Cultural Defense or False Stereotype?

What Happens When Latina Defendants Collide With the Federal Sentencing Guidelines

Kristen L. Holmquist†

I. INTRODUCTION

At the height of the War on Drugs, Ana Reyes and María Avila found themselves before a federal judge on trial for laundering money.[1] Reyes's husband, José Reyes, was the head of a drug trafficking and money-laundering operation—and quite possibly Avila's paramour.[2] The way the women tell it, they would do just about anything for José, even look the other way while participating in his criminal enterprises—a kind of "don't ask, don't tell" policy. Besides, they claimed, he wouldn't have told them had they asked. The jurors, however, saw it differently. They saw women who knowingly engaged in criminal activity and who should be punished accordingly—even if with unduly severe sentences.

Leticia Castañeda's timing was not much better,[3] but her fate was.[4] Like Reyes and Avila, Castañeda was accused of participating in a Latino family-based narcotics ring and was convicted in federal court of narcotics-related crimes. Specifically, Castañeda was convicted of possession, conspiracy to traffic, trafficking, and use of a firearm in the course of a narcotics crime. The

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† Law Clerk for the Hon. Robert Boochever, Circuit Court Judge for the Ninth Circuit, 1996-97; J.D., University of California at Los Angeles School of Law, 1996; B.A., University of California at Berkeley, 1991. This article could not have been possible without the insight and inspiration provided by Professor Laura Gómez; the enthusiasm and wonderful editing assistance provided by Amanda Steiner and Kathy Shlaudeman; and the never-ending support of Stefano Moscato.

1. *See* United States v. Avila, Nos. 90-30221, 90-30385, 90-30386, 90-30401, 1992 WL 75236 (9th Cir. Apr. 16, 1992).
2. Avila wrote a note to Reyes in the drug ledger that stated "I love you." *Id.* at 6.
3. Her crimes also occurred during the height of anti-drug sentiment in the late '80s and early '90s.
4. *See* United States v. Castañeda, 9 F.3d 761 (9th Cir. 1993).

firearm counts—six of them—were especially severe, carrying a federally mandated sentence of five years for each.[5]

It was on appeal that Castañeda's fortune turned for the better. The Ninth Circuit overturned six of her seven convictions for firearm use under 18 U.S.C. § 924, holding that the convictions violated due process.[6] The court seemed to take pity on her, finding her actions more consistent with her role as a wife than as a criminal, and twisted traditional doctrine until it had reduced her prison sentence by thirty years.[7]

Avila's and Reyes's failure to convince a jury that they merely obeyed José without question netted them a long sentence in federal prison, a clear defeat for the women. Castañeda, on the other hand, received mercy at the hands of a Ninth Circuit panel which, apparently without prompting, concluded that Castañeda was acting more like a wife than a criminal when she assisted her husband and thus, at a minimum, did not deserve the thirty-year firearm sentence. Castañeda walked out a relative winner.

But is this view of these women's defenses and sentences myopic? Do the statements made and the stereotypes built upon reverberate beyond the walls of the criminal courthouse?

The narratives presented in these cases stereotype the Latina defendants as passive, domestic, and unable or unwilling to make decisions independent of what the men in their lives dictate. In other words, using a version of the dominant culture's view of Latinas, the women themselves in one case and the judges in the other portrayed Latinas as unable to commit the crimes of which they were accused.[8] On one level, this may be good advocacy and merciful judging. But the consequences of using such narratives as defenses or justifications for leniency are great. Acceptance of this narrative amounts to a legal, authoritative embrace of the stereotypes it relies on, which then becomes precedent in the courts and support for laws and doctrine, further leaking out to bolster gender, race, and culture biases in the public.[9]

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5. Castañeda was found guilty under *Pinkerton* conspiracy liability of a co-conspirator's use of a gun. *See* United States v. Pinkerton, 328 U.S. 640 (1946). *See infra* note 77 for a complete explanation of *Pinkerton* liability, and text accompanying notes 75-79 for its application to Castañeda's case.
6. *See Castañeda*, 9 F.3d at 771.
7. *See id.* at 767.
8. While in *Avila* the stereotype is presented by the women themselves and implied by the court in *Castañeda*, I treat both uses of the stereotype similarly throughout this article. I believe that the motivation for relying on stereotype and the effects of doing so are similar despite who introduces it.
9. For general support for the principle that legally accepted stereotypes have damaging effects outside the legal system, see, e.g., Brown v. Board of Education, 347 U.S. 483, 494 (1954) ("To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) ("Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes. . . .").

Despite the harm of encoding into law the dominant culture's definition of the "other,"[10] and despite the humiliation of claiming a negative stereotype as a picture of oneself, the type of defense relied on by Avila and Reyes and the excuse provided for Castañeda by the court will continue to exist so long as the alternative is the long sentences prescribed, especially for drug crimes, by the Federal Sentencing Guidelines.[11] Enacted in 1984 in an attempt to standardize criminal sentences, the Sentencing Guidelines offer judges little discretion in tailoring a defendant's sentence. As a result, defense attorneys and judges often find creative, and sometimes disingenuous, paths around guilt, failing to present an honest, straightforward look at the defendant's culpability either in the plea bargaining stage or at trial; the stakes are simply too high for the defendant to forego any possible defense. Applied in conjunction with the statutory mandatory minimum sentences imposed in many federal narcotics crimes, the Sentencing Guidelines often result in arguably overharsh sentences for low-level offenders.

This essay will explore what happens when defendants and judges chafe against the Sentencing Guidelines and federally mandated minimum sentences. In particular, it will consider the use of gendered and cultural explanations and defenses by or for Latina participants in family narcotics rings and how they are used to minimize or nullify the Latina defendant's participation.

Part II of this essay briefly lays out the structure of the Sentencing Guidelines and mandatory minimum sentences for drug offenses. To understand why defendants and judges attempt to evade applications of these statutes, one must first recognize their stringency.

Part III further explores the two cases set out above in which "cultural defenses"—an attempt to look at the defendant's actions in the context of gender and culture—arguably played a part in the Latinas' appeal of their convictions of and sentences for drug conspiracy charges. The cases nicely portray both the varied ways such gender and cultural issues can be invoked and the artfulness with which they can be manipulated.

Finally, Parts IV and V examine the implications of relying on gender and cultural stereotypes in an effort to minimize a Latina defendant's federal sentence for drug conspiracy charges. Specifically, they explore how the intersection of these defendants' race and gender found form in a subordinating narrative that dismissed the women's ability to participate in the crimes they were accused of committing. These sections argue that while, as a result

10. *See, e.g.*, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); Derrick A. Bell, Jr., *Reconstructing Racial Realities*, 23 RUTGERS L.J. 261 (1992); Jerome McCristal Culp, Jr., *Diversity, Multiculturalism and Affirmative Action: Duke and the NAS and Apartheid*, 41 DEPAUL L. REV. 1141 (1992).

11. In 1984 Congress passed the Sentencing Reform Act, Pub. L. No. 98-473, §§ 211-38, 98 Stat. 1987-2040 (1984), (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988 & Supp. V 1993)), 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993), which authorized the Federal Sentencing Commission to establish the Sentencing Guidelines. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

of a court's application of gender and cultural stereotypes, an individual defendant might in fact receive a fair sentence, in the end, both she and the women and culture that she "represents" may be seriously harmed. Part V further examines the theoretical framework that encourages such stereotyped defenses and proposes alternative frameworks that would minimize their use. But in the end, this essay concludes that despite the negative repercussions of these defenses and the existence of an alternative theoretical framework that could alter the calculus of decisionmaking and advocacy, the high stakes of the Sentencing Guidelines deny any practical opportunity for advocating an approach different than that taken in the *Avila* and *Castañeda* cases.

