(MIS)IDENTIFYING CULTURE: ASIAN WOMEN AND THE "CULTURAL DEFENSE"

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I. INTRODUCTION

The "cultural defense"[1] is a legal strategy that defendants use in attempts to excuse criminal behavior or to mitigate culpability based on a lack of requisite mens rea.[2] Defendants may also use "cultural defenses" to present evidence relating to state of mind when arguing self defense or mistake of fact. The theory underlying the defense is that the defendant, usually a recent immigrant to the United States, acted according to the dictates of his or her "culture," and therefore deserves leniency.[3] There is, however, no formal "cultural defense"; individual de-

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[1] I put "cultural defense" in quotes since, as discussed throughout the Article, the use of the term is politically problematic and is a misnomer, given the nonexistence of a singular, formalized defense.

[2] In many cases the lack of requisite mens rea is argued on the basis of insufficient mental capacity. An impaired mental state defense is based on the idea that the accused is unable to appreciate the wrongfulness of her act or conform her conduct to the requirements of the law because of a mental disease or defect that she was suffering at the time the offense was committed. MODEL PENAL CODE § 4.01(1) (1962).

[3] There have also been attempts to use "cultural defenses" for non-immigrant defendants of color. *See, e.g.*, People v. Rhines, 182 Cal. Rptr. 487 (Cal. Ct. App. 1982) (involving the appeal of a Black man, convicted of raping two Black women, who argued that the trial court failed to take into account "cultural differences" between Blacks and whites). For a critique of the "cultural defense" attempted in that case and of Orlando Patterson's "cultural defense" of Clarence Thomas's "down home style of courting," see Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 422 (Toni Morrison ed., 1992).

The defense strategy in the murder trial of Native American Patrick Hooty Croy was referred to as a "cultural defense." *See* Denise Ferry, *Capitalizing on Race and Culture: The* Croy *Acquittal and Its Application to Future Minority Cases*, 19 CACJ/FORUM 48, 48 (1992); David Talbot, *The Ballad of Hooty Croy*, L.A. TIMES, June 24, 1990, (Magazine) at 16. The following expert testimony was admitted as relevant to Hooty Croy's argument of self defense: testimony by an expert in Indian history and contemporary affairs about the relationship between Indians and non-Indians in Hooty Croy's

fense attorneys and judges use their discretion to present or consider cultural factors affecting the mental state or culpability of a defendant.[4] In my discussion of this strategy, I focus on the significance of its use for Asian women.

When examining the "cultural defense" and its effect on Asian women, I write from the subject position of an Asian American woman.[5] I also write with the benefit of collective insight of Asian American women working with the Asian Women's Shelter in San Francisco, who created the "Cultural Defense" Study Group.[6] The Study Group arose from concern about the use of the "cultural defense" and from the pressing need for Asian American women to articulate a position on its use.

The "cultural defense" presents several complex problems inherent in essentializing a culture and its effect on a particular person's behavior. I analyze the use of the defense in two cases in order to illustrate problems with the defense and situations in which allowing cultural information into the courtroom might be appropriate. I argue that any testimony about a defendant's cultural background must embody an accurate and personal portrayal of cultural factors used to explain an individual's state of mind and should not be used to fit an individual's behavior into perceptions about group behavior.

Presentation of cultural factors must also be informed by a recognition of the multiple, intersectional layers of group-based oppression that may be relevant to understanding any particular case. The concept of intersectionality, which in this context refers to the interplay of racism and sexism in the experiences of women of color, provides a useful analytical tool.[7] Because of our identity as both women *and* persons of color

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county, testimony by experts in anthropological linguistics and eyewitness identification about misunderstanding in language (e.g., "shooting poofitch"—going deer hunting—was reported by the prosecution witness as "shooting the sheriff"), and testimony by an Indian psychologist who had interviewed Hooty Croy over the course of several years. *See* Ferry, *supra*, at 50.

[4] Cultural factors may be admitted as part of expert testimony at trial or as part of jury instructions. They also may be presented as mitigating factors during the sentencing phase and in the plea bargaining stage.

[5] My perspective also derives from my experiences working with Shakti Women's Aid, a resource center and refuge for battered women of color in Edinburgh, Scotland; with the Asian Women's Shelter, which works with battered Asian women in the San Francisco Bay area; and with the New York Asian Women's Center, which works with battered Asian women in the New York City metropolitan area.

[6] Jacqueline Agtuca, Inderpal Grewal, Deeana Jang, Mimi Kim, Debbie Lee, Jayne Lee, Lata Mani, Leni Marin, Beckie Masaki, and Alexandra Tantranon-Saur composed the Study Group.

[7] I identify this Article as part of a growing body of literature that uses the concept of intersectionality to address how women of color are situated in the law. For examples of other works that use the intersectionality framework, see generally Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Poli-*

within discourses shaped to respond to one categorization *or* the other, women of color exist at the margins of both discourses.[8] Because intersectionality is a methodology that disrupts the categorization of race and gender as exclusive or separable,[9] I argue that an intersectional analysis is essential to an understanding of the relationship of the "cultural defense" to Asian women.

I also explore why the choice of whether or not to support the use of the "cultural defense" is difficult and suggest a strategy for making this choice. I ultimately argue that the value of antisubordination should be used to mediate between a position that totally rejects the defense and a position that embraces a formalized "cultural defense" from the perspective of cultural relativism. I conclude that the formalization of a "cultural defense" should not be promoted, and that a commitment towards ending all forms of subordination should inform the decision of whether or not to support the informal use of cultural information on behalf of a defendant in a given case.

I discuss two cases, *People v. Dong Lu Chen*[10] and *People v. Helen Wu*,[11] in detail because they are representative of the two kinds of cases in which "cultural defenses" involving Asian women have most often been attempted.[12] The first type of case, exemplified in *Chen*, involves

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tics, 1989 U. CHI. LEGAL F. 139; Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Celina Romany, *Ain't I a Feminist?* 4 YALE J.L. & FEMINISM 23 (1991).

This Article also uses approaches found in the literature of critical race theory, which examines the way law and legal categories shape and reflect the social meanings of race with a commitment to ending racial subordination. For examples of critical race theory, see generally DERRICK BELL, AND WE ARE NOT SAVED (1987), DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1993); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1 (1991); Maivan Clech Lam, *The Kuleana Case Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233 (1989); Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1989).

[8] *See generally* Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 7.

[9] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.9 (1991).

[10] No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988).

[11] 286 Cal. Rptr. 868 (Cal. Ct. App. 1991), *rev'g* No. ICR 12873 (Super. Ct. Riverside Co. 1990), *review denied* Jan. 23, 1992.

[12] My discussion of these two cases involves a textual analysis of the relevant court opinions. I use this methodology rather than a doctrinal analysis of precedential cases for the following reasons. First, cases involving "cultural defenses" rarely appear at the appellate level. Second, a rhetorical analysis of the cases allows deconstruction of the

an Asian man seeking a "cultural defense" for his violence towards an Asian woman.[13] The second factual pattern, seen in *Wu*, features an Asian woman seeking to admit cultural factors to explain her mental state when she attempted to commit parent-child suicide.[14]

Both of the cases I examine involve Chinese Americans. I hesitate to focus on these cases because Chinese Americans are frequently used to synecdochically represent all Asian Americans, and I repeat that process here by describing my project as one about "Asian women."[15] Yet, paradoxically, *because* of the homogeneity into which the dominant community crushes the vast diversity of Asian America,[16] the legal system's

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problematic yet unquestioned ideas underlying uses of the "cultural defense." Because no law review article has yet addressed these ideas, the focus of my Article is on raising these issues.

[13] This fact pattern occurs quite frequently. For example, two Korean men in Los Angeles were acquitted of raping a Korean woman who met the men in a nightclub, drank heavily, and then accompanied them to two other nightclubs. *See* Myrna Oliver, *Immigrant Crimes; Cultural Defense—a Legal Tactic*, L.A. TIMES, July 15, 1988, at 1. The defense attorney, Charles Matthews, whose wife is Korean, explained the presentation of the cultural defense: "'It is very, very improper for a Korean girl in her culture to go to bars and drink and carry on with men alone.'" *Id.* "'So I was asking the jury to translate American party attitudes into Asian.'" *Id.*

For other examples of Asian men seeking a "cultural defense" for violence towards an Asian woman, see People v. King Moua, No. 315972 (Fresno Super. Ct. 1985) (sentencing a Hmong man in the San Joaquin Valley of California, who kidnapped and raped "fiance" in "marriage by capture," to 120 days in jail and $1,000 fine after consideration of cultural factors); People v. Aphaylath, 510 N.Y.S.2d 83 (N.Y. 1986) (finding that the lower court's failure to include cultural information about a Cambodian husband who stabbed his wife to death after she received phone call from another man was reversible error); Mary Ann Galante, *Asian Refugee Who Shot Wife Receives 8-Year Prison Term*, NAT'L L.J., Dec. 16, 1985, at 40 (describing a murder committed by a Hmong man who shot his wife to death after learning she intended to work with another man); Oliver, *supra*, at 1 (Hmong man in St. Paul kidnapped and raped young girl in "marriage by capture").

[14] *See, e.g.*, Oliver, *supra* note 13 (describing the case of a Japanese woman in San Francisco who tried to commit parent-child suicide, called *oyako-shinju*, after she learned husband had affair); People v. Fumiko Kimura, No. A-091133 (L.A. City Super. Ct. filed Apr. 24, 1985); Deborah Woo, The People v. Fumiko Kimura*: But Which People?*, 17 INT'L. J. SOC. L. 403 (1989) (describing a case involving a Japanese woman in Los Angeles who tried to commit parent-child suicide after abuse by husband).

[15] Which specific groups are used to represent the entire Asian American community depends on context. *See* Lisa Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581, 1592 (1993) (suggesting that for purposes of white-Asian conflict, "Asian means Japanese" although when "the sore point is Asian-owned small businesses, then Asian may mean Korean").

[16] One author has noted that

> Asian Americans are seen not as individual but as *fungible* . . . . [The presumption of reductionist similarity] obscures not only the differences among Asian American individuals qua individuals but also the historic disputes that have separated Asian peoples. Moreover, it helps conceive individuals as components of monolithic blocs defined primarily by common physical traits.

Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1932 (1993).

treatment of two cases affecting Chinese Americans does reflect popular and legal conceptions of other Asian American communities.[17]

I use the terms "Asian" and "Asian American" at different points throughout this piece in order to emphasize how communities are identified in different contexts. The concept of a "cultural defense" rests on the idea of a community not fully "integrated" into the United States and assists "Asians in America," or "immigrants," as opposed to "Asian Americans." Asian Americans are those whom American society generally assumes to have assimilated into "American culture"[18] to the extent that we do not require a special defense.[19]

Drawing this distinction relies on the problematic positioning of recent immigrants from Asia as "not American." Reserving the term "American" for those who seem fully assimilated erases two important and related factors. The first is the fluid and shifting nature of American identity. The second is the fact that both immigrant and Asian experiences are integral and formative components of American identity. This failure to acknowledge the multiplicity of American identity leaves American identity, and specifically the identity of United States law, a neutral and unquestioned backdrop.[20] One is left with an image of a

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[17] I am, of course, repeating this homogenization by using these two cases to talk about "Asian women."

Whether to use the category "Asian" or "Asian American," instead of categories such as Cambodian, Korean, or Thai, is a political decision entailing both risks and advantages. The articulation of an "Asian American identity" as an organizing tool has provided a concept of political unity, and the building of "Asian American culture" empowers our multicultural, multilingual community against the institutions that marginalize us. But essentializing Asian American identity risks particular dangers because it underestimates our differences and "also inadvertently supports the racist discourse that constructs Asians as a homogenous group." Lisa Lowe, *Heterogeneity, Hybridity, Multiplicity, Marking Asian American Differences*, 1 DIASPORA 24, 30 (1991); *see also* YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES (1992).

[18] When I use the terms "American" or "America," I intend an implicit critique of the ethnocentricity of these terms.

[19] Of course, Asian Americans are, with enormous frequency, not recognized as "American." This positioning as foreign is something that Asian Americans, including fifth-generation Asian Americans in this country, constantly face. For the relation of this perception to anti-Asian violence, see Note, *supra* note 16, at 1938.

[20] None of the law review articles dealing with the question of the "cultural defense" recognize the cultural particularity of American law, nor do they offer a sophisticated analysis of what is being presented as "culture" in cases involving the "cultural defense"—in fact, they frequently attempt no analysis at all. *See, e.g.*, Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 PAC. BASIN L.J. 80 (1990); Donna Kotake, *Survey: Women and California Law*, 23 GOLDEN GATE L. REV. 1069 (1993); Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L.J. 335 (1986); Malek-Mithra Sheybani, *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).

Ahn Lam does question racial and sexual bias in the use of the "cultural defense," for example, how Asian defendants have been treated differently depending on the race or gender of the victim. *See* Anh Lam, *Culture as a Defense: Preventing Judicial Bias*

spoonful of cultural diversity from immigrants ladled onto a flat, neutral base. Creating a "cultural defense" for immigrants in the United States thus rests on the implication that U.S. law is without a culture.[21]

The flawed conception, inherent in a "cultural defense," that recent immigrants have a "culture" while U.S. law does not, promotes an anthropological relationship between the court and the immigrant defendant. The court, through testimony of "experts," conducts an examination of communities not considered to "fit" within the borders of U.S. law. This anthropological relationship is characterized by "expert" presentations of Asian culture that depict Asian communities as static, monolithic and misogynist. This dynamic distances the subject of study by creating an unrecognizable "other" and allows the dominant anthropolgist "expert" to subordinate members of the foreign culture through descriptive control.

This Article begins by examining the use of the "cultural defense" in a case that clearly demonstrates its potential to render Asian women invisible by ignoring factors of subordination within their own communities. In Part II, I narrate the case *People v. Dong Lu Chen*.[22] In that case, an Asian woman, Jian Wan Chen, was murdered by her husband. Dong Lu Chen, the defendant, successfully used a "cultural defense" that presented essentialized notions of "Chinese culture" to excuse his actions. By analyzing the expert testimony and decision of the trial judge, I show how the "cultural defense" in that case used a description of "culture" that obliterated any notion of gender oppression.

In Part III, I analyze the response to the *Chen* case among white feminist organizations and Asian American community organizations, which paradigmatically illustrates the tensions that exist between these

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Against Asians and Pacific Islanders, 1 ASIAN AM. PAC. ISLANDS L.J. 49, 62–63 (1993). Two law review articles criticize "cultural defense" cases as validating violence against Asian women but do not address many of the problems identified in this Article. *See* Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM J.L. & SOC. PROBS. 597 (1991).

[21] 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. *See* RENATO ROSALDO, CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS 209–12 (1989). Rosaldo writes:

> More generally, race relations in North America involve a blend of assimilationist efforts, raw prejudice, and cultural containment that revolves around a concerted effort to keep each culture pure and in its place. Members of racial minority groups receive a peculiar message: either join the mainstream or stay in your ghettos, barrios, and reservations, but don't try to be both mobile and cultural.

Id. at 212.

[22] No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988).

groups regarding the use of the "cultural defense." I survey reactions to the "cultural defense" both within these communities and within legal literature. I conclude that a new approach to the "defense" is necessary, both to guide appropriate presentations of cultural information within the courtroom, and to inform the choice of whether and when to support admission of a defendant's cultural background.

I examine in Part IV the case of *People v. Helen Wu*,[23] in which the state of California convicted an Asian woman of killing her son. This case illustrates that, despite the problematic positioning of "immigrant," "culture" and "America" inherent in the "cultural defense," many cases will present compelling fact patterns that encourage allowing cultural evidence into the courtroom to explain the defendant's actions as shaped by her particular experiences. But *People v. Helen Wu* also exemplifies the problem of cultural determinism inherent in the use of a "cultural defense": the defense rests on the notion that one's behavior is determined by one's identity. Because what defendants frequently present as "culture" in "cultural defenses" is static and particular, if a defendant's behavior does not sufficiently match what experts describe as "traditional" cultural behavior, she may lose the opportunity offer testimony as to her cultural background.

In Part V, I explain why a formal "cultural defense" would be problematic and why allowing informal testimony is preferable. As an instructive parallel that argues against the creation of a formalized "cultural defense," I describe difficulties engendered by a formalized battered women's syndrome. I explain the importance of an intersectional analysis to understanding how "cultural defenses" impact Asian women and discuss the utility of "strategic essentialism" in determining when to allow "cultural" evidence.

I conclude by describing in Part VI an approach to the "cultural defense" that supports what may appear to be the contradictory interests of Jian Wan Chen, "victim," and Helen Wu, "defendant." I argue that the value of antisubordination should be factored into the decision of whether or not to support use of the defense and that a commitment to antisubordination must entail a simultaneous recognition of material and descriptive oppression based on factors such as race, gender, immigrant status and national origin.[24]

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[23] 286 Cal Rpt. 868 (Cal. Ct. App. 1991), *rev'g* No. ICR 12873 (Super. Ct. Riverside Co. 1990), *review denied* Jan 23, 1992 (unpublished opinion).

[24] While not a focus here, factors I also consider fundamental include class and sexuality.

II. INVISIBLE WOMAN: *THE PEOPLE V. DONG LU CHEN*[25]

In 1989, Brooklyn Supreme Court Justice Edward Pincus sentenced Chinese immigrant Dong Lu Chen to five years probation for using a claw hammer to smash the skull of his wife, Jian Wan Chen.[26] The defense sought to demonstrate that the requisite state of mind was lacking by introducing evidence about Chen's cultural background. After listening to a white anthropologist "expert," Burton Pasternak, provide a "cultural defense" for Dong Lu Chen, Pincus concluded that traditional Chinese values about adultery and loss of manhood drove Chen to kill his wife.

The defense introduced most of the information about Dong Lu Chen's cultural backgrond through Pasternak's expert testimony. Defense Attorney Stewart Orden presented Pasternak with a lengthy hypothetical designed to evoke a response about the "difference" between how an "American" and a "Mainland Chinese individual"[27] might respond to a particular set of events. This hypothetical was in fact a history of Dong Lu Chen and provided the defense's explanation for why he killed Jian Wan Chen.[28]

As Orden set forth in this "hypothetical," Dong Lu Chen was fifty-four years old at the time of trial. Since 1968 Dong Lu Chen believed he was hearing voices around him; doctors told him there was something wrong with his mind.[29]

In September, 1986, the Chen family immigrated to the United States. While Dong Lu Chen worked as a dish washer in Maryland, Jian Wan Chen and the three children stayed in New York.[30] During a visit when Jian Wan Chen refused to have sex with him and "became abusive,"

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[25] No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988).

[26] After hearing the evidence during the course of the trial, Pincus convicted Chen of second degree manslaughter, which carried a maximum prison term of five to fifteen years. Record at 309–10, *Chen* (No. 87-7774).

[27] Record at 58.

[28] The reader should be mindful that this is what Dong Lu Chen's defense attorney presented as an explanation of what "happened." By placing Dong Lu Chen's version here, before the reader learns more about Jian Wan Chen, I reenact her erasure in the narrative of the trial. I do this to show the reader how an easy acceptance of Chen's "cultural" explanation is only made possible by Jian Wan Chen's absence from the narrative as a living, breathing person.

[29] Chen was born in Toisan, China. After he left school he worked as a farmer. He married Jian Wan Chen in 1963 in an arranged marriage. They had three children, the oldest 21 at the time of the trial, the youngest 15. *See* Record at 58–61.

[30] Record at 64. During the first eight months of separation he returned to New York three times. On the first visit Dong Lu Chen and Jian Wan Chen had sexual intercourse. The second visit she refused. On the third, she again refused and "became abusive towards him, including beating him." Record at 64. Their children said that they never saw their mother beat their father. *See* Record at 183–84, 213, 217, 219.

