

Module XI: Cultural Defenses and Cultural Evidence**Table of Contents: Cultural Defense**

(12 Pages)

Learning Objectives:

This module will enable judges to better:

- Understand what a "cultural defense" is
- Determine whether to admit a cultural defense
- Determine the qualifications of an expert witness offered in a cultural defense case

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Module XI: Cultural Defenses and Cultural Evidence

What Is "Culture"?

This Module is adapted from: NATIONAL JUDICIAL EDUCATION PROGRAM, *Unit V, The Cultural Defense and Cultural Evidence, in WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE FOR WOMEN OF COLOR IN THE COURTS* (1998).

Culture is "[k]nowledge about customs, values, language, behavior, etiquette, traditions, belief systems, world views, food, dress, and musical tastes that is shared by members of a group. This shared knowledge is learned from others and passed on from generation to generation. Culture tells us how to behave and influences our interpretation of how others behave. Culture is the set of assumptions and understandings, often unexamined, that shapes our ideas and impacts our every decision."

— NAGAE & O'LEARY, RACE FAIRNESS AND CULTURAL AWARENESS, 1996 at 5.



Resources

Nonperiodical Literature

- Peggy A. Nagae, Kathleen M. O'leary, THE NATIONAL JUDICIAL COLLEGE, RACE FAIRNESS AND CULTURAL AWARENESS FACULTY DEVELOPMENT WORKSHOP MANUAL at 5 (1996)
- [*Women of Color as Victims of Gender-Based Violence*](#) WHEN BIAS COMPOUNDS: ENSURING EQUAL ACCESS TO JUSTICE FOR WOMEN IN THE COURTS (1998)

Module XI: Cultural Defenses and Cultural Evidence

What is a "Cultural Defense"?

The cultural defense excuses criminal behavior altogether or mitigates criminal liability due to a lack of requisite *mens rea* based on the defendant's claim that the act is accepted behavior in his/her culture and community. "The term 'cultural defense,' as it is used to describe freestanding defenses raised by criminal defendants who are not part of the dominant culture is a relative newcomer to American legal scholarship." (Maguigan, *Cultural Evidence and Male Violence*, 1995.) As the United States has become a more diverse and multicultural society, the cultural defense has been promoted as a necessary means of achieving fairness and justice in the legal system.

The general arguments for and against the cultural defense and for its limited use are summarized in this module. Most salient to the subject of this curriculum is the deep concern that because domestic violence and marital rape are so widely accepted in cultures across the world – just as they were until very recently in our own – immigrant defendants can easily use cultural background as a defense to justify or excuse intimate partner battering and sexual assault. See [Why Victims Don't Report: Cultural Considerations](#). For example, sexual assault and kidnapping have been defended as part of a marriage ritual in "marriage-by-capture" cases; similarly, bludgeoning a wife to death after learning of her infidelity has been excused as a normal reaction in a more violent culture.

Articles

- Holly Maguigan, [Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?](#), VOL. 70 NEW YORK UNIVERSITY LAW REVIEW 36 (1995)

Resources**Module XI : Cultural Defenses and Cultural Evidence****Arguments For the Use of Cultural Defenses**

The arguments favoring a freestanding cultural defense run as follows. The criminal justice system is often criticized for its imposition of and assumptions based on Western and white-male norms and values. A formal, freestanding cultural defense could be used to achieve fairness and individual justice and to promote cultural pluralism. Allowing the defendant to raise a cultural defense promotes fairness in the legal system in several ways by:

- Allowing the fact finder to apply a more accurate profile of a "reasonable person" in the defendant's situation;
- Providing individual fairness for recent immigrants who may not yet be familiar with the laws of the U.S.;
- Educating the jury about the defendant's background to bridge the cultural gap;
- Helping cultural pluralism to survive and flourish by allowing individuals to maintain their customs and values.

Thus, by allowing each individual to maintain his/her culture, the criminal legal system will assist in preserving and promoting a pluralistic society (Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 1993; Note, *The Cultural Defense in the Criminal Law*, 1986).

