

THE CULTURAL DEFENSE

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THE MELTING POT

J. Hector St. John de Crevecoeur in *Letters from an American Farmer* (1782):

"What then is the American, this new man?" . . . the American is one who leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced Here individuals of all nations are melted into a new race of men, whose labors and posterity will one day cause great changes in the world."



“IT NEVER GETS LATER THAN MIDNIGHT”

Josephina Moscato Piazza was pushed into an arranged marriage at age 11 and married at 14.

They came from the same village of Cianciana and married in Ohio.

She had eight pregnancies and six survived.

Raised in insular Sicilian family but found herself married to a union leader.

“It never gets later than midnight.”



CHANGING DEMOGRAPHICS

- There are almost 50 million foreign immigrants in the country.
- Changing nations of origin.
- In 2000, nearly half of all foreign-born immigrants, 41.2 percent, were Hispanic while 23.6 percent were non-Hispanic Asian.
- Since 2009, Asians constitute 34.7 percent while Hispanics constitute 30.1 percent.
- By 2013, the percentage of non-Hispanic had increased to 40.2 percent of the total immigration flow, while the percentage of Hispanics dropped to 25.5 percent.



EARLY CULTURAL DEFENSES

- *Regina v. Barronet & Allain* (1852)
- Frederic Courmet, a French naval officer, enlisted his friends Etienne Barronet and Edmond Allain to serve as seconds in an illegal duel.
- Courmet was killed and his friends charged.
- They argued ignorance of dueling being illegal in England and that, as Frenchman, were acting out of their native rules of honor.
- The Court rejected the claims.



CULTURAL EVIDENCE VERSUS CULTURAL DEFENSE

CULTURAL DEFENSE

- Neal Gordon has argued that a true cultural defense occurs when a defendant claims culture as a defense *outside of existing standards*. In other words, it is a defense operating "outside of criminal law's existing mechanisms."

CULTURAL EVIDENCE

- Often cases raise culture as evidence without existing criminal structures. Rather than being an exception to a criminal law, it is a new form of evidence to justify or defeat an existing element.

THE CULTURAL DIVIDE

CIVIL

- CIVIL LIABILITY
- DEFENSES (INTENT)
- DAMAGES
- CASES RANGING FROM INTENTIONAL TORT TO INFLICTION OF EMOTIONAL DISTRESS TO PRODUCT LIABILITY

CRIMINAL

- CRIMINAL GUILT
- DEFENSES (INTENT)
- SENTENCING
- CASES RUNNING THE GAMBIT OF CRIMINAL LAW FROM MURDER TO CHILD ABUSE TO SPOUSAL ABUSE TO RAPE

RULE 401

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

RULE 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

RULE 702 AND CULTURAL EXPERTS

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods;
and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

CALIFORNIA V. KIMURA

Fumiko Kimura came to the U.S. from Japan 14 years earlier, but still spoke little English and had few friends.

Mistress called her to reveal an affair with her husband.

Seven days later, in January 1985 (at the age of 33), she tried to drown herself, her infant daughter, and her four-year-old son in the Santa Monica Bay.

Teen surfers tried to rescue them but only she survived.



OYAKO-SHINJU

- Ancient Japanese ritual of parent-child suicide.
- Illegal in Japan, but rarely punished.
- A wife is viewed as shamed by a husband's affair and having "failed" as a wife.
- The children are viewed as carrying that shame.



HOW WOULD YOU RULE?

- Defense counsel claimed insanity due to the Japanese traditional values.
- Note the use of the value was not to claim innocence but insanity.



TRICK QUESTION

- Kimura ultimately pled guilty to voluntary manslaughter.
- Sentenced to one year in jail, five years' probation, and counseling.
- Immediately released since she had already served that time.
- After her release, she rejoined her husband and continued their marriage.

CALIFORNIA V. VIRK

Narinder Virk, 39, was originally from India and spoke little English and was isolated. She was forced into an arranged marriage.

Her husband abandoned her and her children. He ultimately demanded a divorce. In her culture, she faced shame and shunning.

She took her two children (aged 6 and 9) to the harbor and tried to drown them and herself but they were pulled from the water.

Virk was charged with two counts of attempted murder. In July 2002, a jury found her guilty of attempted murder, but legally insane at the time of the incident.

In September 2002, the judge ordered her indefinitely confined to a state hospital.