Dong Lu Chen became suspicious she was having an affair. He returned to Maryland, burdened with the stress of his wife's assumed infidelity.[31]

In June, 1987, Dong Lu Chen moved to New York.[32] On August 24 he rushed into his wife's bedroom and grabbed her breasts and vaginal area. They felt more developed to him and he took that as a sign she was having affairs.[33] When he confronted her the next day, she said she was seeing another man.[34] On September 7, when he again confronted her and said he wanted to have sex, "she said I won't let you hold me because I have other guys who will do this."[35] His head felt dizzy, and he "pressed her down and asked her for how long had this been going on. She responded, for three months."[36] Confused and dizzy, he picked something up and hit her a couple of times on the head. He passed out.[37]

After presenting the above "facts" as part of his hypothetical, Orden asked Pasternak if this history was consistent with reactions "under normal conditions for people from Mainland China."[38] Pasternak responded:

> Yes. Well, of course, I can't comment on the mental state of this particular person. I am not a psychiatrist. I don't know this particular person. But the events that you have described, the reactions that you have described would not be unusual at all for Chinese in that situation, for a normal Chinese in that situation. Whether this person is normal or not I have no idea . . . . If it was a normal person, it's not the United States, they would react very violently. They might very well have confusion. It would be very likely to be a chaotic situation. I've witnessed such situations myself.[39]

Orden also asked Pasternak to verify that a "normal Chinese person from Mainland China" would react in a more extreme and much quicker

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[31] Record at 64–65. He had difficulty sleeping and palpitations, and began to hear the voice of his wife's lover planning to hurt him. *See* Record at 65.

[32] Record at 65. Jian Wan Chen "became increasingly more brutal . . . she was hitting him, telling him to drop dead and . . . she would not permit him to touch her." Record at 66. Dong Lu Chen noted that Jian Wan Chen, working as a seamstress, changed her site of work and assumed that this was to facilitate her rendezvous with other men. She took all her clothing from their apartment; he thought it was so she could wear the clothes for her lover. Record at 66.

[33] *Id.* at 66.

[34] *Id.* at 66–67.

[35] *Id.* at 67.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 68.

[39] *Id.* at 68–69.

way than an "American" to the history as given in the hypothetical.[40] Pasternak answered:

> In general terms, I think that one could expect a Chinese to react in a much more volatile, violent way to those circumstances than someone from our own society. I think there's no doubt about it.[41]

This initial testimony highlights some important issues. First, the distinction Orden and Pasternak draw between "American," "someone from our own society," and "Chinese" implies that "Chinese" and "American" are two utterly distinct categories: "American" does not encompass immigrant Chinese.[42] This dichotomy rests on the lingering perception of Asians in America as somehow "foreign," as existing in "America" while not being "American."[43] Importantly, the perspective that Chinese living in the United States are not "American" is the very basis for the assertion of the "cultural defense," on the grounds that someone from a distinctly "non-American" culture should not be judged by "American" standards.

Perceiving Chinese living in the United States as American, as part of our polis, significantly affects our responses to Dong Lu Chen. Referring

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[40] *Id.* at 74.

[41] *Id.*

[42] Pasternak's assumption that "American" does not encompass immigrant Chinese ignores the fact that we do not live in hermetically sealed cultures that travel with us from cradle to grave. We are not completely unaffected by other communities and do not live in cultural compartments separating "natives" from "anthropologists" or "immigrants" from "Americans." *See* ROSALDO, *supra* note 21, at 44–45.

[43] On the original and lingering perception of Asian Americans as "foreign," see Neil Gotanda, *Asian American Rights and the "*Miss Saigon *Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT 1087, 1095 (Hyung-chan Kim ed., 1992); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of* Justice at War, 85 COLUM. L. REV. 1186, 1188 (1985); Elaine Kim, *Asian Americans and American Popular Culture, in* DICTIONARY OF ASIAN AMERICAN HISTORY 99 (Hyung-Chan Kim, ed. 1986); John H. Torok, Towards a Liberatory Approach to Asian American Legal History (June 1993) (unpublished manuscript on file with the *Harvard Women's Law Journal*).

For historical illustrations of judicial perceptions of Asian Americans as "foreign," see Plessy v. John H. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.").

In Fong Yue Ting v. U.S., 149 U.S. 698 (1893), the Court stated:

> [L]arge numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests . . . .

Id. at 717.

to Dong Lu Chen's identity as a hyphenated identity—Asian American—recognizes the specific histories of people of color in the United States while emphasizing the existence of a community of other Asian Americans that is best situated to evaluate and judge his actions. For reasons discussed further below, members of Asian American communities, particularly community organizations aware of internal power dynamics, should determine the use and content of the "cultural defense."[44]

After dichotomizing "American" and "Chinese," Orden and Pasternak's second step in creating a "cultural defense" was to assert that a man considered "normal" in the category "Chinese" would react very differently from someone in the category "American" to the belief that his wife was having an affair.[45] Their third step collapsed the history of a particular person with specific mental problems into the category "normal person from Mainland China."[46] Finally, Orden's and Pasternak's description of Dong Lu Chen's reaction was predicated on the "stress theory" of violence: abuse happened because the batterer experienced stress. This is a theory much criticized by battered women's advocates who note that batterers *choose* to abuse power over their victims and that violence is not an automatic stress-induced response beyond batterers' control.[47] As the prosecuting attorney pointed out, Chen waited from August 25, when he was allegedly informed by his

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[44] For an example of the important role that the defendant's community may play, see the discussion of *State v. Chong Sun France*, *infra* notes 164–168 and accompanying text.

[45] Pasternak's claim that "American" men would react less violently than "Chinese" men to the belief their wives were having affairs is belied by the very encoding of the manslaughter/provocation doctrine in American law, which is explicitly premised upon a *violent* reaction to this knowledge. The voluntary manslaughter law of most jurisdictions recognizes the sight of a wife's adultery as a motivation to kill. In fact, adultery is *the* paradigmatic example of provocation sufficient to mitigate a charge of murder to a voluntary manslaughter conviction. *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 72 (1992).

[46] Dong Lu Chen did not plead an insanity defense. One can conclude that neither his attorney nor the judge found his actions to be insane, given the "cultural" context. Pincus stated:

> The Court finds that the defendant had a frustrated mental aberration. It does not rise to the level of legal insanity, but based on cultural aspects, the effect of the wife's behavior on someone who is essentially born in China, raised in China and took all his Chinese culture with him to the United States except the community which would moderate his behavior [provides reasons why] the Court has found him not guilty of manslaughter in the first degree.

Record at 302–03.

[47] For example, batterers are careful to abuse women when no one else is around to witness the abuse. *See* DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF BATTERED WOMEN (D. Jang et al. eds., 1991).

wife that she was having an affair, until September 7 to confront his wife violently.[48]

To bolster Pasternak's assertions about Dong Lu Chen's behavior, Orden asked him to testify about the particularities of family life in China. Pasternak spoke of the "extraordinary" difference between "our own" ability and the ability of "the Chinese" to control the community through social sanctions.[49] He added to the "voices" that Dong Lu Chen heard in his head, earlier presented as a sign of mental difficulties, another set of "voices" controlling Chen.[50] Pasternak testified that his "Chinese friends" often said "there is no wall that the wind cannot penetrate," meaning that the voices of social control "will be heard everywhere."[51] Orden and Pasternak repeated these "voices of the community" throughout the trial to signify that in a tradition-bound society like Mainland China, social control is more strict and unchanging than in the West, and that a "Chinese individual" carries these "voices" of social control wherever he goes.

Continuing his description of Chinese familial life and values, Pasternak asserted that "casual sex, adultery, which is an even more extreme violation, and divorce" are perceived as deviations from these social

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[48] *See* Record at 293. This information should have substantially undermined any manslaughter defense based on provocation.

[49] *Id.* at 53–54.

[50] Pasternak stated:

> Let me simply begin by observing that the ability of the Chinese community to define values and define appropriate behavior compared to our own ability to do that is extraordinary. The ability to enforce those values and to protect themselves against deviation also is extraordinary. The Chinese who grows up as a person in Mainland China carries that in his mind. They are like voices of his community. It is very difficult to escape. They are very intolerant [of] deviations from those mores, very intolerant, and exert enormous control over people who try to deviate. You carry that with you no matter where you go. Even if you can escape those voices, you cannot escape the information, a deviation being known to everyone, being known to everyone in the Chinese community either here or there. My Chinese friends often say, there is no wall that the wind cannot penetrate. These voices will be heard everywhere.

Id.

[51] *Id.* at 78. By continually returning to this "wall and wind" motif and throwing in picturesque details such as gossip during laundry washing by canals, Pasternak fetishized "difference" as a way to anchor the "foreignness" of the "Chinese," and structured his "Chinese friends" as native informants. For a critique of anthropology and the difficulty facing the anthropological subject who wishes to escape the role of native informant see Robert Ji-Song Ku, Can the Native Informant Write? The Ethnographic Gaze and Asian American Literature (June 3, 1993) (unpublished manuscript presented at the Association for Asian American Studies Conference, Cornell University, June 3, 1993, on file with the *Harvard Women's Law Journal*).

mores.[52] "In the Chinese context," adultery by a woman was considered a kind of "stain" upon the man, indicating that he had lost "the most minimal standard of control" over her.[53] Pasternak contrasted the condemnation of adultery in China with the United States, "where we take this thing normally in the course of an event."[54] He claimed that the Chinese woman was likely to be "thrown out" and that both parties would have difficulty remarrying.[55]

Pasternak proceeded to delineate the ramifications of a woman's adultery for the Chinese man and Chinese woman in the context of the United States.[56] Pasternak relied on his perception of the prevalence of

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[52] Record at 54. Pasternak stated:

> Where adultery takes place, this is considered an enormous stain, much more so than where we take this thing normally in the course of an event. To the Chinese it's a very serious matter. It reflects upon him as a person. It is a reflection upon his family. It is a reflection upon his ancestors and it is a reflection upon his prodigy. It's a terrible stain. One to be avoided at all costs. Chinese act very strongly to this. The community reacts very strongly.

Id.

[53] *Id.* at 55.

[54] *Id.* at 54.