II. SENTENCING PARAMETERS IN NARCOTICS CASES: THE FEDERAL SENTENCING GUIDELINES AND STATUTORY MANDATORY MINIMUMS

In 1984 Congress passed the Sentencing Reform Act with two essential purposes in mind. First, it sought to achieve "honesty in sentencing"—to put an end to the days when a judge would impose a twelve-year sentence, yet a parole board could release the offender after she served only four years.[12] To achieve this end, Congress eliminated parole.[13] Second, Congress intended to reduce what it saw as "unjustifiably wide" sentencing disparities.[14] Thus was born the United States Sentencing Commission,[15] whose task was to promulgate Sentencing Guidelines[16] that standardize federal sentencing.[17]

Prior to the Sentencing Guidelines, judges exercised great discretion in sentencing, deciding under their own favored theories of punishment where a particular defendant fell along a long continuum of possible punishments.[18] Not surprisingly, this discretion resulted in disparate sentences for seemingly

12. *See* Breyer, *supra* note 11, at 4 (citing S. REP. NO. 98-225, at 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3239).
13. *See id.* (citing Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1837, 1987, 2008-09 (codified as amended at 18 U.S.C. § 3624 (Supp. IV 1986)).
14. *See id.* (citing S. REP. NO. 98-225, at 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221). Breyer goes on to quote a Commission finding noting that regional and racial differences greatly affected sentences for otherwise similarly situated bank robbers. *See id.* at 5 (quoting *Sentencing Guidelines: Hearings on Sentencing Guidelines Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 676-77 (1987) (testimony of Ilene H. Nagel, U.S. Sentencing Commissioner)). It is interesting to note that Justice Breyer chose to highlight primarily the regional differences. Query whether the otherwise similarly situated male bank robbers were of "similar" races.
15. Justice Breyer (then Judge Breyer) was an original member of the U.S. Sentencing Commission.
16. The term "Guidelines" is misleading: "Despite their name, the Sentencing Guidelines are binding, not hortatory, and they drastically restrict the discretion of the sentencing judge." David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1286 (1995). *See also* Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 101 (1992); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1684 (1992).
17. *See* Breyer, *supra* note 11, at 5 (citing Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified at 28 U.S.C. § 991-998 (Supp. IV 1986)).
18. *See* Paul M. Winters et al., *Sentencing Guidelines*, 83 GEO. L.J. 1229, 1229 n.2170 (1995) (noting criticism of the indeterminate sentences given under the pre-Guidelines system as well as the disparate sentences given similarly situated defendants).

similar crimes.[19] Such disparity was explained as stemming from personality differences among judges and regional differences among courts, but it also grew from more sinister sources such as racism and sexism.[20] To many, then, the Sentencing Guidelines were a welcome attempt to obviate many of these unwelcome sentencing variables.[21]

The Sentencing Guidelines, as enacted in 1987 and upheld under constitutional attack in 1989,[22] provide a sentencing grid that includes a "base offense level," level increases for "specific offense characteristics,"[23] and level increases or decreases for additional "adjustments."[24] For instance, a sentence may be increased if the perpetrator plays a principal role in the offense,[25] obstructs justice,[26] or preys on government officials[27] or victims who are especially vulnerable.[28] A sentence may be decreased, on the other hand, if he plays a minor role in the offense[29] or accepts responsibility for his acts.[30] In addition to calculating the level-of-offense total, the judge calculates a prior criminal history score for the offender and adds it on to the sentencing score.[31]

The judge then looks at the grid and finds a sentence range for the score she calculated for all of the above factors. For example, in the case of an armed bank robber with an offense level of twenty-three and three points for a prior conviction, the sentencing range is fifty-one to sixty-three months.[32] At that point, the judge must assign a sentence from within the grid range unless she finds factors which justify a departure from the Sentencing Guidelines.[33] The sentencing court may depart from the statutory guideline where

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19. *See id.*
20. *See, e.g.*, Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121, 121-22 (1975) (claiming racism affects sentencing); McCleskey v. Kemp, 481 U.S. 279, 350 (1987) (Blackmun, J., dissenting) (finding in Georgia's capital sentencing scheme an unconstitutional risk of racial discrimination).
21. *But cf.* United States v. Hon, No. 89, 1989 WL 59613 at 2 (S.D.N.Y. May 31, 1989) (criticizing Sentencing Commission's failure to establish guidelines consistent with Congress's instructions that they carry out the multiple objectives of sentencing); ANDREW VON HIRSCH, FEDERAL SENTENCING GUIDELINES: THE UNITED STATES AND CANADIAN SCHEMES COMPARED (criticizing the Guidelines for lack of a clear policy); Chip J. Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 AM. CRIM. L. REV. 1 (1987) (noting that Guidelines do not prioritize sentencing philosophies and are largely descriptive rather than prescriptive); Jack B. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 16-17 (1987) (arguing that the Sentencing Guidelines do not adequately take into account substantial post-crime rehabilitation or other factors).
22. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989).
23. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(b) (1995). For example, the use of a firearm in a drug offense increases the offense level by two points. *See id.* § 2D1.1(b)(1).
24. *See id.* § 1B1.1(c).
25. *See id.* § 3B1.1.
26. *See id.* § 3C1.1.
27. *See id.* § 3A1.2(a).
28. *See id.* § 3A1.1(b).
29. *See id.* § 3B1.2.
30. *See id.* § 3E.1(a).
31. *See id.* §§ 4A1.1, 4A1.2.
32. *See* Breyer, *supra* note 11, at 7.
33. *See* 18 U.S.C. § 3553(b) (1994), for application of Guidelines in imposing a sentence.

it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[34] The Commission envisioned infrequent use of section 5K2.0 departures,[35] and current statistics tend to show that the Sentencing Guidelines are indeed seldom departed from.[36]

Federal defendants face not only the rigidity of the Guidelines' sentencing grid, but also the penalties imposed by the Anti-Drug Abuse Act of 1986.[37] The Anti-Drug Abuse Act established stiff mandatory minimum sentences for drug trafficking and possession—sentences that for the most part remain unchanged today.[38] These mandatory minimums can result in very long sentences for even first-time dealers. For instance, conviction of trafficking in just five grams of crack cocaine mandates a minimum five-year prison sentence.[39] Given these long sentences, it is not surprising that defendants present novel defenses or that appellate judges use original theories to reverse convictions.

III. *AVILA* AND *CASTAÑEDA*: TWO CASE STUDIES

In the two cases detailed here, both the defendants and the courts themselves relied on theories based on cultural stereotypes of Latinas to evade the overharsh results dictated by the Sentencing Guidelines and the mandatory minimum sentences imposed under the Anti-Drug Act. Given the stringency of the federally mandated sentences, other defendants and judges have probably utilized similar techniques. Ironically, the enabling statute for the Sentencing Guidelines explicitly states race and gender neutral policies.[40] Therefore, those relying on cultural arguments have arguably attempted to force round pegs into square holes by attempting to avoid liability altogether where the apt response might simply have been a lighter sentence. Like defense attorneys, many judges disapprove of the results the sentencing grids and mandatory-minimum sentences produce when applied to a low-level par-

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34. *Id. See also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (explaining grounds for departure from the guidelines); Karin Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of The Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 144-45 (1993) (discussing departures under 5K2.0 for specific offender characteristics).
35. *See* Bornstein, *supra* note 34, at 145.
36. *See id.*
37. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 5 U.S.C., 10 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 19 U.S.C., 20 U.S.C., 21 U.S.C., 25 U.S.C., 31 U.S.C., 47 U.S.C., 48 U.S.C.).
38. *See* Sklansky, *supra* note 16, at 1287 & n.14.
39. *See* 21 U.S.C. § 841(b)(1)(B)(iii) (1994). The same sentence is imposed for trafficking in five hundred grams of powder cocaine. *See* 21 U.S.C. § 841(b)(1)(B)(ii) (1994). Note the difference between the "rich" drug—powder cocaine—and its "poor" counterpart—crack. For a thorough exposition of this difference and its implications for equal protection doctrine see Sklansky, *supra* note 16.
40. *See* 28 U.S.C. § 994(d) (1994) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

ticipant or a defendant of mitigated culpability.[41] These judges may find that the only way to avoid an excessive sentence is to manipulate the law or to rely on a stereotyped narrative in the form of a cultural defense to find a defendant not guilty or to overturn her conviction on appeal.

Sketches of the two cases introduced in the opening section of this article follow. I believe that cultural defenses were inappropriately relied upon in each. I chose these particular cases for several reasons. First, they illustrate two different uses of cultural defenses—cultural defense as raised by the defendants and their attorneys, and as relied upon by an appellate court apparently unprompted by the defendant. Second, the stereotype of a submissive Latina who does not involve herself in her husband's business surfaces in both cases despite jury findings of adequate proof of the defendants' knowing participation.[42] The use of the cultural defense, then, reflects a naked attempt to paint the women as passive and obedient, allowing the judges or juries to find Avila, Reyes, and Castañeda incapable of committing the crimes of which they were accused.

Finally, these cases are among the very few published decisions where the preceding factors can be located even implicitly in the text. Perhaps the scarcity of such factors is representative of the actual frequency with which inappropriate gender and cultural defenses are relied upon. In that case I have concentrated on much ado about nothing. I hypothesize, however, that these cases represent merely the tip of the iceberg. Commonly accepted statistics note that defendants plea bargain in upwards of ninety percent of criminal cases.[43] Among those that do go to trial, only a small percentage of those resulting in conviction go on to appeal.[44]

Not withstanding this generally small rate of criminal appeals, there is another explanation for the even smaller ratio of Latina defendants who make it all the way to the appellate level. Chivalry theorists argue that women who enter the criminal justice system are treated more leniently than men.[45] This chivalrous treatment is contingent on women's acceptance of traditional female roles:

> A chivalrous relationship between men and women, in general, can be thought of as a bargain or an exchange. Women receive special treatment in return for displaying appropriate sex-role behaviors. According to this theory, when law enforcement officials (e.g. police, prosecutors, judges), most of whom are male, interact with female violators, the encounter is transformed into an

41. *See, e.g.*, Freed, *supra* note 16 at 1719-20, 1725-30 (discussing the tendency of district court judges to either formally challenge or informally avoid the sentencing guidelines and distinguishing the reactions of appellate court judges).