NO CULTURAL DEFENSE

- Susan Smith drowned her three-year old boy and 14-month old boy by letting her car roll into lake.
- History of mental illness.
- Sentenced to life imprisonment with the possibility of parole after 30 years. (Release eligibility in 2024).



EQUAL TREATMENT?

- Andrea Yates drowned her five children in a bathtub.
- She was suffering from postpartum depression and postpartum psychosis.
- Declared sane and sentenced to life in prison with possibility of parole after 40 years.
- The sentence was overturned due to false testimony of expert psychiatric witness.
- Second trial found not guilty by reason of insanity. Sent (and still resides) in a Texas mental facility.



CALIFORNIA V. WU

- In 1989, Helen Wu – a Chinese woman who lives in both Asia and in Palm Springs, California believed that her husband was only interested in her money and was treating their son badly.
- She proceeded to strangle her nine-year-old son, Sidney Wu, and then attempted suicide by both trying to strangle herself and slash her wrists.
- Defense sought to put on a cultural defense with a psychiatrist and a clinical psychologist as “experts on transcultural psychology.”

VERDICT

- The trial judge refused to allow the testimony that she was in an unconscious and “fugue-like” state due to her cultural values.
- Found guilty and sentenced to 15 years in prison.
- She appealed on the basis of the denial of the cultural defense evidence.

THE APPEAL

The California appellate court **overturned the conviction** on the basis for the denial of the expert testimony and the failure to instruct the jury that it could consider her cultural background:

“[T]he evidence of defendant’s cultural background was clearly relevant on the issue of premeditation and deliberation. . . . **The evidence of defendant’s cultural background offered an alternative explanation for the statements (that defendant intended to kill herself) and also for motive behind the killing, . . . was not deliberate and premeditated.**”

WESTERN VERSUS CULTURAL VALUES

The Appellate court also noted the testimony that:

“in my expertise as a transcultural psychiatri[ist], . . . with my familiarity with Chinese culture . . . **she thought she was doing that out of the mother’s love, mother’s responsibility to bring a child together with her when she realized that there was no hope for her or a way for her to survive in this country or [on] this earth.** . . . This may be very difficult for the Westerner to understand But in the Asian culture when the mother commits suicide and leave the children alone, usually they’ll be considered to be . . . totally irresponsible . . .

CONVICTED AGAIN

- Wu was retried and found guilty of voluntary manslaughter rather than murder.
- Given 11 years in jail.



IS THE CULTURAL DEFENSE GENDER-SENSITIVE?

- Quang Ngoc Bui, a Vietnamese man, was married to an American woman for 11 years.
- He discovered that his wife was seeing other men. Mrs. Bui had been absent from the home for two days with a male friend.
- Bui threatened that, if she wanted to see her children alive, she had to come home within 15 minutes. Police were called and found that he had killed the three children (ages 8, 6, and 4) with a butcher's knife. Bui claimed he had lost his mind over the anger and shame.
- He said "I cut my kids. I didn't want her to get them" and that he wanted to "die with his babies."
- Argued insanity defense with cultural defense experts.

VIETNAMESE CULTURE

"The thrust of the cross-cultural defense, in broad terms, was that the appellant's values and perceptions were formed by the Vietnamese culture of which he was a product, that the appellant had experienced overwhelming difficulties in assimilating to life in the United States after his involuntary departure from his homeland, that the appellant was despondent because of his wife's infidelities, that the appellant's state of mind at the time of the offense and his actions in killing his children were to some degree understandable-even "normal"-in terms of the Vietnamese culture."

“SAVING FACE”

“Dr. Cao explained that in Vietnam, if a man's wife was running around on him, it would be a ‘loss of face.’ Had Bui been in Vietnam, he would have returned Jeannie Bui to her family to ‘save face.’ Dr. Cao also testified that since Bui was living in the United States, the only way Bui felt he could ‘save face’ was by killing himself and his children.”

LACK OF FOUNDATION

Notably the appellate court believed that the rejection of the cultural defense may have been due to the perceived lack of foundation for the witnesses who spent little time interviewing the defendant.

“[t]he manner in which the [experts’] interviews were conducted and the lack of underlying data to support the expert opinions were probably significant to the jury and helped create a reasonable doubt of insanity.”

IS THE CULTURAL DEFENSE GENDER SENSITIVE?

- Bui was sentenced to death.
- Despite a series of reversals and remands over jury selection and other violations, his sentence was ultimately upheld.
- Note that he was allowed to present the cultural defense but it was rejected, including a bid for manslaughter that succeeded for the prior cases involving women.