[55] Pasternak stated:

> In the Chinese context, divorce is virtually the end . . . . It could be the end of a person's real life. In the Chinese context, if a woman commits adultery, she's very likely to be thrown out. She will have a very hard time remarrying . . . . If he is poor, he has a very hard time remarrying, because it's a reflection on his ability to maintain the most minimal standard of control within his family. It's a reflection on his family, which also has shown an inability to maintain basic standards in the family. So, his remarrying opportunities are very, very severely restricted by virtue of this kind of evolution.

Id. at 55.

[56] Pasternak stated:

> If you take those two people who were involved in an adulteress [sic] relationship with the potential of divorce and you put them in our context here, it's odd that the situation reverses itself. That is to say, the woman, in that case, has a better advantage than the man here . . . . The Chinese woman who is now involved in an adulteress [sic] relationship that looks or is perceived to be moving in the direction of a possible divorce, she can look out into the Caucasian community and maybe find somebody there who doesn't know about all this. She has a chance. In China, she would have very little chance. But the man, who, in China, would have something of a chance, a diminished one, but nonetheless a chance, here, would have very, very little chance, particularly if he was a poor man, because he doesn't have the wherewithal to do it. He can't find a woman in the Chinese community who [doesn't think] he's a pariah and he will have virtually no chance in the Caucasian community to find a spouse. In a sense, he has lost his family.

Id. at 55–56.

"yellow fever" among white males and the desexualization of Asian men in America to assert that a Chinese "adulteress" would have no problem establishing a relationship with a white man, while the Chinese male cuckold would have no chance of finding a white woman. The Chinese male would be considered a "pariah" among Chinese women because he would be viewed as having been unable to "maintain the most minimal standard of control" within his family.[57]

Pasternak's bizarre portrayal of divorce and adultery in China in fact had little basis in reality.[58] When Assistant District Attorney Arthur Rigby pressed Pasternak for his sources during cross-examination, Pasternak mentioned fieldwork he did between the 1960s and 1988 (he could not remember the title of his own article), incidents he saw, such as a man chasing a woman with a cleaver, and stories he heard.[59] He admitted he could not recall a *single instance* in which a man in China killed his wife or having ever heard about such an event, yet he suggested that this was accepted in China.[60] Pasternak's description of "Chinese society" thus was neither substantiated by fact nor supported by his own testimony. The description was in fact his own *American* fantasy.

During his cross-examination of Pasternak, Rigby attempted to undermine Chen's "cultural defense" by deconstructing Pasternak's identification of "American," his description of Chinese as insulated from Western influence and his depiction of Chinese Americans as completely non-assimilated. Rigby began his questioning by asking, "What would you consider your average American?" Pasternak responded, "I think you are looking at your average American."[61]

With this statement Pasternak situated his own subjective position as the definition of the "average American." In other words, Pasternak defined the "average American" to be a white, professional male. By

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[57] *Id.* at 55.

[58] The number of divorces has risen steadily since 1980, following the Cultural Revolution and the 1981 marriage law reform allowing for "no fault" divorce; the historical peak of divorces was in 1953 when marriage laws introduced by the Communist government enabled women to escape feudal marriages. One Chinese judge remarked, "[Chinese] don't think divorce is shameful any more. It is the right of an independent man and woman. From this point of view the rate of divorce is a symbol of reform." Teresa Poole, *China Divorce is Too Close For Comfort*, INDEPENDENT, Apr. 13, 1993, at 8. *See also Survey Shows Divorce Rising Among Chinese*, CHI. TRIB., Oct. 11, 1992, at 5 (stating that the divorce rate more than doubled in the 1980s and reporting that the number of divorce applicants was about 20% of the number of marriage registrations); *Divorce Loses Stigma with 10% Annual Rise*, (BBC Summary of World Broadcasts, Oct. 8, 1992) (claiming that less than 12% of people in Chinese nationwide survey think divorce is disgraceful and that 42% of divorcees seek to remarry).

[59] Record at 105–08.

[60] *Id.* at 106–07. Pasternak gratuitously remarked: "It also happens, by the way, that the men are beaten. It isn't only the women. Sometimes, it's the men. In Inner Mongolia, a man drowned himself because his wife was beating him this summer." *Id.* at 85.

[61] *Id.* at 76.

situating himself as the "average American," Pasternak exposed his subjective identification as the "average American" against whom the "foreigner," Dong Lu Chen, was to be compared. He also demonstrated his identification with masculinity. He thereby abandoned any pretensions towards "objectivity" he might have claimed as an anthropologist and revealed his personal investment in his identity as dominant anthropologist[62] and white male, vis à vis the subordinated Chinese male and female objects of study.

When Rigby pressed Pasternak about whether he meant "Anglo Saxon male" by "average American," Pasternak responded by positioning "us"/"American" and "them"/"Chinese" as "two extremes."[63] When asked to identify what he meant by "American," he replied by describing American as not "Chinese."[64] With this explanation, Pasternak followed a tradition, identified as Orientalism, of dichotimizing the human continuum into "we" and "they" and essentializing the resultant "other."[65] When a dominant group essentializes a subordinated group by focusing on selected traits to describe the group as a whole, the dominant group defines its own characteristics in contrast to the subordinated group.[66]

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[62] By "dominant anthropologist" I refer to the power inherent in the relationship between anthropologist and subject of study, which is exercised through the anthropologist's dissemination of descriptive "knowledge."

[63] Record at 76.

[64] *Id.* Pasternak explicitly included white Anglo-Saxons, Jews, Blacks, Puerto Ricans, and Roman Catholics in his notion of "Americans," and contrasted them all with "Chinese."

Describing an "average American," Pasternak said:

> It's difficult to say what an average American is, but most of us are familiar with divorce. Most of us know something about adultery. Divorce rates are very high here. We become inure [sic] to this. They are not inure [sic] to this. This is a very remarkable thing to them still. We are at two extremes . . . . To a Chinese, it is a matter of great concern and it's uncommon.

Id.

[65] *See* EDWARD SAID, ORIENTALISM (1978). For a critique of white feminist essentialization of women of color see Caldwell, Harris, and Kline, *supra* note 7.

[66] The "West" characterizes the "other" as unchanging and homogenous in order to measure Western "progress" as well as to justify Western imperialism. Describing societies as "classically traditional" and governed by a set of fixed rules, as Pasternak did, masks power relations within those societies, for instance, Chinese men over Chinese women, and justifies the subjugation of those societies by the "West." Western anthropologists who subjugate in their descriptive function, missionaries who need to save the heathen, or colonists and imperialists who conquer in the name of bringing enlightenment and civilization are examples of subjugating forces. *See* ROSALDO, *supra* note 21, at 41–42.

This fetishization of "difference" has historically enabled global conquest and imperialism:

> Generalizations about the characteristics of a particular culture or the people of a particular nation helped define a national identity. Combined with political domination, they also involved generalizations about the people of the dominated

This fetishization of "difference" enabled Pasternak's creation of a "cultural defense" for Dong Lu Chen by depicting gender relations in China as vastly different from gender relations in the United States. The resulting image erased the prevalence of gendered violence in the United States and distanced the United States-based spectator from both Dong Lu Chen and Jian Wan Chen in a way that rendered them unrecognizable and inhuman.

After challenging Pasternak's definition of "average American," Rigby attacked his depiction of Chinese culture as insular and impermeable by outside influence. Rigby asked whether in the last ten years, since Nixon opened relations with China, China had "embraced Western culture" and if this had a "liberalizing" or "awakening" effect. "No," said Pasternak.[67] This question demonstrated that Rigby as well as Pasternak accepted a construction of China as a "closed" or "conservative" nation slumbering away, as compared to the "advanced" West. Rigby's method of attack thus depended in part on the same stereotypes he attempted to undermine.

Rigby, trying another approach, then asked: "Now in a situation where someone from China comes to the United States, let's say, for instance, comes to New York City, how quickly do they assimilate, if at all, the American culture?" Pasternak answered, "Very slowly, if ever . . . . Of all the Asians who come to this country, from my experience, . . . the people who have the hardest time adjusting to this society are Chinese. The Japanese do a lot better."[68]

Pasternak's statement obviously served his construction of Dong Lu Chen as inassimilable alien. His response failed to problematize the concept of assimilation, and its complete lack of historical or contextual specification unmasked ludicrous generalizations. Which "Chinese" was Pasternak referring to? Which "Asians?"[69]

Although Orden attempted to point out some of the flaws inherent in Pasternak's characterizations of Chinese culture and its relationship to Jian Wan Chen's death, Justice Pincus was swayed by the "persuasive-

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culture or nation as inferior and so provide justification for the existing power relationship.

Elaine Kim, *supra* note 43, at 111.

[67] Record at 81.

[68] *Id.* at 102.

[69] On redirect, Orden asked Pasternak to state whether seeing Dong Lu Chen bow when he entered the courtroom could lead him to conclude that Chen had not assimilated himself as an American. Pasternak responded that "Chinese do it when they feel enormous respect and the Japanese do it, of course." *Id.* at 118–19. The "Chinese" Pasternak attempted to define were a monolithic construction of his fantasy, a group peopled exclusively of bowing "Orientals."

ness" of Pasternak's testimony about the "cultural" roots of Dong Lu Chen's actions. He held:

> Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court [sic] would have been constrained to find the defendant guilty of manslaughter in the first degree. But, this Court [sic] cannot ignore . . . the very cogent forceful testimony of Doctor Pasternak, who is, perhaps, the greatest expert in America on China and interfamilial relationships.[70]

Pincus specifically found significant Pasternak's testimony that Chen lacked a Chinese community to act as a "safety valve" to keep Chen from killing his wife.[71] Yet the alleged motivation for Chen's actions was his "shame" and humiliation before this very same community. The inconsistency in this reasoning is self-evident.[72]

Pincus attempted to incorporate his newly acquired, inaccurate and essentialized understanding of Chinese culture into his sentencing decisions. At the probation hearing Pincus tried to integrate these lessons about the "Chinese" and how a "Chinese" is motivated by "honor" and "face":

> And I must have a promise from the defendant on his honor and his honor of his family he will abide by all of the rules and conditions that I impose . . . . And if he does not obey and he violates any of these conditions, not only does he face jail, but this will be a total loss of face.[73]

In his decision to grant probation rather than impose a jail sentence, Pincus also took other unrelated "cultural" considerations into account. Pincus believed that the possible effect of Chen's incarceration on his daughters' marriage prospects should be a factor in determining Chen's sentence. Pincus told a reporter, "Now there's a stigma of shame on the whole family. They have young, unmarried daughters. To make them

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[70] *Id.* at 301–02. After hearing the evidence and expert testimony during the course of the bench trial, Pincus considered counts of second degree murder, first degree manslaugter, and second degree manslaughter. *See id.* at 301.