Articles

- Note: *The Cultural Defense in the Criminal Law*, VOL. 99 HARVARD LAW REVIEW 1293 (1986)
- Alison Dundes Renteln, *A Justification of the Cultural Defenses as Partial Excuse*, VOL. 2 CALIFORNIA REVIEW OF LAW AND WOMEN'S STUDIES 437 (1993)

Module XI : Cultural Defenses and Cultural Evidence**Arguments Against the Use of Cultural Defenses**

Opponents of a freestanding cultural defense also argue by the principles of fairness and justice. A legal system should have only one standard, and immigrants and other minority groups must learn its rules and values. Otherwise, those who know the rules, regardless of their race or national origin, would be treated more harshly and thus unfairly compared to recent immigrants committing the same criminal acts. Furthermore, victims of those who do not know the rules will be offered less protection.

Women's advocates are also concerned that a formal cultural defense is unfair, especially to immigrant women, because it eliminates the limited progress achieved in areas such as domestic violence and marital rape. Because violence against women is still so widely accepted and approved in cultures across the world, cultural background can easily be used to justify or excuse the perpetrator's actions. Members of immigrant communities who should otherwise be protected by the law are at risk of further violence. Victims of immigrants, particularly their partners and children, would receive unequal and less protection than the non-immigrant population.

Furthermore, immigrant communities already often express their concern that crimes with immigrant victims are punished less severely than cases in which the victim is white. For example, a Hmong man received probation after sexually assaulting his two stepdaughters because his attorney argued that, "he is from Vietnam. . . Part of what happens in an agrarian culture, sometimes young girls are married and that may have been a carry-over in their culture. . . . This behavior may have seemed to be OK or not as bad as we view it." A spokesman for the victims' family countered, "There are no cultural differences to allow a man to molest children that age. . . . The family of the victims were shocked." (*Molester's Probation Shocks Kin*, CAPITAL TIMES, August 29, 1996, at 3A). They compared this sentence of probation to an earlier case involving a young white girl. The girl's stepfather was sentenced to 10 years in prison for sexually assaulting her. (Meg Jones, *Sex Assault Sentence Draws Charges of Bias*, MILWAUKEE J. SENTINEL, Aug. 29, 1996, at 1).

Newspapers

- *Molester's Probation Shocks Kin*, CAPITAL TIMES at 3A (August 29, 1996)
- Meg Jones, *Sex Assault Sentence Draws Charges of Bias*, MILWAUKEE SENTINEL at 1 (August 29, 1996)

Module XI: Cultural Defenses and Cultural Evidence**Arguments Against the Use of Cultural Defenses (cont'd)**

The danger of allowing a cultural defense or accepting inaccurate information as cultural evidence has surfaced in the experiences of women in immigrant communities. (Volpp, *(Mis)Identifying Culture*, 1994; Gallin, Note, *The Cultural Defense*, 1994.)

For example, in a 1988 New York case with a bench trial, a Chinese immigrant was convicted of a reduced charge and received a minimal, probational sentence for murdering his wife after she confessed to infidelity. (*People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988)). The judge found that the defendant's cultural values contributed to his state of mind.



Women in the Asian community were outraged and frightened. Battered women in the Chinese community felt that they were at a much greater risk of violence from their partners. One Chinese immigrant husband told his wife, "If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney." Another woman fled her home with her children and sought emergency shelter immediately after reading about the case in a Chinese newspaper, fearing that her husband would find out about the decision. In addition, a counselor for battered immigrant women confirmed that before the decision, women could try to threaten their abusive husbands with punishment through the legal system. Afterwards, this potential deterrent had been eliminated (Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown: Battered Asians Shocked by Husband's Probation*, *NEWSDAY*, Nov. 26, 1989, at 4).

As a result of cases such as this one, women in immigrant communities, who are in violent relationships may be even less willing to report their abusers than women from the dominant culture because they may feel that the justice system offers them no protection. These concerns and concerns about their immigration status, see [Why Victims Don't Report, Immigration Status Concerns](#), may leave immigrant women without recourse to justice.