42. It should be noted that the other female defendant in *Castañeda*, María Meras, did not fare as well at the hands of the Ninth Circuit. In fact, she was described as a "major player[]" in the drug conspiracy. *See* United States v. Castañeda, 9 F.3d 761, 768 (9th Cir. 1993).

43. *See, e.g.*, Dunworth & Weisselberg, *supra* note 16 at 105-06.

44. *See id.* at 104 n.13.

45. *See, e.g.*, Christy A. Visher, *Gender, Police Arrest Decisions, and Notions of Chivalry*, 21 CRIMINOLOGY 5-6 (1983) (discussing specifically the preferential treatment of selected female offenders in the early stages of criminal processing).

exchange between a man and a woman. In this situation, appropriate gender behaviors and expectations may become more salient than strictly legal factors in the official sanctioning of female offenders.[46]

Because Latinas are often stereotyped as passive and obedient,[47] they may be considered ultrafeminine and treated particularly chivalrously by police officers and prosecutors.[48] The result might be fewer arrests of Latinas and lighter charges and more plea bargains when they are arrested. Thus, while it is difficult to generalize from so few appellate opinions, I believe that the following cases may be representative of widespread stereotyping of Latina defendants.

A. United States v. Avila[49]

María Avila and Ana Reyes were convicted of specific acts of money laundering and conspiracy to launder money and distribute cocaine.[50] The government presented evidence that they were members of a drug and money-laundering operation headed by José Reyes.[51] José Reyes, Ana Reyes, Avila, and several friends (like José, Latino men) began selling cocaine in Los Angeles but later moved to Idaho where cocaine claimed a higher price.[52] The odometer on Reyes's pickup marked frequent travel, and trips back and forth between California and Idaho transporting cocaine in a secret compartment in the trunk.[53] The world began its steady crash around this group when Ana Reyes and a co-conspirator sold twenty ounces of cocaine to a government informant at a motel in Pocatello, Idaho.[54] Thereafter, the government watched as Avila, the Reyeses, and others wired money to Los Angeles to buy cocaine and bought houses and cars with the proceeds of their sales.[55] DEA agents later discovered drugs in Avila's home, among other places.[56]

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46. *Id.* at 6.
47. *See* IRENE I. BLEA, LA CHICANA AND THE INTERSECTION OF RACE, CLASS, AND GENDER 125-26 (1992).
48. While chivalry theorists have focused primarily on interactions between male authorities and female defendants/suspects, female law enforcement officials may also treat female offenders more leniently. A former DEA agent suggested that it was not her practice to arrest women, particularly where there were children, unless she had evidence that the women were major players in the criminal activity under investigation. She generally assumed that the women were low-level participants, that it was a waste of government resources to arrest them, and that they were better off left to care for their children. Statement by Elise Hatcher, former Drug Enforcement Agent, Speech to Gender and Crime Class, University of California at Los Angeles School of Law (October 18, 1996).
49. Nos. 90-30221, 90-30385, 90-30386, 90-30401, 1992 WL 75236 (9th Cir. Apr. 16, 1992).
50. *See id.* at *1.
51. *See id.* at *2, *4.
52. *See id.* at *5.
53. *See id.* at *6.
54. *See id.*
55. *See id.* at *2, *4.
56. *See id.* at *3.

After finding Avila and Ana Reyes guilty of several drug-related crimes, the trial court sentenced them according to the Federal Sentencing Guidelines.[57] Avila and Reyes appealed their convictions, and Reyes sought reversal of her sentence.[58]

To prove money laundering under 18 U.S.C. § 1956(a)(1), the government must show that a defendant (1) conducted a financial transaction involving the proceeds of unlawful activity, (2) knew the property stemmed from some form of unlawful activity, and (3) acted either with the intent to promote the unlawful activity or with the knowledge that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of those proceeds.[59] In order to avoid the stiff penalties associated with narcotics crimes, appellants Avila and Reyes argued that the Government failed to prove its case.[60] Specifically, Avila argued that as to the second element of money laundering—the defendant's knowledge of the unlawful source of the proceeds—circumstantial evidence suggested that she could not have known the money's origination.[61] A government informant testified at trial that "Hispanic men often deny their women knowledge of what they are doing,"[62] thereby suggesting that Avila had no source of information regarding the derivation of the money. The Ninth Circuit found that given the evidence that narcotics were stored in Avila's home and transported in both her car and her diaper bag, a rational jury had sufficient grounds to find that she knew the money stemmed from cocaine distribution.[63]

Ana Reyes's defense avoided direct reference to her culture yet implicitly incorporated the cultural evidence used to argue Avila's lack of knowledge. Reyes argued that her participation in those purchases alleged to be money laundering merely reflected the Idaho custom of husbands and wives co-signing agreements for major expenditures.[64] The relevance of this custom comes to light only when one also believes that, as a Latino man, Reyes's husband would not have revealed to her details of the purchases, including the source of the funds. The "Idaho custom" is invoked to explain why Reyes co-signed the purchase agreements—evidence that would otherwise tend to contradict the "Latino custom."

Reyes appealed her sentence, attacking the lower court's application of the Sentencing Guidelines.[65] Reyes contended that the trial court erred in finding her a *minor* participant in the conspiracy rather than a *minimal* partic-

57. *See id.* at *14.
58. *See id.*
59. *See id.* at *1 (citing United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991)).
60. *See id.*
61. *See id.* at *3. Both Avila and Reyes disputed the sufficiency of the evidence regarding other elements as well. The court found against the appellants on all counts. *See id.* at *18.
62. *See id.* at *3.
63. *See id.*
64. *See id.*
65. *See id.* at *14.

ipant[66]—who, as such, rates a longer sentence under the Sentencing Guidelines.[67] She argued that no direct evidence linked her to the conspiracy and that the jury was improperly permitted to presume her participation in the conspiracy based on her relationship with her husband.[68]

Reyes's argument takes on a fuller meaning when compared with earlier testimony[69] that Latino men do not involve "their women" in business. Reyes's argument can be understood as twofold: (1) The only evidence linking her to the conspiracy is her husband, and (2) the sentencing judge has been presented with adequate evidence to find that Reyes's husband would not keep her sufficiently informed to find her even a minor participant in the conspiracy.

The Ninth Circuit rejected her argument.[70] The court noted her convictions on four separate charges of money-laundering, her role as a lookout at drug exchanges, and the fact that her diaper bag was used as a carrying case in one large drug transaction[71]—far more evidence of participation in the conspiracy than mere association with her husband. In addition, Reyes enjoyed the illegal proceeds.[72] Presented with this evidence, the court found that it was not clear error for the trial court to find Reyes a minor, rather than minimal, participant.

B. United States v. Castañeda[73]

Like Avila and Reyes, the defendants in *Castañeda* were members of a family-based narcotics trafficking ring convicted and subjected to stiff penalties for drug-related crimes. Ismael Barron was the hub of an extensive conspiracy to distribute cocaine and heroin in which Uriel Castañeda, among others, acted as a supplier.[74] Investigations of Barron's ring, which included wiretapping most of the participants' telephones, led to charges against Leticia Castañeda for actively assisting her husband in his illegal activities.[75] She was tried and convicted as a co-conspirator in the Barron ring.[76]

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66. *See id.*
67. Under the Sentencing Guidelines, the sentence of a "minimal" participant may be reduced more than the sentence of a "minor" participant. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2. *See also supra* text accompanying notes 22-30 for a discussion on how the level of participation in crime is related to sentence length.
68. *See Avila*, 1992 WL 75236, at *14.
69. Avila presented this testimony in her own defense. But because Avila and Reyes were tried in the same trial before the same jury, the jury could have easily considered this testimony in its assessment of Reyes as well—a fact probably not lost on Reyes's attorney.
70. *See Avila*, 1992 WL 75236, at *14.
71. *See id.* (quoting trial court opinion).
72. *See id.* (quoting trial court opinion).
73. 9 F.3d 761 (9th Cir. 1993).
74. *See id.* at 761.
75. *See id.* at 763, 767.
76. *See id.* at 764-65.

