 (2d ed. 1985).

Balancing analysis is also used in common law negligence cases. The Restatement (Second) of Torts requires a balancing of the plaintiff's and the defendant's interests in connection with a consideration of the relative social utility of both positions to determine whether there has been a breach of the duty of care. See Restatement (Second) of Torts s 291 (1965). The Restatement provides that

[w]here an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done. Id. The Restatement also requires a discussion of less burdensome alternatives. Specifically, it requires that the parties discuss and the courts address(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct; (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct; [and]

(c) the extent of the chance that this interest can be adequately advanced or protected by another and less dangerous course of conduct. Id. s 292.

In the negative or dormant Commerce Clause area, the Supreme Court has created a balancing test to be used in determining whether state regulation violates the Commerce Clause. This test weighs the burdens on interstate commerce against the “putative local benefits” to be derived from the regulation. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Like other balancing tests, this approach requires courts to scrutinize whether the “local interest involved ... could be promoted as well with a lesser impact on interstate activities.” Id. Another example of the Supreme Court's use of the balancing approach to resolve competing interests is found in the im-

plied preemption area, where the Court has evolved a test that asks "whether, under the circumstances ... [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). As applied, this standard requires a weighing of the respective interests of states and the federal government. See Brest & Levinson, supra note 187, at 391 94 (discussing preemption analysis as reflecting contemporary balancing approach).

[FN298]. See System Called Ambivalent, supra note 50, at 6 (quoting Renteln as saying "I believe a cultural defense should be denied to a person who chooses to come to somebody else's culture. For the most part, I subscribe to the '[w] hen in Rome' philosophy.").

[FN299]. See supra note 35 (listing feminist scholarship opposing cultural defense).

[FN300]. See supra notes 114 124 and accompanying text (discussing use of personal information in mitigation of sentence).

[FN301]. See supra notes 111 121 and accompanying text (discussing defendants' right to present wide-ranging evidence in mitigation of sentence).

Whatever the reduction, the use of cultural evidence never should be used to eliminate completely, e.g., through a suspended sentence, any sentence imposed. Moreover, while the result of this inherently subjective, defense-oriented process may, in some cases, result in a reduced sentence, it does not permit the exoneration of the immigrant defendant. Indeed, by definition the sentencing phase of criminal proceedings only takes place once a defendant has been found guilty of a crime. The purpose of this phase is therefore both secondary and distinct: It is expressly intended to follow the objective determination of guilt with a subjective evaluation of the particular defendant's moral culpability.

A good example of this doctrine is that we generally will find two people who separately steal one hundred dollars both equally guilty of the crime of theft; however, we generally will sentence more leniently the person who stole to feed his or her family than we will the person who stole to buy jewelry.

[FN302]. See supra notes 232 233 and accompanying text.

[FN303]. American men long have argued that a wife's adultery stigmatizes them as weak in our culture. This is, essentially, the same argument that is made in the cultural defense cases where men kill or beat their unfaithful wives. The claim that the branding is particularly severe in the foreign culture as compared with American culture is at least open to debate.

[FN304]. See supra notes 47 48 (discussing contemporary disingenuous use of cultural evidence in context of mens rea analysis and addressing Professor Maguigan's view that cultural evidence is not actually presented as a defense).

[FN305]. Tort law may provide a remedy to victims in cultural defense cases. However, it is entirely possible that, if accepted in the criminal process, the cultural defense would also be available to the defendant in related civil cases. Moreover, even if the cultural defense were not accepted in the civil context, there are a multitude of problems that likely would make a successful suit difficult. In the marriage-by-capture context, for example, the defendant could continue to use consent as a defense to any action. In the mother-child suicide context, the father could sue; however, his contribution to his wife's emotional distress likely would reduce if not eliminate any recovery. The other cases pose similar practical problems.

[FN306]. See Rimonte, supra note 21, at 1322 24.

[FN307]. Rimonte herself argues for education and a bar on the use of the cultural defense. See id. Her concern about the need to be respectful of the cultural sensitivities of members of immigrant communities is an important one, and is shared by others who have addressed the issue of culture-based immigrant crime. See, e.g., Minority Health Improvement Act of 1994, H.R. 3869, 103d Cong., 2d. Sess. (1994) (providing for gathering of information and educational measures in communities practicing female genital mutilation). This bill stops short of proscribing the practice of female genital mutilation. See id. The World Health Organization has recommended that any:
programs aimed at the elimination of [female genital mutilation] should be designed in a manner that recognized the cultural, traditional, and social pressures that women in these communities face and that such programs should be carried out in a manner that is sensitive to, and respectful of, the particular needs and problems of these individuals. H.R. Rep. No. 103-501, 103d Cong., 2d Sess., at 67 (1994). But see supra text accompanying notes 107 109 (noting that immigrant community counselors in Atlanta have avoided the education option in the context of female genital mutilation).
[FN308]. Hansen & Scroggins, supra note 4, at A10 (quoting founder of Atlanta Somali Relief and Adjustment Organization).