Resources**Cases**

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

Articles

- Leti Volpp, [\(Mis\)Identifying Culture: Asian Women and the Cultural Defense](#), VOL. 17 HARVARD WOMEN'S LAW JOURNAL 57 (1994)
- Alice J. Gallin, Note: *The Cultural Defense: Undermining the Policies Against Domestic Violence*, VOL. 35 BOSTON COLLEGE LAW REVIEW 723 (1994)

Newspapers

- Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown: Battered Asians Shocked by Husband's Probation*, *NEWSDAY* at 4 (Nov. 26, 1989)

Module XI : Cultural Defenses and Cultural Evidence**Allowing Limited Use of Cultural Defenses**

Recognizing the problems of allowing cultural evidence, some scholars advocate a limited approach in order to maintain gains in areas such as violence against women while minimizing cultural stereotyping. Proponents of this approach recognize that while cultural evidence has been used to practically legitimize violence against women depending on the cultural setting, it may also aid in the defense of women of color, particularly those whose actions have been shaped by a culture in which women are devalued and marginalized.

Mother/child-murder/suicide cases are an example. In Western culture this is the worst kind of criminal act. But in some Hispanic and Asian cultures this is culturally acceptable in certain situations. The crime would be for the mother to kill herself and leave her children behind, uncared for or in the hands of an abusive parent.

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Allowing Limited Use of Cultural Defenses (cont'd)

A case of this kind involving intimate partner sexual abuse, domestic violence and child sexual abuse is that of Juana Leija, a Mexican woman living in Houston, Texas. She "was physically and sexually abused every day of her life and so were her kids." She sought help but "[e]very social organization..., except the church failed her and the church couldn't do much." (Interview by Chris Travis with Dick DeGuerin, Defense Attorney for Ms. Juana Leija, Burton, Texas, in THE ROUNDTOP REGISTER at www.roundtop.com/DeGuerin.htm (last visited July 9, 2007).) She tried to drown her seven children and herself. Two of the children died. She said:

"I wanted to end my life and the lives of my children because I know that sooner or later my husband was going to kill me, and I didn't want my children to stay with him or someone else that was going to mistreat them. I know that my children would suffer if they stayed behind."

— Diane Mason, *An Act of Love?*, ST. PETERSBURG TIMES (March 12, 1989) at 1F.

When the circumstances of her life became known, her attorney was able to present her case in the context of the legend of La Llorona the "weeping woman" of Mexican and Mexican-American culture, who drowned her child and herself when that seemed the only way out of an intolerable situation. Juana Leija was given a sentence of ten years probation and, with help from several agencies, was able to rebuild her life. (Diane Mason, *An Act of Love?*, ST. PETERSBURG TIMES, March 12, 1989 at 1F.; Heinzelman, "[Going Somewhere](#)": *Maternal Infanticide and the Ethics of Judgment* , 1998.)



Resources

Newspapers

- Chris Travis, *For the People... A Leisurely Stroll Through the Bill of Rights with Hot Shot Defense Attorney, Dick DeGuerin*, THE ROUNDTOP REGISTER (undated)

Nonperiodical Literature

- Susan Sage Heinzelman, "[Going Somewhere](#)": *Maternal Infanticide and the Ethics of Judgment* ed: Paul J. Heald, LITERATURE AND LEGAL PROBLEM SOLVING: LAW AND LITERATURE AS ETHICAL DISCOURSE (1998)

Resources**Module XI: Cultural Defenses and Cultural Evidence****The Balancing Act of Allowing the Use of Cultural Defenses**

Allowing cultural defenses that contextualize the defendant's actions without completely excusing the behavior is a balancing act. Firstly, it must be recognized that women of color and immigrant women are burdened with a double oppression: sexism within their own culture and sexism and racism within U.S. culture.

In cases involving gender-based violence, it is important to consider various questions when considering whether to allow cultural defenses.

- How are the cultural practices an expression of particular power arrangements between men and women in that culture?
- How are these practices maintained and legitimated?
- How, if at all, have these practices affected the victim's ability to report the violence committed against her?

(Volpp, *(Mis)Identifying Culture*, 1994; Gallin, Note, *The Cultural Defense*, 1994.)

Articles

- Leti Volpp, [*\(Mis\)Identifying Culture: Asian Women and the Cultural Defense*](#), VOL. 17 HARVARD WOMEN'S LAW JOURNAL 57 (1994)
- Alice J. Gallin, Note: *The Cultural Defense: Undermining the Policies Against Domestic Violence*, VOL. 35 BOSTON COLLEGE LAW REVIEW 723 (1994)

Resources

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Need for a Uniform Standard in Admitting Cultural Evidence

In addition to focusing on the intersectionality of race and gender and recognizing the marginalization of women within their own cultures, it is also necessary to establish a uniform standard in admitting cultural evidence. One approach advocates allowing cultural evidence as a challenge to the prosecution's burden of proving *mens rea* (Maguigan, *Cultural Evidence and Male Violence*, 1995).