The trial court found that although Castañeda did not personally carry out the crimes, she was involved in the conspiracy to carry them out and was therefore guilty under *Pinkerton v. United States*.[77] In addition, she was convicted of seven counts of using a firearm in the course of committing these crimes, violations of 18 U.S.C. § 924(c).[78] This statute imposes an additional five-year prison sentence for each instance of firearm use in the course of drug crimes.[79] Again, Castañeda did not personally carry the guns but was held "vicariously responsible for her co-conspirator's carrying of a firearm."[80] To convict Castañeda of the section 924 offenses, the trial court had to find that she could reasonably foresee the use of firearms in connection with the underlying drug offenses.[81]

The cases against Castañeda and Avila and Reyes fall on opposite sides of the judicial spectrum. Whereas the *Avila* court rejected the defendant's claims of limited liability, here the Ninth Circuit went out of its way to create theories that would limit the defendant's sentence.[82]

On appeal, the Ninth Circuit addressed an issue that Castañeda did not raise herself. It found that because of her minimal participation in the conspiracy, convicting her of the firearm charges as a co-conspirator was a due process violation.[83] Although this issue had been discussed before, the court noted that this was the first case in any circuit to find the relationship between a defendant and co-conspirator's use of a firearm so remote that due process mandated reversing the conviction.[84]

In *United States v. Johnson*,[85] a prior case in which a defendant had been found guilty of firearm charges as a co-conspirator, the Ninth Circuit determined that the gun use was foreseeable because "[t]he drug industry . . . is a dangerous, violent business."[86] In *Castañeda* the court distinguished *Johnson* by noting that *Johnson* involved a crack house, which is potentially violent every day, while *Castañeda* revolved around a "high-level import and distribution operation" that had no need for firearms except at specific

77. The Ninth Circuit cites *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946), for the rule that co-conspirators are liable for each others' acts if "the substantive offense is committed by one of the conspirators in furtherance of the unlawful project" (citations omitted) and the offense could "be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." In *Castañeda*, 9 F.3d at 765, the Ninth Circuit concluded that "a conspirator may be held vicariously responsible for her co-conspirator's carrying of a firearm in relation to a specified drug trafficking offense."

78. *See Castañeda*, 9 F.3d at 764.

79. *See* 18 U.S.C.A. § 924(c) (Supp. 1996).

80. *See Castañeda*, 9 F.3d at 765.

81. *See id.* at 766.

82. *See id.* at 766-68.

83. *See id.* at 766-67. Despite her failure to raise the issue, the court noted its authority to "notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public relations of the judicial proceeding." *Id.* at 766 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1935)).

84. *See Castañeda*, 9 F.3d at 766, 768.

85. 886 F.2d 1120 (9th Cir. 1989).

86. *See id.* at 1123.

deal-making moments, none of which were underlying offenses for Castañeda's convictions.[87]

I do not dispute the court's finding that Castañeda was only minimally involved in the drug conspiracy at issue. The Government's evidence linking her to the cocaine ring[88] indeed indicates only limited participation on her part. The question, however, is whether, given her low level of participation in the conspiracy, she could have reasonably foreseen the use of firearms by her co-conspirators. It is on that question that the court's attempt to distinguish *Castañeda* from *Johnson* is a bit of a stretch. The distinction becomes less credible the more differences the court attempts to point out. The crack house is stationary, the Castañeda ring is mobile.[89] The crack house sells small amounts of drugs, the Castañeda's market is "diversified."[90] It is hard to understand precisely why the court believes that a worldwide cocaine and heroin trafficking ring is not a foreseeably "dangerous, violent business."[91] The distinction seems a bit disingenuous—and even if true, certainly not significant enough to indicate a difference between the foreseeable and the unforeseeable use of deadly weapons.

Yet if a clearly unconstitutional application of *Pinkerton* liability is not at the heart of the Ninth Circuit's decision, something else must explain its reversal of Castañeda's conviction on six different firearm counts. The court's language provides telling clues: when discussing her involvement in the drug trafficking conspiracy, it notes that "Leticia 'assisted' Uriel only insofar as she acted as his spouse."[92] After recounting the Government's evidence that Castañeda participated in several telephone conversations that implicated her in the conspiracy, the court states that "the only evidence that connects Leticia to the predicate offenses appears to be her marriage to Uriel."[93] The court consistently genders[94] her and her participation. Between the lines, perhaps Avila's defense—Latino men do not involve "their women" in their business—operates here in the way Avila unsuccessfully argues it should have in her case.[95]

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87. *See Castañeda*, 9 F.3d at 766-67. This distinction, besides its oddity, creates precedent for distinguishing between crack and cocaine generally. Like the Sentencing Guidelines' disparate treatment of the two, it establishes crack (generally the drug of choice among poor African Americans) as more dangerous, more aptly vilified than cocaine (generally the drug of choice among wealthier white people). *See generally supra* note 39 (discussing the Sentencing Guidelines' disparate treatment of crack and cocaine).
88. *See Castañeda*, 9 F.3d at 767-68.
89. *See id.* at 766.
90. *See id.* at 766-67.
91. *See Johnson*, 886 F.2d at 1123.
92. *See Castañeda*, 9 F.3d at 767.
93. *See id.* at 768.
94. More precisely, the court likely both *genders* and *racializes* Castañeda. For further discussion on the intersection between gender and race and how it operates in both *Avila* and *Castañeda*, see *infra* Part V.A.
95. *See supra* text accompanying notes 60-62.

IV. THE BROAD IMPLICATIONS OF RELYING ON STEREOTYPED GENDER AND CULTURAL DEFENSES

A. The Intersection of Race and Gender or What Exactly Do These Defenses Mean?

In this section I will explore whether and to what extent the *Avila* and *Castañeda* cases actually rely on narratives of the women as women or more specifically as Latinas. Is it accurate to assume that stories of both gender and race, and especially the combination of gender and race, are operating in defense of these women? One of the interesting aspects of the gender and culture arguments seen in the *Avila* and *Castañeda* cases is their vagueness. Apart from the explicit ethnic reference in *Avila*,[96] the defendants and the Ninth Circuit alike rely on gender-specific language, lacking any cultural referent. The challenge, then, is to decipher statements like "Leticia 'assisted' Uriel only insofar as she acted as his spouse."[97] Was the court relying on purely gendered mythology to support its notion of "acting like a spouse"? If so, is it possible to isolate Castañeda's gender from her race?

I first reject viewing these defendants purely as individuals without any larger representative significance. Second, I repudiate a feminist analysis that fails to account for these defendants' race and/or culture. Finally, this section advocates viewing the defenses used by Avila, Reyes, and Castañeda as stemming from the intersection of their race, culture, and gender. Without an understanding of how the cultural and gender narratives—which can alternately and less forgivingly be labeled stereotypes—operate in their cases, the defenses of Avila, Reyes, and Castañeda cannot be placed in a context of a "cultural defense." The following critique of cultural defenses depends on an understanding of this context.

Upon an initial read of the *Avila* and *Castañeda* cases, one could debate my assumption that *any* type of stereotypes are operating. These defendants are individuals. In the case of Avila and Reyes, their lawyers did what good defense lawyers do—throw out arguments with the hope that one sticks. Any defendant would do the same.[98] In *Castañeda* a court saw an individual defendant, a person faced with far more prison time than she deserved under any fair assessment. The court acted simply to do justice in

96. *See supra* text accompanying note 62.

97. *See Castañeda*, 9 F.3d at 767.

98. A now infamous version of this type of "say anything to get off" defense was used in the Mike Tyson rape trial. Tyson's defense lawyers played on stereotypes of Black men as oversexed, aggressive, and violent. The lawyers implied that any woman who went to his room would *expect* to have sex with him. The jury could have used this evidence in one of two ways: to either presume that Desiree Washington knew what she was doing and therefore consented to sex (Black man and Black woman as hyperphysical and aggressive sexually); or deduce that even if Washington did not consent, Tyson reasonably believed that her act of accompanying him to his room indicated her consent. *See generally* Darci Burrell, *Myth, Stereotype and the Rape of Black Women*, 4 UCLA WOMEN'S L.J. 87 (1993); Sonja Steptoe, *A Damnable Defense*, SPORTS ILLUSTRATED, Feb. 24, 1992, at 92.

the case before it. Further, despite my claims that the court relied on gender and cultural stereotypes as a means to its end, references to gender are vague at best, while references to culture or race are nonexistent.

This reading, while plausible on its face, neglects to dig beyond the superficial. First, while I have chosen to discuss only two cases, the defendants represented in these cases can be seen as more than "individuals" when viewed in the aggregate—women in the criminal justice system, minority women in the criminal justice system, Latinas in the criminal justice system, or immigrant women in the criminal justice system. When looked at as part of these larger groups, Avila, Reyes, and Castañeda may be seen as more representative than idiosyncratic, more general than specific.[99] Accused women, perhaps especially those involved in family drug rings, are weeded out of the criminal justice system far earlier and in far greater numbers than their male counterparts, in part because of the chivalrous concerns detailed above and in part because of practical concerns of both childcare and the need for smaller players to turn state's evidence. Many of these potential female defendants may be weeded out for the same reasons that Castañeda's firearm convictions were overturned or that Avila's lawyer attempted to prove that she lacked sufficient knowledge to be guilty of money laundering.