[71] *Id.* at 302.

[72] Monona Yin of the Committee Against Anti-Asian Violence pointed out this inconsistency at a forum on the *Chen* case. Linda Anthony, *Women Discuss Protection for the Battered Following Controversial "Cultural Defence" Verdict*, KOREA TIMES, July 14, 1989.

[73] Record at 311.

marriageable prospects, they must make sure he succeeds so they succeed."[74] In the sentencing colloquy Pincus indicated that he also learned that Dong Lu Chen was a "victim":

> Based on the cultural background of this individual he has also succeeded in partially destroying his family and his family's reputation . . . . There are victims in this case: The deceased is a victim, her suffering is over. The defendant is a victim, a victim that fell through the cracks because society didn't know where or how to respond in time.[75]

Thus Pincus was able to justify his probationary sentencing: Dong Lu Chen did not serve time for killing his wife because in balancing this action and the surrounding circumstances *he* was just as much a "victim" as she was.[76]

But where was Jian Wan Chen in this story? The defense strategy rendered her invisible. She was most notably present in the testimony as a dead body[77] and as a reputed "adulteress," bringing a "stain" upon her

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[74] Shaun Asseal, *Judge Defends Sentencing Wife-Killer to Probation*, MANHATTAN LAW., Apr. 4, 1989–Apr. 10, 1989, at 4. Asseal also noted that Brooklyn prosecutors had considered Pincus a very tough sentencer. *Id.*

[75] Record at 355.

Pincus defended the probation sentence saying that Chen's cultural background "made him susceptible to cracking under the circumstances." His Chinese heritage did not excuse him but did create pressures that led him to beat his wife to death with a hammer: "He never displayed psychopathic tendencies . . . . This guy's not going to do it again and he has suffered. There's no question he's going to suffer every day of his life . . . . I don't think this man would have killed her under any other circumstances." Patricia Hurtado, *Killer's Sentence Defended: "He's Not a Loose Cannon,"* NEWSDAY, Apr. 4, 1989, at 17.

Hurtado reported that Pincus considered several other factors in rendering the sentence. Chen showed true remorse; the couple's two teenage children had asked that their father receive probation; and if Chen went to prison, "he might come out a real time bomb." Chen had also already served one and a half years in jail while awaiting trial, in isolation because he speaks a "rare Chinese dialect" (Chen speaks Cantonese and Toisan, neither of which can be called "rare") and had been beaten up by other inmates. Pincus concluded that "[t]his is just a terrible tragedy all around. If you could just see this broken and dejected man and his poor family . . . ." *Id.*

[76] In leniently treating a man who killed a woman, and in seeing male batterers as "victims," Justice Pincus was not unique. The Pace University Battered Women's Justice Center reports that sentences battered women receive for killing their abusive partners far exceed those for abusive men who kill their partners. The average sentence for a woman who kills her partner is 15 to 20 years, for a man, two to six. Nancy Gibbs, *'Til Death Do Us Part: When a Woman Kills an Abusive Partner, Is It an Act of Revenge or of Self Defense?*, TIME, Jan. 18, 1993, at 38.

[77] The forensic pathologist reported that Jian Wan Chen was five foot three and weighed 99 pounds. Her body was found with numerous carved lacerations on both sides of her head. She had contusions on both left and right forearms, a contusion on her right wrist, an abrasion at the back of her left hand, and a bruise on her left thumb. The marks on her head were consistent with having been hit by a hammer. There were depressed

husband.[78] Jian Wan Chen did not exist as a multi-faceted person but was instead flattened into the description "adulteress." Any discussion of her at trial was premised upon her characterization as a woman who provoked her husband into jealousy. How should this flattening be interpreted? This invisibility and erasure of the woman, Jian Wan Chen?

Jian Wan Chen's invisibility involved more than the disappearance of a victim in a trial focused on the guilt or innocence of a defendant. The defense presented a narrative that relied on her invisibility as an Asian woman for its logical coherence. This invisibility was manifest through the absence of Jian Wan Chen as a subject, a void that was filled only by stereotypes of the sexual relationships of "Chinese women" and an image of her silent physicality. She appeared as an object, whose silence devalued her humanity to the extent that the taking of her life did not merit a prison sentence.

Jian Wan Chen's invisibility is a legacy of an intersection of race and gender that erases the existence of women of color from the popular consciousness.[79] Because white male citizens personify what is considered "normal" in the United States, a status as "other" that is more than one deviation away from the "norm" rarely exists in popular consciousness.[80] The exclusion of Jian Wan Chen exemplifies the difficulty that women of color have when attempting to express themselves as holistic subjects, as Asian women whose identity lies at the intersection of multiple forms of subordination.[81]

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skull fractures under her lacerations, indicating that a great amount of force was applied to a small surface area. The injuries on her arms, wrist, and hand were consistent with someone holding her or with her warding off a blow from a hammer. They were also consistent with an individual holding her down and striking her in the face with a hammer. *See* Record at 132–43.

[78] Two of their children testified that they had heard their parents arguing, their father accusing their mother of having another man, and their mother saying "So what, it is so," which could substantiate Dong Lu Chen's allegations that she was having an affair. Both children, however, stated that they had never seen their mother hit their father, as Dong Lu Chen contended. *See* Record at 183–84, 213, 217, 219.

[79] *See supra* note 7. By focusing here on race and gender, I do not intend to assert that only race and gender are critical to the experiences of women of color. Factors such as class, sexual orientation, language, and immigration status are often as critical. For an analysis using postcolonial discourse to examine the intersection of language, gender, race, class, and national origin in the lives of Latinas, see Celina Romany, Sculpting Identities: Carving a Niche for Latinas in Feminist Legal Theory (unpublished manuscript on file with the *Harvard Women's Law Journal*).

[80] Many of the experiences women of color face are not subsumed within the traditional boundaries of race and gender, nor of race and gender discrimination. *See, e.g.*, Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 7 (arguing that Black women suffer employment discrimination without redress because employers point to the presence of white women and Black men to indicate an absence of race and sex discrimination).

[81] The needs of women of color are not fully met by structures or political movements designed to address either race or gender. *See, e.g.*, Margaretta Wan Ling Lin & Cheng Imm Tan, *Holding Up More than Half the Heavens: Domestic Violence in Our Commu-*

Applying an intersectional analysis, it is clear that what Pasternak presented as "Chinese culture" privileged race over any consideration of gender oppression. Pasternak's perspective was "male," obviating the possibility that a woman, and specifically a Chinese immigrant woman, might describe divorce, adultery and male violence within "Chinese culture" very differently. The perspective, was, of course, also "white." The "whiteness" of Pasternak's perspective allowed him to situate Dong Lu Chen in a category labelled "Chinese" diametrically opposite to Pasternak's own "average," white, male citizen position. Yet this placement ignored that Jian Wan Chen was, in fact, the person categorically opposite to Pasternak: she was Chinese, immigrant and *female*. Thus, the "cultural defense" served in this case to legitimize male violence against women by glossing over the gendered aspects of Pasternak's testimony about "culture."

The *Chen* trial suffered from a complete absence of any female perspective: Dong Lu Chen, Pasternak, Orden, Rigby and Pincus were all male. Jian Wan Chen was dead, symbolizing how ideologies that subordinate groups of people literally transpire over the body of an "other." Thus, Jian Wan Chen's invisibility is not only the product of the racist notion that "Asian life is cheap,"[82] it also is a remnant of the indifference with which many in the United States treat the epidemic of violence against women.[83] Furthermore, the complete disregard for her life also reflected the way racism and sexism intersect to render insignificant violence against women of color, and here specifically, Asian immigrant women.

The impact of the trial and probationary sentencing resonated beyond the courtroom, sending a message to the wider community. Jian Wan Chen's life was not valued; her life was worth less than other lives; her murderer did not deserve punishment in jail. Other Chinese immigrant women living with abuse at the hand of their partners and husbands identified with Jian Wan Chen and clearly understood that violence against them by their partners and husbands had the implicit approval of the state.[84]

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nities, A Call for Justice, in THE STATE OF ASIAN AMERICA: ACTIVISM AND RESISTANCE IN THE 1990S 321 (Karin Aguilar-San Juan ed., 1994); Document to Share with the Anti-Asian Violence Movement (unpublished manuscript on file with the *Harvard Women's Law Journal*) (critiquing the invisibility of violence against Asian women in the anti-Asian violence movement).

[82] During the Vietnam War, many in the United States propagated the idea that Asians did not place the same value on life as those in the "West." *See* Richard Reeves, *Guns and Foreigners in America*, SACRAMENTO BEE, June 7, 1993, at B12.

[83] A 1992 United States Surgeon General report attributed the leading cause of death among women to domestic violence. *United States, Look at the Violence Against Women, Democrats Told*, IPS, July 14, 1992.

[84] *See* Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown, Battered Asians Shocked By Husband's Probation*, NEWSDAY, Nov. 26, 1989, at 4.