NEW YORK V. CHEN

In September 1987, Dong Lu Chen, a man born in China, killed his wife Gian Wan Chen, with a claw hammer.

When his teenage son arrived home, he met the boy at the door and told him, “I killed your mother.”



COMMONPLACE?

- The Court allowed a cultural defense witness who “testified that in traditional Chinese culture, a woman’s adultery would be conceived as an enormous stain on the man; that he would find it difficult to remarry if he divorced his wife for adultery; and that violence against wayward spouses was commonplace in China.”
- However, while claiming that killing unfaithful wives was common in China, the expert could not name a single case.
- Notably, Asian groups criticized the prosecutors for not challenging the cultural defense.

REDUCTION

“Were this crime committed by the defendant as someone who was born and raised in America, . . . the Court would have been constrained to find the defendant guilty of manslaughter in the first degree. . . . But based on the cultural aspects, the effect of the wife’s behavior on someone who is essentially born in China, raised in China, and took all of his Chinese culture with him except the community which would moderate his behavior, the Court . . . based on the peculiar facts and circumstances of this case . . . and the expert testimony . . . finds the defendant guilty of manslaughter in the second degree.”

SENTENCING

The Court then effectively double counted the defense by using it to reduce the sentence.

The Court reduced the sentence from prison to probation and even noted that prison could affect the marriage prospects of his daughters. The court made the defendant promise “on his honor and the honor of his family” to comply with the probation and reminded him that a failure on probation would result in a “total loss of face.”

TARASOFF

TATIANA
TARASOFF



PROSENJIT
PODDAR



BACK STORY

- Tarasoff born in China to Russian parents and grew up in Sao Paola, Brazil. Poddar grew up in Bengazi village in India as Harijan or “untouchable” caste.
- Poddar was a graduate student in naval architecture at Berkeley.
- Tarasoff kissed Poddar on New Year’s Eve, which he took as a romantic connection. Told friends he would kill Tarasoff after learning of her boyfriends. Dr. Moore diagnosed Poddar as paranoid schizophrenic.
- Moore and two colleagues believed that he presented a danger and Moore called campus police and urged them to commit Poddar.
- Police released him based on his promise to stay away from Tarasoff.
- Later Poddar began to room with Alex Tarasoff, her brother. Alex told him to leave sister alone. After her return from Brazil, Poddar went to her home, shot her with a pellet gun and then stabbed her 17 times.

DIFFERENCES BUT NOT CONSEQUENCES

While best known for the torts holding on third party liability, the case actually involved an intense fight over the use of the cultural defense.

The trial court excluded the testimony of an anthropologist for a defense on “diminished capacity.”

The court was willing to allow testimony on cultural differences but not the direct consequences of such issues for diminished capacity. The defense declined that compromise.

APPELLATE RULING

“We conclude that it was proper to exclude the testimony [of the anthropologist] in the form in which it was offered. Diminished capacity is a mental infirmity. To the extent that it is to be evaluated by experts, the experts should be those qualified in the mental sciences. . . .”

JUDICIAL NOTICE?

- Trujillo-Garcia v. Rowland, 1992 U.S. Dist. LEXIS 6199 (N.D. Cal. April 28, 1992)
- The defendant, 19, was born in Mexico but lived here for 3 years. He killed another Mexican man after the victim lost \$150 and later cursed him by saying “chinga tu madre!” (roughly, “go f--- your mother!”).
- His counsel sought to use a cultural defense that any Mexican male would have killed such a person.
- The trial court found him guilty and sentenced him to 15 years to life.
- An Appellate court upheld the conviction and ruled that “even by the standard of [the defendant’s] culture the insults in question did not constitute adequate provocation.”

SPOUSAL ABUSE

In a recent case in Brooklyn, Noor Hussain, 75, beat his wife to death. Hussain was upset because his wife failed to make him a goat meat dinner and instead served a vegetarian dinner.

His defense counsel Julie Clark admits that Hussain beat his wife but argued that such beatings are customary in Pakistan. In her opening statement, Clark argued that “He comes from a culture where he thinks this is appropriate conduct, where he can hit his wife. He culturally believed he had the right to hit his wife and discipline his wife.”

- SHOULD SUCH A DEFENSE BE ALLOWED?



THE ITALIAN RULING

Notably, the Italian Supreme Court recently heard a cultural defense from a father who was arrested after beating his 12-year-old daughter with a broom handle when she could not properly recite the Koran.

He was convicted of child abuse and aggravated assault.