Prosecutors would assume a vital role in exposing stereotypes and other types of incorrect information in the defendant's arguments. Prosecutors would also have the responsibility, when necessary, of providing accurate information about the defendant's culture and about, non-violent choices in the situation. In cases involving violence against women, for example, the prosecution could present rebuttal cultural evidence from a women's advocacy organization in the defendant's community, to dispel stereotypes about gender roles or to discuss the non-violent options the defendant might have had in his community. Another scholar goes further in advocating a formal cultural defense as a partial excuse, such as in provocation or diminished responsibility, to either reduce a charge or a sentence (Renteln, *A Justification of the Cultural Defense*, 1986).

As discussed in [Module IV. Why Victim's Don't Report, Ignorance of the Law](#), women from cultures where neither marital rape nor domestic violence are crimes may not know that they have legal recourse in the United States. More importantly, in such cultures there is tremendous pressure from family and friends to stay with an abusive partner, which compounds the myriad reasons victims don't report with fear of being disowned by one's own community. Cultural evidence should not be used merely as a defense strategy. See [Why Victim's Don't Report, Cultural Considerations](#). Cultural evidence should also be used to assist jurors and fact finders in understanding the gender-role limitations and oppressive contexts in which victims act.

Articles

- Holly Maguigan, [Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?](#), VOL. 70 NEW YORK UNIVERSITY LAW REVIEW 36 (1995)
- Alison Dundes Renteln, *A Justification of the Cultural Defenses as Partial Excuse*, VOL. 2 CALIFORNIA REVIEW OF LAW AND WOMEN'S STUDIES 437 (1993)

Module XI : Cultural Defenses and Cultural Evidence**Expert Witnesses**

If the court decides to consider admitting cultural evidence, great care must be taken in qualifying the experts. Thorough *voir dire* of the proposed experts is critical. Following the New York bench trial described earlier, in which women in the Chinese immigrant community feared physical abuse from their partners after a defendant was convicted of a reduced charge and then given the minimum sentence of five years probation for killing his wife, members of the Chinese and Asian American communities were outraged at the stereotypes and inaccurate information presented by the so-called expert witness on Chinese culture. For example, the testimony offered by a white anthropologist, described the Chinese, compared to Americans, as being more volatile and violent (Volpp, *(Mis)Identifying Culture*, 1994).

Cross-examination of the expert revealed that he had never heard of a Chinese case in which a man had killed his wife, yet he testified that this act was accepted in China. Nevertheless, the judge gave the expert testimony and the inaccurate cultural profile considerable weight in his decision when he described the Defendant as "a product of his culture.... The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor." (Nina Schuyler, *Cultural Defense: Equality or Anarchy?*, SAN FRANCISCO WEEKLY, Sept. 25, 1991.)

When evaluating the expert witness testimony, it is also necessary to ask from whose perspective the "culture" is being described. In this wife-murder case, the anthropologist presented the story from a male perspective. As pointed out by one commentator, the expert did not consider the gender oppression experienced by women in Chinese society because the expert's testimony "obviate[d] the possibility that a woman might describe divorce, adultery and male violence within 'Chinese culture' very differently." (Volpp, *(Mis)Identifying Culture*, 1994).

Resources**Articles**

- Leti Volpp, [*\(Mis\)Identifying Culture: Asian Women and the Cultural Defense*](#), VOL. 17 HARVARD WOMEN'S LAW JOURNAL 57 (1994)

Newspapers

- Nina Schuyler, *Cultural Defense: Equality or Anarchy?*, SAN FRANCISCO WEEKLY (Sept. 25, 1991)

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Key Points: Cultural Defense

CULTURAL DEFENSES AND CULTURAL EVIDENCE: KEY POINTS

- Cultural defenses have been misused to excuse all types of violence against women.
- Cultural defenses may be appropriate in *limited* circumstances.
- Cultural evidence can explain both the defendant's behavior *and* the oppressive contexts in which the victim was acting.
- When allowing an expert witness, a thorough *voir dire* is key to determining the biases and perspectives the expert witness has on the culture.