The *Chen* decision sent a message to battered immigrant Asian women that they had no recourse against domestic violence. One battered Chinese woman told a worker at the New York Asian Women's Center, "Even thinking about that case makes me afraid. My husband told me: 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.'"[85] In other words, her husband could afford to hire someone to testify as an expert to bolster a "cultural defense" that legitimized his violence.[86] The New York Asian Women's Center co-director reported that battered women who had previously threatened their husbands with legal sanctions also lost this threat as a means to stop the abuse: "For some women this has worked, but no more. They tell me their husbands don't buy it anymore because of this court decision."[87]

III. RESPONSE TO THE CASE: LIMITED POSITIONS

After Pincus's decision in the *Chen* case, a coalition of Asian American community activists and white feminists protested and planned to file a complaint against Pincus with the state Commission on Judicial Conduct.[88] The coalition, however, rapidly fragmented. White feminists like Elizabeth Holtzman[89] and the National Organization for Women wanted to completely ban any consideration of culture from the courtroom, while Asian American activists from the Organization of Asian Women, the Asian American Legal Defense and Education Fund and the Committee Against Anti-Asian Violence were unable to agree with that position.[90] Asian American groups wanted to be able to retain the possibility of using the "cultural defense" in other contexts. Francoise Jacobsohn, president of the New York City National Organization for Women chapter, said that she understood the concerns of the Asian American organizations but felt frustrated:

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[85] *Id.*

[86] The importance of economic class in access to and experience in the legal system is often overlooked and cannot be underestimated. *See* GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

[87] Jetter, *supra* note 84.

[88] Hurtado, *supra* note 75. City University of New York Assistant Law Professor Sharon Hom charged: "This kind of thinking reinforces patriarchal and racial stereotypes—which don't even exist in China today. This is like saying, 'My goodness, Americans lynch blacks, let's let them do it,' just because lynchings have happened in the past." *Id.*

[89] Elizabeth Holtzman was the District Attorney for Kings County when the *Chen* case was heard.

[90] *See* Jetter, *supra* note 84.

> They were afraid that we were going to go around with a battering ram and destroy the whole concept of a cultural defense. But the judge needed to know that we did not find his statements acceptable.[91]

The philosophical division that fragmented this coalition is symptomatic of the split that exists between white feminists and feminists of color. White feminists saw the case as indicating that a defendant's cultural background should never be taken into account in deciding a sentence: according to Holtzman, we should have only "one standard of justice."[92]

Holtzman's position is one example of a number of different responses to the "cultural defense" taken by legal scholars. As yet, none have effectively navigated between the extremes of condemning the defense in all cases or promoting the defense in the interest of cultural pluralism. Neither of the extremes is satisfying because they both fail to acknowledge that the multiple subordinations existing within immigrant communities are relevant to the choice of whether to support the use of the "cultural defense" in any one case.

The position that a defendant's cultural background should never be taken into account not only denies that our legal system already has a culture, but also rests on other troubling assumptions. Julia Sams's article is probably the most egregious example of law review literature that espouses this "no culture in the courtroom" position, and an examination of her article unmasks the xenophobia and positivism that can lurk underneath this stance.[93]

Sams writes:

> The response of United States courts to this [novel] theory is significant because it stems from an increasingly urgent problem in the United States—the collision of foreign cultures with the United States legal system.[94]

She states in a footnote: "This conflict has been aggravated by the rising population of immigrants and refugees, most of whom are Asian."[95] In other words, Asian immigrants—whom she labels "foreign newcomers"—are responsible for the urgent problem of collision of their "foreign" cultures with the U.S. legal system.

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[91] *Id.*
[92] *See* Anthony, *supra* note 72.
[93] *See* Sams, *supra* note 20.
[94] *Id.* at 335–36.
[95] *Id.* at 336 n.6.

Sams bases her dislike of a formalized "cultural defense" on the theory that "[l]ack of cultural conformity and ignorance of the United States law by such people pose serious threats to the court systems and communities in which they settle."[96] She expresses the concern that allowing a "cultural defense" will strip the criminal law of its deterrent function:

> If [foreign newcomers'] incentive to learn about the judicial system is diminished, their communities will likely continue to fluctuate between following the newcomers' alien customs and those of their newly adopted American ways.[97]

Allowing those immigrants to follow their "alien" ways through granting them a "cultural defense" is also unfair, says Sams, to the majority of Americans who cannot use it.

Sams ultimately touts assimilation as the key to success.[98] She suggests that rejecting the "cultural defense" is a means to encourage and accelerate the assimilation process:

> By rejecting the "cultural defense" and therefore not excusing the immigrants' ignorance, the courts will encourage them to adapt more quickly to the legal system of their new homeland. This hastened assimilation by the newcomers to unfamiliar laws may aid their assimilation into other aspects of life in the United States.[99]

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[96] *Id.* at 345.

[97] *Id.* at 348.

[98] *Id.*

[99] *Id.* at 348–49. She states that "[t]he United States lifestyle is easier to adopt for immigrant groups who come from more modern countries, such as Japan and Korea. Groups like the Hmongs, however, have had little exposure to the western world. Thus, even the simple rules and regulations of everyday life . . . can be confusing." *Id.* (citation omitted). As an example Sams notes:

> [T]he Hmongs also have a habit of butchering pigs in their backyards. This custom violates local ordinances and disturbs other residents in the neighborhoods. If the tribesmen are warned by the police and punished by the courts for violating these laws, then perhaps they will alter their custom of food preparation. The Hmong's conformity will bring them within the law, thereby encouraging a better relationship between them and the Americans into whose communities they have settled. This process of conformance is known as "enculturation."

Id. at 349 (citing Thompson, *The Cultural Defense*, 14 STUDENT LAW. 25, 27 (1985)).

In other words, "foreign newcomers"—read immigrants—are to be hounded by the police and legally sanctioned unless they stop those cultural "practices" that bother their "American" neighbors. The power dynamic, implicit in who needs to adjust to whom, is clear despite the original relationship between the United States, Vietnam and Laos that created the refugee status of the Hmong and forced them to emigrate here. Sams also seems to think that punishment is an appropriate way to aid the process of "encultera-

Lastly, Sams makes the positivist argument that upholding the principle of legality is reason enough to disavow any "cultural defense." This is because "the necessary elements of a legal order are that rules of law with 'objective meanings' are declared by 'competent officials' and only those meanings of the rules are the law."[100] The legal regime "'opposes objectivity to subjectivity, judicial process to individual opinion, [and] official to lay' opinion."[101]

Patricia Williams discusses this reliance on "objectivity," "judicial process" and "official opinion" in her description of the characterizations of Anglo-American jurisprudence.[102] Claims by subordinated groups are frequently met by assertions like Sams's of a competing claim of the need for social order, or for legal order in the form of hegemonic authority to control an unruly populace.[103] This claim for social order fails to recognize the inherent subjectivity of legal standards and masks the oppressive force of the law against subordinated communities.

Other scholars have taken a more sophisticated position than Sams by criticizing the "cultural defense" as justifying violence against women.[104] Generally, articles in this vein only examine "cultural defense" cases such as the *Chen* case that can be condemned easily within a Western feminist framework.[105] Melissa Spatz calls for human rights law as the

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tion," but punishing immigrants for butchering pigs in their backyards might, in fact, worsen the relationship of immigrants to the police.

[100] *Id.* at 351 (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382, 383 (2d ed., 1960)).

[101] *Id.* at 352 (quoting HALL, *supra* note 100, at 383).

[102] Professor Williams writes:

> "Theoretical legal understanding" is characterized, in Anglo-American jurisprudence, by at least three features of thought and rhetoric:
> 1) The hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication: rights/needs, moral/immoral, public/private, white/black.
> 2) The existence of transcendent, acontextual, universal legal truths or pure procedures . . . . The more serious side of this essentialized world view is a worrisome tendency to disparage anything that is nontranscendent (temporal, historical), or contextual (socially constructed), or nonuniversal (specific) as "emotional," "literary," "personal," or just Not True.
> 3) The existence of objective, "unmediated" voices by which those transcendent, universal truths find their expression. Judges, lawyers, logicians, and practitioners of empirical methodologies are obvious examples . . . .

PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 8–9 (1991).

[103] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (exclusion order requiring all persons of Japanese descent to leave their homes on the West Coast upheld on the basis of the need for national security); Dred Scott v. John Sandford, 60 U.S. (19 How.) 393 (1857) (allowing Blacks to be citizens would inevitably produce "discontent and insubordination" and endanger "the peace and safety of the State"); Fong Yue Ting v. U.S., 149 U.S. 698, 717 (1893).

[104] *See, e.g.*, Rimonte, *supra* note 20; Spatz, *supra* note 20.

[105] Rimonte's article focuses solely on the "cultural defense" in cases involving

universal standard to judge cases in which cultural contexts legally sanction the killing of wives.[106] This analysis does not address more thorny issues involving the use of culture in the courtroom, for example, in contexts that do not fit so neatly within a feminist framework. One such difficult case is the *Wu* case,[107] which involved a mother who killed her son.

White feminists' failure to broach the complex issues raised by cases that do not easily fit within the feminist framework exemplifies their difficulty in recognizing that women of color also belong to communities of color and that they are not "just women." Women of color must continually navigate and choose where and when to articulate allegiances that are often presented as antithetical. Many white feminists repeatedly fail to recognize this multiple subordination, and continue to deny that subordination along lines other than gender gravely impacts women of color.[108] Analyzing what underlies the notion of a "cultureless" courtroom demonstrates the trouble facing feminists who want to disavow any considerations of "culture" in favor of "American" law or "international human rights."[109]

To say that there should be no "culture" in the courtroom is to claim that non-immigrant Americans have no "culture." It is impossible to hold on to this dichotomy without falling into the paradigm of the "West" as somehow "neutral" and "standard." Embracing the diversity and plurality of the United States necessitates a decentering of this "neutral"

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violence against women. She asserts the "cultural defense" validates "Pacific-Asian patriarchal values" that promote or facilitate crimes against women. Her solution is to apply United States laws that proscribe violence uniformly. *See* Rimonte, *supra* note 20, at 1326. For a critique of using Asian culture to explain violence in the Asian community, see *infra* notes 159–161 and accompanying text.

[106] *See* Spatz, *supra* note 20. This is a strategic move that characterizes the "women's rights as human rights" movement. For an explanation of this movement see Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990).

[107] *See infra* part IV.

[108] For an example of an interchange raising some of these issues, see Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?* 4 YALE J.L. & FEMINISM 13 (1991) and the subsequent response from members of the Yale Collective on Women of Color and the Law, Students, *Open Letters to Catharine MacKinnon*, 4 YALE J.L. & FEMINISM 177 (1991).