Second, the arguments made and actions taken in *Avila* and *Castañeda* are simply too consistent with gender and race stereotypes to ignore. Avila's assertion that Latino men don't allow "their women" to be involved with their business is the most blatant.[100] But Reyes's argument and the court's treatment of Castañeda likewise assume the women lack involvement in their men's illegal businesses. Both build upon narratives of the women as naive and unaware of their obvious surroundings despite substantial evidence supporting actual knowledge—and significant involvement in the cases of Reyes and Avila—of the drug trade around them.

The defenses of all three women may be understood through essentialized[101] gender notions—gendered narratives that treat all women similarly and fail to recognize differences among women. Thus, men are the heads of households and women act under their direction;[102] women are not crimi-

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99. *See supra* text accompanying notes 45-48.

100. The broad nature of Avila's claim—she refers to her culture generally rather than to her specific situation—reinforces the foregoing analysis of her case as potentially representative of a class of criminal cases. However, the fact that she is the only one of the three defendants discussed who directly relies on this gender and cultural argument causes one to question whether such a stereotype frequently remains a *sub rosa* issue at any or all of the charging, trying, and sentencing stages.

101. *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (identifying the tendency of white feminists to essentialize, or treat as a monolith, women without recognizing differences *among* women).

102. *See* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 31-63 (1994) (noting that doctrines such as the marital coercion doctrine and, more recently, the Battered Woman Syndrome define women as unable to act except under the direction of or in response to their husbands).

nals, particularly not violent criminals;[103] and women generally do not involve themselves in business affairs. While these feminine stereotypes clearly operate in these women's defenses, to stop there—at their gender—is as shortsighted as neglecting to look beyond them as individuals.[104]

A subset of critical race theorists have explained that for women of color, race and gender are not so easily unbound so as to permit a purely "feminist"[105] analysis of women such as Avila, Reyes, and Castañeda. Professor Paulette Caldwell notes that while there generally exists a powerful assumption of race and gender independence,[106] "[t]he interactive relationship between race and gender is unmistakable. Its existence flows factually and logically from an examination of the structure of dominance—historically and contemporarily—and the stereotypes, myths and images about race and gender . . . that sustain it."[107] Intolerance operates at the intersection of race and gender to create distinct stereotypes of women of color. A Latina woman can be discriminated against, then, *in three different ways*: as a person of Latin American origin, as a woman, or *as a woman of Latin American origin*.[108]

As both a normative and an empirical statement, this assertion informs the Ninth Circuit's statement regarding Castañeda's role. It highlights implicitly racialized aspects and assumptions underlying explicitly gendered reasoning, providing a more nuanced understanding of, for example, what it means for Castañeda to act "like a spouse."

Much legal scholarship on intersectionality is written by Black women and focuses on societal images of Black women. But the reality of race and

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103. Despite the *Castañeda* court's assertion that firearms do not always accompany drugs, courts tend to associate narcotics trafficking with violent behavior. *See, e.g.*, United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989).

104. The Supreme Court has consistently warned against the dangers of legal doctrines which explicitly or implicitly rely on gender and race stereotypes. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973); Brown v. Board of Education, 347 U.S. 483, 493-95 (1954). *See also* additional discussion of cases *supra* note 9.

105. I put feminist in quotes here to highlight the essentialist nature of most "feminist" arguments. A feminist analysis, in the most widely accepted sense, is a white feminist analysis. *See* Harris, *supra* note 101, at 585 ("The result of this tendency toward gender essentialism, I argue, is not only that some voices are silenced in order to privilege others . . . but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of 'We the People'—among them, the voices of black women.").

106. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 373 (noting historical and contemporary independence of movements for racial and gender equality and distinct legal approaches to race and gender).

107. *Id.* at 374.

108. Professor Kimberle Crenshaw was among the first to explore this notion of intersectionality.

> Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.

Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149.

gender intersection extends logically to all women of color.[109] Excluding for the limited purposes of this essay all women not white, Black, or Latina, at its most base, the paradigm of racialized women is as follows: women are white,[110] Black women are antiwoman,[111] and Latinas are too woman.[112] Thus, at the intersection of her race and gender a Latina is overly submissive, domestic, and family oriented—precisely the attributes that would keep her from knowing the source of laundered money or from understanding that the narcotics trade is a dangerous business, and precisely the attributes that would lead her to assist her husband as a wife and only as a wife.

The arguments advanced by Avila and Reyes's defense attorneys and the theory relied upon by the court on Castañeda's behalf are rooted in these assumptions about the role of a Latina woman in her family and her community. Some would assert that the debate regarding the defendants' level of blameworthiness correctly emphasized this role. In the following section, I introduce arguments that favor this sort of cultural contextualizing of criminal defendants.

B. Gender and Cultural Defenses Generally: Scholarly Arguments in Favor of Contextualizing a Criminal Defendant's Actions

To understand the role of stereotypes and cultural explanations in a criminal prosecution, one must understand the contexts in which they can affect a defendant's case. Despite my readily applied label of "stereotype" to the assumptions made in the *Avila* and *Castañeda* cases, some argue that an understanding of a criminal defendant's culture can drastically and properly affect the charging, trial, and sentencing stages of her case. This section briefly summarizes the arguments commonly put forth by proponents of a cultural defense.

The phrase "cultural defense" itself is misleading as it encompasses not one but several theories of lessened culpability. However, the impetus behind the several proposals is sufficiently consistent to permit generalizations. Specifically, I will explore the following two paradigms that consistently emerge

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109. Women of color experience this intersection, among other places, within antiracist and feminist politics. "[M]y participation in the Chicano movement had been limited by my gender, while in the women's movement it had been limited by my ethnicity. I drew power from both movements—I identified with both—but I knew that I was at the margin of each one." Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 191 (1994). *See also* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1184-88 (1991) (providing anecdotal evidence of the difficulty of combining race and gender politics).

110. *See* Harris, *supra* note 101, at 588.

111. Black women are often stereotyped as sexually vociferous, aggressive, and deceitful. These stereotypes are embodied in the archetypes of the Black Jezebel and the Welfare Queen. *See generally* Nell Irvin Painter, *Hill, Thomas, and the Use of Racial Stereotype*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 200, 209-13 (Toni Morrison ed., 1992) (discussing stereotypes of Black women as used in Clarence Thomas's Supreme Court confirmation hearings).

112. *See* Blea *supra* note 47, at 125-27.

from the literature: first, an affirmative defense that acts as a formal excuse when a defendant of a particular culture violates a legal prohibition because she either does not know of or has not internalized the norms of American law; and second, a more limited proposal that advocates considering cultural evidence to determine a criminal defendant's state of mind[113] and possibly minimize charges or mitigate a sentence.

Despite my general agreement that many uses of the second form of a cultural defense are apt, and despite the apparent link between those uses and the arguments presented in the *Avila* and *Castañeda* cases described above, I will argue in Part V that upon closer examination, cultural explanations were misused in both of those cases.

Operating under the tenet that criminality is not universal, cultural defenses assert that blameworthiness is deeply intertwined with culture.[114] Therefore, a defendant who claims a cultural defense—often a recent immigrant or a member of an otherwise definable "culture"—and who acted according to her cultural dictates deserves leniency within the American criminal justice system. This defense can take at least the two legally cognizable forms detailed above. I will consider each use of cultural information in turn.

A cultural defense in the form of a formal excuse for illegal behavior currently exists only in legal scholarship and will not likely surface in any American jurisdiction in the future. However, legal scholars have proposed complete or partial excuses for culturally based ignorance of the law or incapacity to conform to the law. These commentators argue that although it is fair

113. Criminal trials almost always involve individualized scrutiny of a defendant's mens rea, level of provocation, or some other form of mental state. For example, a homicide trial must delve into the defendant's own state of mind at the time of the killing, considering all evidence relevant to his actual state of mind at the time. Did his wife's infidelity provoke him? Was she afraid for her life based on a history of abuse? This type of inquiry is different from the second form of cultural defense only in name. Under some circumstances, a man who kills his wife upon witnessing her infidelity has been understood by American culture to be sufficiently provoked to mitigate the charge to manslaughter. *See, e.g.*, State v. Singletary, 472 S.E.2d 895 (N.C. 1996); Commonwealth v. Andrade, 661 N.E.2d 1308 (Mass. 1996). When the legal system individualizes its examination of an Anglo defendant, perhaps the term "cultural defense" is not used because the Anglo-American system of justice considers itself cultureless, or because it so clearly privileges its own culture that to label use of American culture a cultural defense would seem redundant.