The Italian Supreme Court rejected his claim that he was simply acting in accordance with his religion and his Islamic culture. The court ruled that this was abuse — plain and simple.



CHILD ABUSE

- **Dumpson v. Daniel M., (New York Oct. 16, 1974).**
- The defendant, 34, was a Nigerian taxi driver, who was studying Engineering at Brooklyn College. His son received nine letters from his teacher about misbehaving in school. The parents met with the Assistant Principal but in the middle of the meeting the defendant suddenly got up and beat the boy.
- He was charged with the infliction of excessive corporal punishment on his son, based on two incidents.
- He explained that in Nigeria such conduct brought shame upon the family and required a beating. He also said that he became outraged when his son looked the Assistant Principal in the face – a sign of disrespect in Nigeria.

DISTINCTION BETWEEN GUILT AND SENTENCE

- The Court found that beating met the statutory criteria:

“In a society as culturally amorphous as our own, it is incumbent upon all members of society to be tolerant and understanding of customs that differ from their own While the commonly accepted definition of corporal punishment means some type of applied bodily force, there is no doubt that pummeling with the fists, striking with a belt, and kicking with the feet, satisfy the elements of even the most conservative definition of corporal punishment.”

SENTENCING

- However, the court found on sentencing that the defendant was not “a mean, vindictive, or disturbed parent,” but rather “a man who honestly believes that he is acting in the best interests of his children.”
- The Court rejected demands for jail and added that the criminal law is “not a device for recrimination against parents who use unorthodox child-rearing practices.”

MAINE V. KARGAR,

679 A.2D 81 (ME. 1996).

- Mohammed Kargar was an Afghan refugee who came to the U.S. from Afghanistan in 1990.
- In 1993, a neighborhood girl at the house saw Kargar kissing the penis of his 18-month-old son as he was getting the boy ready for bed.
- Under state law, “gross sexual assault” is “any sexual act with a minor (non-spouse) under the age of 14”; and “sexual act” is defined to include – among other things – “direct physical contact between the genitals of one and the mouth . . . of the other.”

CULTURAL DEFENSE

A full cultural defense was presented by various experts that kissing a son's penis is common and that often the entire penis is taken into the mouth of a father. The various experts also testified that this is done out of love for the child.

All of the witnesses testified that there is nothing sexual in the action.

The prosecution presented no rebuttal witnesses.

HOW WOULD YOU RULE?

THE DEFENSE REJECTED. . . . SORT OF

- The judge rejected the defense and found Kargar guilty.
- However, while finding no basis for the cultural defense, the judge recognized that no sexual gratification was involved in the act, and that it had no harmful effect on the baby boy.
- Accordingly, the judge suspended Kargar's entire sentence.

APPEAL

On appeal, the state Supreme Judicial Court reversed the conviction and ordered the dismissal of the charges because of the trial court treated the cultural defense as irrelevant.

The appellate court found the actions to be de minimis in light of the cultural evidence on his state of mind:

It further noted that the reversal : “ . . . does not nullify the gross sexual assault statute, nor does it reflect approval of Kargar’s conduct. The conduct remains criminal. Kargar does not argue that he should now be permitted to practice that which is accepted in his culture. The issue is whether his past conduct – under all of the circumstances – justifies criminal convictions.”

MARRIAGE BY CAPTURE

California v. Moua, No. 315972-0 (Fresno Co. Super. Ct. Feb. 7, 1985).

Kong Pheng Moua, a 21-year-old Hmong man, was seen abducting Xieng Xiong, an 18-year-old Hmong woman, from the Fresno City College campus.

He then forced her to have intercourse against her will.

After the woman called the police, he explained that in his culture is expected for men to capture wives in this way.

Women are expected to resist or risk being viewed as “unchaste.”

A QUESTION OF INTENT

The court allowed the cultural defense to be presented.

The defense argued that Moua did not understand that Xieng was truly resisting and thought that she was just playing her expected role in a traditional Hmong marriage ritual.

‘REPARATIONS’

- Moua faced eight to 10 years in prison on the kidnapping and rape charges.
- However, the prosecutor decided to drop any kidnapping charges.
- The Court allowed Moua to plead guilty to a misdemeanor charge of false imprisonment, and was sentenced by the judge to 120 days in jail and fined \$1000 – \$900 of which was paid to the victim as “reparations.”