[109] Turning to international human rights law seems somewhat less problematic because there is greater consciousness among feminists that the international instruments created through the "women's rights as human rights" movement are designed to be applied to women in highly diverse communities across the world. Thus, the legal instruments used will be contested by different groups. Fitting one feminist standard to different contexts is a challenging process, requiring recognition of how structures of power construct gender differences.

See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 121 (criticizing existing human rights discourse as "unresponsive to the most basic rights of women," and calling for "a dialogue which forces the anti-subordination thrust of feminism through the filter of cultural diversity").

standard as the "norm." A feminist position that equates "West" with "feminist" is also predicated upon the popular misconception that feminism only flourishes in the "West."[110] This view relies on what Professor Laura Nader describes as a "grid of positional superiority,"[111] whereby white feminists in the "West" tend to ignore the subordination of women in the "West" or of white women, exaggerate the subordination of women in non-"Western" countries or in communities of color, and deny the existence of feminist movements in non-"Western" countries or among women of color.[112] This sense of "positional superiority" also denies the devastation Western colonialism has wrought on women's status in the "Third World" and in communities of color in the United States.[113]

A different version of "feminist imperialism" does not privilege the status of women in the "West" or of white women as non- or less oppressed but rather posits all women as predominantly linked across history and culture by the force of sexual domination. This view, characterized for example by some of the work of Mary Daly[114] and Catharine MacKinnon,[115] is problematic in its tendency to essentialize

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[110] The existence of a formation that can be called "West" relies on the same technique that Pasternak used to distinguish "American" and "Chinese." In other words, a "West" requires there to be an "East," or, as formerly named, "the Orient." While it is no longer in vogue for some to refer to the "Orient" (harkening to the "primitive" and "Oriental"), references to "Western," usually implying sophistication, advancement, and enlightenment remain uninterrogated; we still refer to the "West" while only silently acknowledging that this paradigm relies upon an "East."

[111] Laura Nader, Professor of Anthropology, University of California at Berkeley, Speech at Harvard University (1988). Nader points to the equal pay for equal work women get in many Islamic countries, unlike in the United States, and to the comparative percentages of women on the faculty in 1980 at U.C. Berkeley (approximately 10%) and at Rabat, Mohammed V University in Morocco (38%) as examples that should disrupt the "positional superiority" with which many American feminists look at Islamic countries. *See* Tanya Schevitz Wills, S.F. EXAMINER, Oct. 11, 1993, at A8.

[112] For example, Cathy Young, Heritage Foundation lecturer, contends that the use of "cultural defense" in the courtroom promotes sexism; she premises this argument upon her belief that non-Western cultures are more sexist than "American" culture, and thereby queries why one would want to recognize non-Western culture within American legal standards. Cathy Young, *Equal Cultures or Equality for Women? Why Feminism and Multiculturalism Don't Mix*, THE HERITAGE LECTURES No. 387, 1992.

For a more subtle version of this position, see Lori Heise, *Crimes of Gender*, WORLD-WATCH (Mar.-Apr. 1989) (detailing violence against women "worldwide" almost exclusively with examples of violence in "Third World" countries and calling for international action because governments in "tradition-bound nations" are unlikely to support women's rights).

[113] *See generally* GITA SEN & CAREN GROWN, DEVELOPMENT, CRISES, AND ALTERNATIVE VISIONS (1987) (addressing the role of women in development from the perspective of third world women).

[114] *See generally* MARY DALY, GYN/ECOLOGY (1978) and AUDRE LORDE, *An Open Letter to Mary Daly, in* SISTER OUTSIDER (1984).

[115] *See generally* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987). For a critique of feminist essentialism in this text, see Paulette Caldwell et al., *supra* note 7.

women and to deny the importance of forces of subordination that are not based on gender. An exclusively gender-based perspective conceptualizes "culture" either as acting only as a source of subordination, or alternatively as not having a specific influence on women's experiences.

Yet a position on the "cultural defense" that has *no* gender content is also problematic for women. A 1986 Harvard Note[116] analyzes the "cultural defense" from a position of cultural relativism, an anthropological perspective that withholds any condemnation of "cultural practices" of communities not one's own.[117] The Note argues for recognition of a formal "cultural defense" in the interests of individualized justice,[118] cultural pluralism[119] and social order.[120] I discuss why a formalized "cultural defense" is problematic and should not be promoted below in Part V.

Although the Note author recognizes the prevalence of racism in the judicial system and is concerned that the values of immigrants be respected, the author does not problematize what constitutes "culture." The Note author is thus willing to accept executing an adulterous wife as a foreign cultural "value." The author explains:

> Immolating one's own children for the sake of honor, executing an adulterous wife, and lashing out at someone in order to break a voodoo speak may seem very bizarre—indeed barbaric and disturbing—to the majority. But this is no reason to attempt immediately to quash the values of foreign cultures. American society has thrived on tolerance, curiosity towards the unknown, and experimentation with new ideas.[121]

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[116] Note, *supra* note 20.

[117] Cultural relativism is harmful because, in "a world of radical inequality, relativist resignation reinforces the status quo." Mary Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 SIGNS 533, 557 (1989). Pasternak's testimony in the *Chen* case was premised upon a perspective of cultural relativism. *See supra* notes 38–69 and accompanying text.

[118] This term refers to justice for the immigrant who does not yet know American law or who is compelled to commit "a criminal act solely because the values of her native culture compelled her to do so." Note, *supra* note 20, at 1300.

[119] The author asserts that: a "cultural defense" would recognize cultural pluralism, which will maintain the "vigor" of the United States; would reflect American principles of equality for all; and would value the American commitment to liberty. *See id.* at 1300–01.

[120] According to the author, use of a "cultural defense" would not inhibit the social order or deterrent function of the law. In fact, recognizing other communities' cultural values is a way of ensuring that groups do not become alienated and subsequently hostile, disrupting social order. Thus, "[r]ecognition of a cultural defense is one way of preserving a nucleus of values that, although leading to undesirable behavior in some contexts, encourages law-abiding conduct in many others." *Id.* at 1305.

[121] *Id.* at 1311.

The Note suggests limiting the scope of the "cultural defense" on the basis of the likelihood of recurrence and the severity of the crime. Since the author asserts that the only way to differentiate cases is based on the severity of the crime, patterns of subordination within immigrant communities lie unexamined. The author fails to interrogate what "culture" really means, or to identify who labels what as "culture." The author does not recognize that differently situated people within a community experience "culture" differently, or that Asian women might not find violence against them a good basis for "tolerance" and "experimentation with new ideas." Thus, the author falls into the trap of advocating a position that could justify Pasternak's "defense."

The Note and Sams's article thus illustrate two extreme positions with regard to the defense: a formalized "cultural defense" or no consideration of "culture" at all. In response to the *Chen* case, organizations like the Asian American Legal Defense and Education Fund and the Committee Against Anti-Asian Violence attempted to navigate a middle ground between white feminist positions calling for "no culture," and the position of cultural relativism underlying Pasternak's "cultural defense" and the Harvard Note. Similarly, in this Article I strive to mediate a new position in the chasm between an adoption of the "cultural defense" premised on cultural relativism, and a rejection of the defense based on xenophobia or the inability to understand that Asian women may benefit from some consideration of "culture." The next Part, in which I describe the case of Helen Wu, demonstrates why community-based organizations may want to retain the opportunity to admit cultural information into criminal trials in very different contexts than the Dong Lu Chen case.

IV. NOT A GOOD MOTHER: *THE PEOPLE V. HELEN WU*[122]

After strangling her son, Sidney Wu, with the cord from a window blind, Helen Wu was convicted of second degree murder and was sentenced to a term of fifteen years to life by a California Superior Court.[123] She appealed, claiming in part that the trial court committed reversible error by refusing to give a jury instruction about the effect her cultural

[122] People v. Helen Wu, 286 Cal. Rptr. 868 (1991), *rev'g* No. ICR 12873 (Super. Ct. Riverside Co. 1990), *rev. denied* Jan. 23, 1992 (unpublished opinion). While the Reporter of Decisions was directed not to publish this opinion, it is still valuable for the fact pattern it presents and instructive as to problems inherent in the use of the "cultural defense."

[123] *Id.* at 869.

background might have had on her state of mind when she killed her son.[124]

Compared to Dong Lu Chen's case, Helen Wu's case presents a more compelling reason to admit cultural information and a more accurate and individualized portrayal of cultural factors influencing the defendant's behavior. The case, however, also highlights a second tier of problems inherent in the use of the "cultural defense"—the limitations posed by linking behavior to identity.

Helen Wu was born in 1943 in Saigon, China.[125] In 1963 she met Gary Wu, who emigrated to the United States that same year and married another woman. In 1978 or 1979 Gary Wu contacted Helen and said that he heard she had been married, was divorced and had a daughter.[126] He told her that his marriage was unsatisfactory because his wife was infertile and that he planned to divorce her. They discussed the possibility of Helen emigrating to the United States and bearing a child for him. Helen, who was in love with him, believed that Gary would marry her after he divorced his wife.

Gary Wu sent Helen money so that she could apply for a visa and in November 1979 she came to the United States. At his request, Helen brought most of the money he had sent her. Upon her arrival he told her his divorce proceedings would be completed soon and that he would marry her. Gary then obtained a divorce but did not tell Helen.[127]

Helen Wu conceived a child with Gary in early 1980. After Sidney was born, Gary still made no overtures regarding marriage. Helen was depressed, could not speak English, could not drive, and had no support system in the United States. She told Gary that she intended to return to Macau, thinking that he would persuade her to stay. After he failed to do so, she returned to Macau without Sidney because she did not wish people in Macau to know she had had a baby out of wedlock.[128]

For the next eight years Helen repeatedly asked Gary to bring Sidney to visit her in Macau. In 1987 he said that he needed money and agreed to bring Sidney in return. During his visit, Helen showed him a certificate of deposit for a million Hong Kong dollars, which belonged to a friend. He proposed marriage, but she declined, depressed because the proposal seemed to be because of "her" money and because she did not

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[124] She also contended that the court committed reversible error by refusing to instruct the jury on the defense of unconsciousness. *Id.* at 870.