114. For a general exposition of the legal debate regarding all forms of cultural defenses, see generally Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80 (1990); Plácido G. Gómez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357 (1994); John C. Lyman, Note, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87 (1986); Sherene Razack, *What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence*, 19 SIGNS 894 (1994); Alison Dundes Renteln, *A Justification of the Cultural Defense As Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994); Susan Girardo Roy, Note, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263 (1995); Julia P. Sams, Comment, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751 (1987); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

to "impute knowledge of American law to persons raised in this country"[115] because of the socializing power of schools, communities, and places of worship, recent immigrants have not been similarly socialized and therefore lack the same acculturated sense of legal norms. To hold the two groups of people, then, to the same legal standards would fail to recognize real differences between lifelong Americans and recent immigrants. People born and raised in American society, particularly members of the dominant class, already enjoy seeing their own values and morals encoded into American law. A formal cultural defense provides the same advantage to the most recent Americans. Proponents of this form of a cultural defense argue that it "would further the important societal value of cultural pluralism by allowing people from different cultures to live their lives in accordance with their unique values."[116]

Professor Plácido Gómez extends this argument by asserting that, on occasion, the courts are not only justified but morally bound to mete out disparate sentences to people who have committed the same crime in cases of cultural difference.[117] He asserts that such a duty stems from the dual factors of cultural diversity and classic liberal theories of culpability. Because "[p]unishment is only justified when (1) the action is morally condemnable, and (2) the actor is culpable," an individual offender's motivations and limitations must be assessed.[118] The light in which a particular culture views an action may serve to increase or decrease the actor's culpability. Moreover, "an offender's culture may add to the pressures that make it difficult for him to comply with a societal norm."[119]

Many commentators use as an example the case of Fumiko Kimura, a Japanese woman who killed her two young children and attempted to kill herself to escape the shame of the recent discovery that her husband had taken a mistress.[120] In her defense, thousands of Japanese Americans signed petitions claiming that, in Japan, attempted oya-ko shinju—parent-child suicide—is never prosecuted as anything more than involuntary manslaughter, and is usually punished with a "light, suspended sentence, probation, and supervised rehabilitation."[121] In California, however, Kimura was charged with first-degree murder.[122] Gómez argues that

> Japanese culture contains a hierarchy of roles, within which actors are influenced by community expectations. . . . Ms. Kimura's role was that of a wife and a mother. She had recently discovered that her husband was supporting a

115. *See* Note, *supra* note 114, at 1299.
116. *Id.* at 1300.
117. *See* Gómez, *supra* note 114, at 361.
118. *See id.* (quoting David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 388 (1976)).
119. *Id.* at 367.
120. *See, e.g., id.* at 367-73; Chiu, *supra* note 114, at 1100; Renteln, *supra* note 114, at 463.
121. *See* Gómez, *supra* note 114, at 367-68. For a discussion of the factual accuracy of this statement, see Taimie L. Bryant, *Oya-ko Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1, 10-24, 28-31 (1990).
122. *See* Gómez, *supra* note 114, at 367. Kimura ultimately pleaded guilty to voluntary manslaughter. *See* Bryant, *supra* note 121, at 2.

> mistress. Her social obligation was to rid herself of shame without leaving that shame to haunt her children. [Oya-ko shinju was] within the realm of her community's expectations. Her culpability is not that of one convicted of [even] voluntary manslaughter.[123]

A system based on notions of culpability cannot be wholly true to its mission without a contextualized assessment of an offender's motives, mores, beliefs, and concepts of self. This, arguably, is the reason behind finding Castañeda not guilty of the firearm charges in her conspiracy conviction. According to the court's implicit reasoning, Castañeda acted like a good Latina wife. She, like Kimura, was obligated by her social role in a strict hierarchical society and is therefore less blameworthy than an offender who does not act in accordance with such cultural dictates. While true in some sense to our system's reliance on individual culpability, this view of Kimura's and Castañeda's[124] crimes presents as many problems as it purports to solve, problems I will discuss below in Part V.

Despite the arguments of scholarly proponents, the cultural defense is not now nor in the foreseeable future likely to be a general excuse of "cultural defense."[125] This is not to say, however, that cultural information and expert testimony are not being offered as relevant to issues at or before trial. Cultural evidence has been presented as relevant, for example, to issues of mens rea,[126]

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123. Gómez, *supra* note 114, at 370. A second example of this type of cultural defense as applied to a nonimmigrant person of color is Harvard sociologist Orlando Patterson's defense of Clarence Thomas's behavior vis-à-vis Anita Hill. Patterson claims that Thomas's actions were but examples of "down-home style courting." *See* Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill, in* RACE-ING JUSTICE, EN-GENDERING POWER 402, 422 (Toni Morrison ed. 1992). Professor Crenshaw undermines the validity of this use of a cultural defense by noting that Patterson's remark "exemplifies the underlying ways in which certain notions of race and culture function to maintain patriarchy and deny or legitimize gender practices that subordinate the interests of black women." *Id.*

124. A troubling distinction between Kimura and Castañeda's claims is the respective positions of those who raised the defense. In Kimura's case, four thousand members of the Japanese-American community in Los Angeles came forward and explained the cultural relevance of her actions. *See* Gómez, *supra* note 114, at 367-68. Castañeda, on the other hand, neither raised a cultural defense herself nor was spoken for by members of her community. Rather, the Ninth Circuit itself relied on stereotypical beliefs about Castañeda's culture, and reversed her sentence-hiking charges accordingly—without ever explaining this cultural motivation for its anomalous actions.

125. *See* 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, 44-45 (1995) ("There is not and will not be a separate cultural defense because as a practical matter such a defense can be neither defined nor implemented. In short, debate over a new cultural defense is misguided because the use of cultural information is not new, a workable legal definition of culture is impossible to develop, and the information is not being offered in court to create a separate defense.").

126. *See, e.g.*, United States v. Avila, Nos. 90-30221, 90-30385, 90-30386, 90-30401, 1992 WL 75236, at *3 (9th Cir. Apr. 16, 1992); Chiu, *supra* note 114, at 1115-16; Deirdre Evans-Pritchard & Alison Dundes-Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage Capture" Case in Fresno, California*, 45 CAL. INTERDISCIPLINARY L.J. 1 (1995) (discussing a case in which a rape charge against a Hmong male was reduced to misdemeanor false imprisonment, because the court found that the defendant believed the woman consented and that his belief was due to the Hmong practice of taking brides-to-be over their protests and forcibly consummating the union).

provocation,[127] reasonableness,[128] and mitigated culpability in sentencing and plea bargaining.[129] These uses fall at varying points along a continuum, with broad "cultural defenses" at one end and traditionally relevant defendant traits at the other. On the one hand, cultural practice as sentence-mitigating evidence clearly broaches a pure cultural "ignorance of the law" defense. On the other hand, traditional notions of criminal law are based on the actor's mental state. Thus, any evidence illustrative of that mental state is relevant to whether a crime was committed. As such, this evidence should be admitted at trial without requiring any leniency for cultural explanations.[130] For example, Avila's claim that Latino men do not inform "their women" regarding business dealings was the type of gender and cultural mental state evidence from which a jury could infer that Avila did not have the requisite knowledge of the laundered money's origins.[131]

In the abstract, contextualizing evidence permits a complete assessment of a defendant's moral culpability for the crime committed. The danger lies in human inability to separate out character from stereotype, relevant from irrelevant, blameworthiness from exoneration.

V. A DAMNABLE DEFENSE:[132] WHEN CONTEXT IS MYTH AND MYTH BECOMES REALITY

Despite the strong arguments in favor of cultural defenses, I believe that in most instances they are far more destructive than they are useful. Cultural and gendered explanations for a defendant's actions raise questions of essentialism and definition, perpetuation of negative stereotypes, and loss of agency. Particularly distressing are cases like those of Avila, Reyes, and

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127. *See, e.g.*, People v. Wu, 286 Cal. Rptr. 868, 883 (Cal. Ct. App. 1991) (ordered not to be officially published) (allowing introduction of cultural evidence in support of heat of passion argument for mitigation of murder to manslaughter).

128. *See, e.g.*, State v. Wanrow, 559 P.2d 548 (Wash. 1977). In *Wanrow*, the defendant offered cultural evidence to substantiate her self-defense claim. Wanrow, a Native American woman, stood trial for killing a man whom she believed was a child molester. The man had suddenly appeared in the home where she and her young son were staying. At trial she attempted to introduce expert testimony that "would have allowed the jury to understand the tension in Wanrow's circumstance between the cultural value of respect for elders and the culture's abhorrence of 'unnatural sex acts' and the resulting impact of those competing factors on the defendant's state of mind in a confrontation with an older man whom she believed to have molested other children." *See* Maguigan, *supra* note 125, at 80. The testimony was excluded and Wanrow was convicted. On appeal, the Washington Supreme Court supported the trial court's decision on the cultural evidence, but reversed because the trial court also failed to instruct the jury in a way that mandated their consideration of the impact of her gender. *See Wanrow*, 559 P.2d at 550, 558-59.

129. *See, e.g.*, Maguigan, *supra* note 125, at 66-69 (discussing a Fresno County Superior Court case in which a defendant pleaded for probation for killing his wife because, in his culture of origin, "a wife's adultery is punishable by death and the husband must be the executioner").

130. *See Wu*, 286 Cal. Rptr. at 868.