CIVIL LITIGATION

Rai v. Taco Bell, No. CIV-178430 (Ventura County, Calif. Superior Court) (filed Jan. 20, 1998, dismissed (based on settlement) May 11, 1999)

Rai is Hindu and ordered a *bean* burrito at Taco Bell but was served a *beef* burrito. Rai did not discover the error until he took a bite out of the burrito.

He sued Taco Bell for \$144,000 and argued that the mental impact on Rai was “the equivalent of eating his ancestors.”

He had to seek psychiatric treatment and travel to India for a purifying bath in the holy waters of the Ganges River.



CULTURAL DAMAGES

Taco Bell settled the case – for an undisclosed sum – “on the courthouse steps,” as the case was ready to go to trial

Onyeausi v. Pan Am – mishandling of corpse which was sent to wrong country and took nine days without embalming. When it arrived in Nigeria, the casket was gone due to damage in transport. The body arrived in a burlap bag and face down.

The woman was an honored figure and the culture buries criminals in bags and face down. Some claimed emotional distress from the mishandling and shunning by the tribe. The court allowed such claims for damages.

CAVEL INT'L V. MADIGAN

Cavel, a Belgian corporation, sued the State of Illinois over a state statute banning the sale of horsemeat.

The Illinois plant process between 40,000 and 60,000 horses per year and shipped to Europe and Asia where American horsemeat is a prized delicacy.



It noted the law was based on a cultural bias and that these horses would be killed anyway.

COMMERCE CLAUSE

Posner noted that “[h]orse meat was until recently an accepted part of the American diet and “the Harvard Faculty Club served horse-meat steaks until the 1970s.”

“We are not entirely happy about having to uphold the Illinois statute . . .” but found a legitimate state interest and a rational, non-discriminatory purpose for the state statute.



SORENSEN V. CITY OF NEW YORK

(This 2003 action involved both civil and criminal cases)

Danish actress was inside a Manhattan restaurant, with the father of her 14-month-old baby girl, and left the baby sleeping in a stroller outside in Manhattan while they sat near a window.

A waiter called the police but Sorensen insisted that in Denmark it was customary and viewed as better for babies than being in dirty or smoke filled restaurants. European papers supported her.

NO LIABILITY BUT NO DAMAGES

The child endangerment case was dropped.

Her 1983 civil case went on for years but she lost on all counts.

Similar to recent case of Madeleine McCann, 4, who disappeared from her bed at a resort in Portugal as parents were away at bar.



HOW TO CONCEPTUALIZE CULTURE

Excuse

- Most cultural claims are based on notions of excuse.
- The focus of an excuse defense is on the actor.
- A typical argument is based on insanity or incapacity or duress or involuntary elements.

Justification

- The alternative is use as a justification defense.
- The focus of a justification defense is on the act (like the necessity defense or de minimis defense).
- The act reflected the choice between the lesser of two harms.

A QUESTION OF FOCUS

Professor Paul Robinson wrote generally on this distinction:

“**Justified conduct** is correct behavior that is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the *act*, not the actor. **An excuse** represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic vitiates society's desire to punish him. Excuses do not destroy blame . . . rather they shift it from the actor to the excusing conditions. **The focus in excuses is on the actor. Acts are justified; actors are excused.**”

A MATTER OF FAITH?

- Justification defense go back to some of the earliest writings like the story of Abraham preparing to sacrifice his son.
- Abraham had no choice in his mind, but what is the limiting principle?
- What of “honor” killings?



ETHNOCENTRISM?

Some advocates have claimed that the failure to recognize a defense (similar to an justification defense) is a form of ethnocentrism, or a lack of "tolerance of foreign cultures due to a lack of moral basis for punishment."



THE ROLE OF LAW IN SHAPING CULTURE

- Law as a common article of faith.
- Equal protection
- Representative democratic change
- National identity embodied by a single system of laws.
- Yet, is uniform the same as equal?



LAW AND CULTURE

Rosemary Coombe has written that "[t]he relationship between law and culture should not be defined" and rejected the notion because both culture and the law were largely developed in the eighteenth and nineteenth centuries to naturalize and legitimate European colonial power.



WHAT CONSTITUTES CULTURE?

Culture is "[a] set of rules or standards shared by members of a society which . . . produce behavior that falls within a range of variance the members consider proper and acceptable."

Yet, Professor Leti Volpp has noted, "culture is experienced differently by different people within a particular community, for example, along lines of age, gender, class, race, or sexual orientation . . . **culture is not some monolithic, fixed, and static essence.**"



Consider the story of **Malala Yousafzai**.

RESOURCES

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