[FN309]. See supra Part III.C (discussing messages sent to relevant communities when cultural evidence is permitted to be dispositive in criminal cases).

[FN310]. See supra text accompanying note 216.

[FN311]. See supra Part II.B.

[FN312]. See supra Part III.B.

[FN313]. See supra notes 182 207 and accompanying text (discussing history of discriminatory laws, and equal protection principles).

[FN314]. Whether or not the reader agrees with Professor Fish's characterization of multiculturalism and multiculturalists, his analysis illustrate the debate about the nature and form multiculturalism should take in the United States. His analysis suggests that, before we change our laws to reflect principles of multiculturalism, we should first decide what form this influence should take. Depending upon the conclusion, it may not be necessary to adopt the cultural defense.

[FN315]. The fact that a particular culture and its dictates may not so easily be defined is an enormous evidentiary dilemma in these cases. For example, the realities of contemporary litigation aside, the story one witness tells of a customary practice likely will vary from that told by an opposing witness. The variations will exist because of our adversarial process, but also because of gender, age, religious, and ethnic differences among the parties and even among the witnesses themselves. See, e.g., Volpp, supra note 5, at 64 84 (describing expert testimony in Chen case as exclusively male).

[FN316]. 510 N.W.2d 218, 220 21 (1994).

[FN317]. Stuart Hall, Cultural Identity and Diaspora, in Identity, Community, Culture, Difference 222, 225 (Jonathan Rutherford ed., 1990).

[FN318]. Rimonte, supra note 21, at 1315.

[FN319]. See id. at 1325 26 (discussing evolutionary nature of culture).

[FN320]. Lam, supra note 35, at 67. See also Maguigan, supra note 19, at 52 n.58 (discussing difficulty of sufficiently defining culture for purposes of requisite legal analysis). Professor Maguigan finds a separate cultural defense practicably unworkable due to the mutability of culture and its components. See id. at 52 55.

[FN321]. For this purpose, I leave aside the larger and different question of whether we ought to be engaged in this debate when there is no effort to inject one culture's dictates into another society; clearly, there is substantial, ongoing work to universalize certain rights, including women's rights, that is contrary to the pure multicultural position, and that goes beyond the issue that I address in this Article.

[FN322]. See, e.g., Sandra L. Rierson, Race and Gender Discrimination: A Historical Case for Equal Treatment under the Fourteenth Amendment, 1 Duke J. Gender L. & Pol'y. 89, 92 105 (1994) (discussing historical treatment of women in the law).

[FN323]. 347 U.S. 483 (1954).

[FN324]. While the law sometimes develops to reflect existing social values, the Brown decision is largely credited with imposing upon United States society the new social values of integration and equality.

[FN325]. Not surprisingly, the courts have also rejected efforts to use the cultural defense in cases where the defendant is not an immigrant. Efforts by counsel for urban African-American male defendants accused of violent crimes to establish what essentially is a “ghetto-culture defense” similarly have been rebuffed by the courts.

For example, the argument has been made on behalf of a black defendant that black men--especially those who live in the cities--are particularly violent. It goes something like this: Life is mean in the ghetto. It breeds mean people who do mean things. And so, it's all right for me to be mean so long as I'm only mean in the ghetto where life is bad and people do bad things.

One formulation of this argument has been called “urban survival syndrome.” It is described as a feature of contemporary black urban culture where young men grow up with a kill or be killed mentality. See Dateline NBC (NBC television broadcast, Oct. 19, 1994), available in WL, Dateline database [ [ [hereinafter Dateline transcript]. The urban survival defense was used to bolster the self-defense arguments of Daimion Osby, a black teenager in Houston, Texas, who shot and killed two black men he alleged had threatened him. Id. at *4 *5. It turned out that the victims were unarmed and probably did not pose a factual threat at the time of the killings. Id. at *6. Osby was permitted to present his expert and the urban survival defense in his first capital murder trial. The expert “testif[ied] about how Osby's neighborhood might have affected him,” and in particular “that his upbringing in a violent, inner-city neighborhood made him believe he had no other choice.” Jury Rejects ‘Urban Survival’ Defense, Wash. Post, Nov. 13, 1994, at A16. Osby's first trial ended in a hung jury. The only vote to acquit came from the foreman, allegedly on traditional self-defense grounds. See Dateline transcript at *14. On retrial, Osby was sentenced to life in prison. Courts Awash in Murky Stew of Syndromes, Baltimore Sun, Apr. 12, 1995, at A1; see also Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 L. & Ineq. J. 9, 54 55 (1985) (discussing variants of “urban survival,” “rotten social background,” and “black rage,” and arguing that they should constitute cultural defenses).

[FN326]. Burstyn, supra note 98, at 33.

[FN327]. James A. Carlson, Laotian Immigrant Kills Wife, Himself, Phil. Inquirer, June 17, 1995, at A2.

[FN328]. See id.
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