131. Compare this possible inference with the plethora of evidence admitted against Avila at trial which tended to prove that Avila knew the source of the drug money and was aware of her role in the criminal activity. *See Avila*, 1992 WL 75236, at *3-4.

132. I borrow this phrase from Sonja Steptoe's article in *Sports Illustrated* on Mike Tyson's rape trial. Sonja Steptoe, *A Damnable Defense*, SPORTS ILLUSTRATED, Feb. 24, 1992, at 92.

Castañeda. Despite substantial evidence to the contrary, these women were defined as passive participants, women who, in keeping with some "Latina tradition," are naive regarding their men's activities yet unable to refuse to assist them. Such uses of gender and culture place Latina defendants in a double-bind.[133] They can choose to accept the harsh statutorily mandated sentences, or they can embrace stereotype and play to a court's sympathy by presenting themselves as pawns of their husbands, naive and lacking in self-determination. By choosing the latter they shape themselves according to someone else's definition and mold their destinies, and the destinies of others like them, according to someone else's plan.

A. Essentialism and Definition

The decision to rely on cultural defenses presents two separate evidentiary-type problems. First, the defendant's "culture" must be defined. If evidence of a particular culture is introduced at trial, some combined effort of the lawyers, "cultural" experts, and the judge will produce that definition. In cases like *Castañeda*, where an appellate court *sua sponte* chooses to consider gender and cultural evidence in relation to a defendant's culpability, the judges will be the sole arbiters of the culture of the defendant before them, deciding among competing views of that culture as presented by battling anthropological and sociological experts.[134] Second, there must be a debate regarding how well the actual defendant embodies this cultural dictate. A mini-trial, then, will take place (either actually at trial or within the decision-makers' mental processes) on how "Latina" this particular Latina is.

The problem of defining a defendant's culture will ultimately be controlled by a judge. From the position of perceived culturelessness—for supporting the use of cultural defenses must be a theory of nonculture on the part of American law[135]—a largely Anglo male judiciary will approve parameters: *This* is Latina culture. You have not presented enough support to show *that* is Latina culture.[136] This schema recreates centuries of dominant cultural control: He who writes the rules wins the game. Such a paradigm creates an incentive for criminal defendants to rely on gender and cultural stereotypes

133. *See* Razack, *supra* note 114, at 918.

134. *See, e.g.*, Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555, 564-69 (1977) (discussing the problem of cultural evidence and battling experts).

135. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 62 n.21 (1994) ("Descriptions of societies that have 'culture' and societies in which culture is invisible, e.g., for white America, coincide with the relative powerlessness and power of the societies. Thus, assimilation or social mobility in the United States is supposed to coincide with a stripping away of culture.") (discussing analysis by RENATO ROSALDO, CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS 209-12 (1989)).

136. *See* Razack, *supra* note 114, at 918.

in court.[137] While the individual criminal defendant may benefit, the law as a whole will suffer as it takes notice of new *legal* definitions of culture. The next time a Latina sues for employment discrimination, arguing that her employer refuses to promote her because she is a young married woman and he fears she will leave to have children, she will face a legally accepted definition of Latinas as domestic, submissive to their husbands' wishes, and more interested in family affairs than business. She will be protected in the criminal arena because, like a noble savage, she means only to act according to her cultural dictates; when she stumbles it is only because she is different and cannot be expected to be held to *American* cultural standards. But as these cultural definitions spill over into civil law, the Latina will find herself with fewer rights, fewer responsibilities, and fewer legal remedies: She cannot be expected to uphold *American* standards.[138]

Closely related to the risks of defining the cultural "other" are the hazards of essentializing that culture. No culture can accurately be explained by means of a single definition that can simply and without contradiction be recounted in a court of law. Yet I imagine that both at trial and in the minds of judges reviewing the evidence, culture will indeed be so reduced. Once a single cultural definition is introduced, it is likely to be grotesquely similar to a stereotype; the fight becomes over "who [the defendant] was rather than what she did."[139] To receive the benefit of the cultural evidence, the defendant will have to show that she fits into the appropriate cultural box: She was domestic, submissive to her husband's wishes, and uninterested in business affairs. Any evidence to the contrary will allow the court to find her not a *real* Latina and therefore not worthy of the mercy afforded by a cultural defense.

B. Perpetuation of Negative Stereotypes and the Subordinating Narrative

> I realized that one of the things passed on from slavery, which continues in the oppression of people of color, is a belief structure rooted in a concept of black (or brown or red) antiwill, the antithetical embodiment of pure will. We live in a society where the closest equivalent of nobility is the display of unremittingly

137. Stereotypes are appealing and effective because they tell stories and create neat categories. Decision-makers can draw on a pre-existing list of attributes that define the stereotyped person. These attributes may take the form of statements, claims, or beliefs by or about this person which become more or less credible to the decision-makers depending on how closely they mesh with the stereotyped role. *See generally* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 279-83 (1989) ("[S]chemas [or stereotypes] help us assign meaning to incoming information.").

138. For a similar argument as applied to battered woman syndrome, see Coughlin, *supra* note 102, at 2 ("Though actors who do not possess the capacity for responsible conduct may not be punished criminally, the decision to excuse them constitutes a negative statement about their status as moral agents, which may expose them to supervision by civil authorities.").

139. Volpp, *supra* note 135, at 90.

> controlled willfulness. To be perceived as unremittingly without will is to be imbued with an almost lethal trait.[140]
>
> [F]or many centuries, the criminal law has been content to excuse women for criminal misconduct on the ground that they cannot be expected to, and, indeed, should not, resist the influence exerted by their husbands.[141]

Once presented with the option of pointing to a stereotype[142] as an excuse for her actions, the criminal defendant is placed in a double bind. In order to avoid the opprobrium of criminal penalty, she must embrace another sort of stigma—she must define herself in terms of crude stereotype, reducing herself to the dominant culture's caricature of her.[143] By relying on a stereotypical image of Latina women as submissive and domestic, courts provide "evidence" to the public at large that these stereotypes are accurate. Such "evidence" may justify white feelings of superiority, further entrench racism, and bolster anti-immigrant sentiment. Such gendered and cultured notions of predetermined actions not only perpetuate disempowering stereotypes, but also deny these Latina defendants a claim to complexity, a claim to agency. The women become "unremittingly without will" in the eyes of the dominant culture which, by "employing partializing standards of humanity, impose generalized inadequacy on a race."[144] By adopting a gendered and cultural explanation for her actions, the defendant dons the mantle of all people the court, and the law generally, categorize as "like her."

Defendants Avila and Reyes opted for self-denial rather than a willing confession of guilt. The government presented ample evidence to prove the defendants knew they were laundering drug money. Nonetheless, both defendants appealed to cultural stereotypes: Latina women do as their men ask without involving themselves in the details.[145] Faced with the real possibility of very real prison time, these women chose to ill-define themselves as "antiwill."

Note, however, that my language of "choice" in this context is arguably inappropriate: can a defendant choose between submitting herself to incarceration and submerging herself into a stereotype that denies her will? In the

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140. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 219 (1991).

141. Coughlin, *supra* note 102, at 5 (discussing a feminist critique of the Battered Woman Syndrome defense).

142. This is assuming, as I do in the previous section, that an essentialized definition of culture will incorporate stereotypes about the culture in question.

143. *See* Judd F. Sneirson, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251 (1995) (analyzing the use of Black rage defense in criminal law).

144. WILLIAMS, *supra* note 140, at 219.

145. Where cultural evidence is introduced to illuminate the jury's understanding of the defendant's mental state, it is relevant to an element of the crime and therefore difficult to argue that it should be kept out. My dispute with Avila's and Reyes's evidence, however, is not with the evidentiary doctrine regarding its admission, but with their reliance on it despite substantial circumstantial evidence contradicting it. Despite claiming their agency, these women hid behind masks of stereotype and denied control over their own lives.

context of "chosen" castration for sex crimes, Professor Patricia Williams questions the nature of coerced choice:

> I don't think it serves any interest to window-dress the enormous power and dominance of the state in transforming the public interest in consistent and fair sentencing into one of private desire. The private desire that comes out of the defendant's mouth is in fact the private whimsy of the judge. The inversion of having the defendant beg to be dominated does not make the state any less dominating . . . .[146]

Professor Williams's theory extends to the "choice" given to these Latina defendants—particularly to Castañeda. Castañeda did not implore her judges[147] to caricature her. She did not raise a cultural defense to prove lessened culpability. Rather, when faced with sanctioning sentences that far exceeded the blameworthiness of any defendant in her position—that of a minor level co-conspirator—the appellate court overturned Castañeda's firearm convictions for violating due process. In the appellate court's opinion, Castañeda was acting only as a wife, not as a criminal. The *Castañeda* court removed any pretense that the defendant herself could *opt* for this deal with the devil; the court made the decision for her. Castañeda was to avoid submission to the state so long as she continued submitting herself to her husband. By forcing Castañeda to embrace a submissive stereotype, the court is perpetuating and legally sanctioning that stereotype.[148]

Whether or not Avila and Reyes can accurately be described as choosing to rely on clichéd images of Latina women, the effect on nondefendant Latinas will be similar. The paradigm defining them as "too woman" will be reinforced, political advances may be slowed, and legal rights may be curbed.

C. Locating A Theoretical Framework

Accepting that the use of negative gender and cultural stereotypes has repercussions beyond an individual case, why are those damaging stereotypes still used? Why did Avila and Reyes choose, if it can be called a choice, to deny their own and, by extension, other Latina women's individual identities by playing into a flat, pre-existing narrative that was easily understood by the dominant legal culture? Why did the Ninth Circuit consider Castañeda's personal freedom so important that it arguably relied on a two-dimensional caricature of her in order to grant it to her? The answer, commentators assert, lies in a collective value basic to the American criminal justice system—the primacy of individual rights. This section will explore how American liberalism

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146. WILLIAMS, *supra* note 140, at 34.

147. I use the term "judges" here to refer to both Castañeda's jury and her judge—all those with power over her fate.

148. Latinas after Castañeda had best not want it both ways. Legal thinkers despise nothing more than inconsistent theories: submissive when called a criminal; independent and self-motivated when seeking employment.

condones sacrificing the many for the good of the one. Further, it looks at two alternative legal theories that would significantly alter the types of values that are relevant to, and should be considered when, planning a criminal defense or deciding a criminal defendant's fate. Finally, I come to the disheartening conclusion that the stringent punishment at stake in federal drug crimes provides criminal defendants and judges with an overwhelming incentive to protect individual freedom at any cost to the larger community.

Commentators propose that liberal theory[149] tolerates and even encourages racialized narratives of criminal defendants.[150] Privileging individual-rights-based advocacy and decisionmaking, liberal theory permits exploitation of culture, gender, and race in the service of the ultimate goal of *individual* vindication.[151] In the case of Castañeda, for example, the prevailing liberal-theory framework allowed her personal acquittal based on a stereotyped cultural characteristics because on an individual level it was right, a reduced sentence was what she deserved. The overwhelmingly negative, broader repercussions are in fact almost irrelevant under a constitutional and legal structure concerned primarily with individual rights.[152]

Professor Anthony Alfieri advocates a postmodern assessment of the subjugating narratives related in criminal defense cases. Such an approach, he claims, "evaluates the boundaries of racialized stories, constantly checking their configuration, meaning, and context. This checking function requires ongoing judgments about 'storytelling genres, familiar stereotypes, and deeply rooted cultural myths.'"[153] Before a defendant opted to root her defense in a particular narrative, she would, as a part of the legal process, question its source, its continuing validity, its truthfulness, and its harmful side effects. A judge would do likewise when relying on a familiar "cultural" trait in assessing the defendant before her. Under this framework, the defendant and the judge may arrive at conclusions similar to those determined under the current liberalism paradigm. However, through the process they each would have considered the repercussions of flattening the defendant's story to that of a stereotype.

Alternatively, Wendy Brown-Scott's version of communitarian theory, a race-conscious communitarianism, provides a different theoretical lens for

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149. For a discussion on the experiences of a liberal yet multicultural society, see Robert J. Lipkin, *In Defense of Outlaws: Liberalism and the Roles of Reasonableness, Public Reason, and Tolerance in Multicultural Constitutionalism*, 45 DEPAUL L. REV. 263 (1996).

150. *See, e.g.*, Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1322-1331 (1995).

151. *See, e.g., id.* at 1323-25 (Alfieri notes that in the lawyer/client context, as "[c]onstrued by Euro-American legal discourse, the client subject devolves into a 'natural rights-bearing person' positioned 'against the interests of the collectivity.'") (quoting Jeanne L. Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 594 (1994)).

152. *See, e.g.*, Coughlin, *supra* note 102, at 5.

153. Alfieri, *supra* note 150, at 1333 (quoting Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 708 (1994)).

assessing the use of racialized narratives in the criminal defense context.[154] Noting that communitarianism's primary emphasis on community[155] and its traditional focus on citizen participation[156] ignores the continued subjugation of African-Americans, Brown-Scott calls for communitarianism to explicitly adopt a race-conscious perspective to help end racial subordination.[157] In a criminal law context, a race-conscious communitarianism approach would force defendants, attorneys, and judges to directly consider the good of the whole, racially inclusive, community in either encouraging or rejecting a racialized narrative. This approach would not tolerate the use of racist narratives to aid an individual defendant, when those narratives perpetuate racial subjugation in the larger community.

Either approach could encompass gendered as well as race-conscious storytelling, and each opens up the universe of relevant factors, stories, and consequences related to an individual defendant's case. Both theories ask the defendant, defense attorney, and judge to view the defendant as not only *part* of her larger community, but in a dialectical relationship with it—each affecting, molding, and changing the other. Perhaps more importantly, a race-conscious paradigm demands that defendants, advocates, and decisionmakers accept responsibility for the larger repercussions of a subordinate narrative.

Considered within a framework of either race-conscious communitarianism or postmodern reassessment, Avila and Reyes's defense is easily understood as problematic—the effort to obtain an acquittal of the two defendants comes at a high price to their larger community because it relies on a familiar stereotype rooted in a racist and sexist dominant baseline. A race-conscious communitarian approach views the community repercussions as part of the problem faced by the defendant and her lawyer. For its part, a postmodern reassessment of racialized storytelling would question the origin and purpose of the subjugated stereotype put forward by Avila and Reyes. Under either framework, the defendants would have been encouraged to regard more than their individual autonomy as being at stake. Likewise, Castañeda's judges would have looked beyond the circumstances of the individual defendant before them and considered the broader consequences of the stereotype implicitly relied upon in her case.

What complicates these cases in terms of framework analysis is the confluence of factors encouraging defenses relying on a narrative of subjugation. Not only are the cases located within a paradigm of liberal theory with its emphasis on individual rights, but the incentive to litigate and rely on a subordinating narrative is great because the potential punishment under the Sentencing Guidelines and mandatory-minimum statutes is unduly harsh. In the face of the Sentencing Guidelines, I find it difficult to advocate

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154. Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209 (1994).

155. *See id.* at 1217.

156. *See id.* at 1218.

157. *See id.* at 1211.

a race-conscious community framework or one that seriously questions the source and value of certain stories, when the price to be paid by an individual defendant is harsh and disproportionate to her actions. I do not mean to suggest that the price paid by the individual outweighs that paid by her larger community. However, an individual who sees herself as perhaps overcharged and almost certainly facing an excessive prison sentence may fail to see the justice in a community-based approach. Practically speaking, the two alternative approaches look much more like idealistic ivory-tower solutions than feasible goals as long as our criminal justice system chooses to approach narcotics crimes with the kind of overkill represented by mandatory minimum sentences.

VI. CONCLUSION

In terms of a prison sentence, Leticia Castañeda probably got what she deserved. In fact, I can almost be certain that she will spend far more time in prison than I could, with a clear conscience, ask her to. But my main quarrel is with the Federal Sentencing Guidelines: Guidelines that allowed a sentence of five years to be tacked on to Castañeda's sentence for each time one of her cohorts used a gun; guidelines that would not permit a judge to determine that a multi-decade sentence was patently too long for a defendant who was only minimally involved in a drug-trafficking conspiracy.

What Castañeda received, and what Avila and Reyes asked for, however, affected not only their prison sentences and not only themselves. The defenses that operated in their cases pushed real, multilayered, complex women into a narrow, two-dimensional caricature of themselves. Where the choice was between significant prison time and accepting or perpetuating a false definition of the Latina defendants, these defendants, defense attorneys, and judges opted for the latter. Such a choice, if it can aptly be called that, has repercussions far beyond a single criminal trial.

These women and others like them have been flattened into a simple, stereotyped picture—a picture accepted by courts, later by the public, and still later, perhaps, by the women themselves. This new, legally accepted definition of Latina will inform future legal discourse, rights, and responsibilities. It will seep into the public consciousness as a judicial stamp of approval on existing biases. It may mold a Latina's own view of herself until she becomes the person she has been told time and time again that she is.

Such repercussions cannot be excused by an individual's avoidance of criminal penalty. While liberal theory permits race- and gender-based narratives in the name of individual rights, the alternative frameworks explained above can be invoked to discourage the flat, stereotyped images of Latina women depicted in the *Avila* and *Castañeda* cases. But the Sentencing Guidelines only offer these defendants and their judges two choices: a race- and gender-conscious approach that avoids subordinating Latinas but probably results in conviction and a prison sentence widely believed to be excessive;

or an individual-rights-based focus that offers a better foundation for acquittal but at the price of a subordinating narrative about these defendants and Latinas in general. The choice itself is a damnable one, not adequately explained by the War on Drugs, not adequately accounted for by merciful judges doing their best to avoid innocent casualties. The broad and deep repercussions of such a choice, such a defense, are inexcusable.