[125] The following presentation of facts is what the appellate court described as "the evidence . . . upon which defendant's requested instructions were predicated." *Id.* at 870. In other words, this is Helen Wu's version of the facts.

[126] Her daughter was 25 at the time of trial. *Id.*

[127] *Id.* at 870–71.

[128] *See id.* at 871.

know if he was still married. She was so distraught she tried to kill herself.[129]

Helen came to the United States again in 1989 and visited Gary's ill mother, who said that Helen should take Sidney when she died because Gary would not take good care of him. That September Gary and Helen were married in Las Vegas. On the drive back, she asked him if he married her for her money, and he responded that until she produced the money, she had no right to speak.

Eight days later Helen saw Gary beat Sidney. Sidney then told her that the house they were staying in belonged to another woman, Rosemary, who was Gary's girlfriend. Sidney also told her that Gary called Helen "psychotic" and "very troublesome," and that Gary beat him.[130]

After hearing this, Helen began to experience heart palpitations and have trouble breathing. She told Sidney that she wanted to die and asked him if he would go too. He clung to her neck and cried. Helen cut the cord off a window blind and strangled her son. She stopped breathing, and when she started again, she was surprised how quickly he had died.

Helen wrote Gary a note saying that he had bullied her too much and that "now this air is vented. I can die with no regret." After failing in an attempt to strangle herself, she then slashed her left wrist with a knife in the kitchen. Helen returned to the bedroom and lay down next to Sidney on the bed, after first placing a waste-paper basket under her wrist so the floor would not be dirtied with her blood. Gary returned several hours later to find Sidney dead and Helen in a decreased state of consciousness. She was taken to an emergency room and revived.[131]

Based on these facts and the evidence at trial, the appellate court reversed and remanded the case.[132] The court found that the trial judge should have instructed the jurors that they could choose to consider Helen Wu's cultural background in determining the presence or absence of the various mental states that were elements of murder.[133] The trial court had refused to give the instruction, commenting that it did not want to put the "stamp of approval on [defendant's] actions in the United

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[129] *See id.*

[130] *Id.* at 871–72.

[131] *Id.* at 872.

[132] *Id.* at 887.

[133] *Id.* at 882–83. A tailored jury instruction may not have been necessary, since jury instructions in California contain a great deal of leeway. In addition, the recommendation by the appellate court that "cultural difference" be a jury instruction was presumably the reason the case was unpublished, since there was no basis for the appellate court's recommendation in California law. Telephone Interview with Jayne Lee, Spaeth Fellow, Stanford University (Jan. 16, 1994).

The appellate court also held that the trial court committed reversible error by refusing to instruct the jury on the defense that she was unconscious when she strangled Sidney. *Wu*, 286 Cal. Rptr. at 873.

States, which would have been acceptable in China."[134] The appellate court held that evidence of Helen's cultural background was relevant to the elements of premeditation and deliberation, and found that cultural information was also relevant to the issues of malice aforethought and the existence of heat of passion because it could potentially reduce an intentional killing to voluntary manslaughter.[135]

At the initial trial, the prosecution and defense attempted to paint very divergent views of Helen Wu. They both focused on whether she had "motherly" feelings towards Sidney, and whether she was a "traditional Chinese woman."

> Initially, we note that the facts presented at trial, while not in conflict as to certain specific events, did vary considerably as to whether defendant had "motherly" feelings toward the victim, her son, whether she was a "traditional" Chinese woman, and, based on the above noted factors, whether the motive for his death was a desire for revenge against Sidney's father or guilt over having not taken good care of the child and fear that he would be ill-treated in the future.[136]

On appeal, the prosecution argued that the court did not give the instruction because the evidence that Helen Wu had the values and motives of a traditional Chinese mother was contradicted by other evidence, and because their expert noted that nothing in Chinese culture or religion encouraged filicide. The appellate court responded that a conflict in evidence did not mean the jury should not have been given an instruction.[137]

The appellate court held that there was ample evidence of both Helen Wu's cultural background and the impact that her background might have had on her mental state. Unlike in the *Chen* case, the defense offered some of this information through experts on "transcultural psy-

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[134] *See id.* at 880.

[135] *Id.* at 883.

[136] *Id.* at 870. According to the court of appeals:

> The prosecution's theory seems to have been that defendant killed Sidney because of anger at Sidney's father, and to get revenge. The defense's theory was that defendant believed that Sidney . . . was looked down upon and was ill-treated by everyone except his paternal grandmother because he had been borne out of wedlock, and that when she learned that the grandmother was dying of cancer, she felt trapped and, in an intense emotional upheaval, strangled Sidney and then attempted to kill herself so that she could take care of Sidney in the afterlife.

Id.

[137] *Id.* at 880.

chology."[138] These experts testified that Helen Wu's emotional state was intertwined with and explained by her cultural background. They described Helen's actions in killing her son as stemming not from an evil motive, but from her love for Sidney, her feeling of failure as a mother and her desire to be with her son in another life. One expert, Dr. Chien, testified about the cultural context within which Helen acted:

> She thought the only way to find out a way out is to bring this Sidney to go together so the mother and son can finally live together in the other heaven, other world if that cannot be done in this realistic earth . . . . [S]he was under the heat of passion when she realized that her son was unwanted son, uncared by Gary, passed around from one woman to the other woman, and now the grandmother is dying and she was planning to leave, 'What will happen to Sidney?' And all this information came up to her mind to stimulate all her guilt feeling which was probably more than ordinary guilt feeling that some depressive person would feel . . . . [I]n my expertise as a transcultural psychiatr[ist] . . . with my familiarity with the Chinese culture . . . and from the information interview I obtain from Helen, she thought she was doing that out from the mother's love, mother's responsibility . . . .
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> It's a mother's altruism. This may be very difficult for the Westerner to understand . . . . But in the Asian culture when the mother commits suicide and leaves the children alone, usually they'll be considered to be a totally irresponsible behavior, and the mother will usually worry what would happen if she died . . . .[139]

In addition to Dr. Chien, the defense called another expert to explain the influence of Helen's cultural context on her behavior. Psychologist Terry Gock stated:

> [S]he in many ways is a product of her past experiences, including her culture . . . . [I]n some sense the kind of alternatives that she . . . saw how to get out of that situation was quite culturally determined . . . perhaps in this country, even with a traditional woman may, may see other options. But in her culture, in her own mind, there are no other options but to, for her at that time, but to kill herself and take the son along with her so that they could sort of step over to the next world where she could devote herself, all

[138] Transcultural psychology involves "culturally sensitive" evaluations and treatment that recognize variations in mental illnesses among ethnic groups. *Community Profile: Dr. Francis Lu*, ASIANWEEK, Aug. 27, 1993, at 4.

[139] *Wu*, 286 Cal. Rptr. at 885.

> of herself to the caring of the son, caring of Sidney . . . . Her purpose . . . in many ways . . . is a benevolent one.[140]

This presentation of cultural information avoided some of the pitfalls exemplified by Pasternak's "cultural defense" of Dong Lu Chen.[141] Here, the "experts" extensively interviewed the defendant, so that the focus of their testimony was on the individual and how her behavior fit into their conceptions of "culture," in contrast to Pasternak's focus on "the Chinese" and his attempt to fit Dong Lu Chen into that generalization. In addition, Helen Wu's "experts" based their theory on "transcultural psychology." Their analysis was based on the experience of people who migrate to the United States rather than in "culture" as observed in the country of origin. Finally, the "experts" *were* experts in the sense that they were immigrants to the United States themselves and were thus invested in representing the experience of immigrants from a subjective position. Their position stands in contrast to the white anthropologist Pasternak, whose subjectivity was based on an oppositional position to the "other," Dong Lu Chen, veiled behind a pretense of objectivity.

Although advocating that expert witnesses offer a subjective point of view flies in the face of traditional reliance on "objective" testimony, subjective cultural experts may present a fuller, more human analysis of the defendant. This is especially true because the "othering" that Pasternak practiced will not transpire. In other words, it may be more difficult to obscure the power relations within an immigrant community through a monolithic description of "culture" if the person doing the describing is from that community. This increased accuracy may result because the experts' description is more suspect as "less objective" and therefore more closely examined. More importantly, someone from an immigrant community may have more difficulty describing another member of that community in a way that completely denies her humanity.

In addition to providing a "subjective" perspective on Helen Wu, the experts testifying on her behalf also successfully collapsed the "difference" created between the culture-less "American" and the "cultural" Chinese.[142] By flattening this difference between the person accorded with a "cultural defense" and Americans with an "invisible culture," the jury could envision the defendant without the bizarre and dehumanizing

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[140] *Id.* at 886.

[141] Differences between the expert testimony in the two cases may also reflect differing ways in which litigants choose to present expert testimony when trying a case before a judge versus a jury, or the different legal standards in California, where diminished capacity is not recognized, and in New York.

[142] On bridging the distance between "us" and the "other," see Isabelle Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1991–92).

distance that resulted from the *Chen* defense. Helen Wu was not protrayed as alien and other.[143]

For example, Professor Juris C. Draguns, a clinical psychologist and expert in the area of cross-cultural psychology testified at Helen Wu's trial about parent-child suicide by American mothers in 1920s Chicago. These mothers apparently did not yet regard their infant children as separate personalities with a right to live, but rather, as part of themselves. Draguns found this tendency to interpret the interests and attitudes of another in terms of one's own interests neither abnormal nor unusual. In cases where the attitude led to parent-child suicides, the mother did not regard herself as doing anything criminal or even wrong. She was motivated by love, pity and sympathy, and acted to remove someone from suffering that she had endured and that the other would, in time, also encounter.[144] Draguns's testimony about similar occurences of parent-child suicide in the United States thus helped to collapse cultural differences between "American" and "Chinese" culture.

Despite an improved presentation of "culture" in the *Wu* case, the use of a "cultural defense" still presents problems because of the ease with which culture may be reduced to stereotype and the likelihood that an inquiry into the defendant's "culture" becomes one into the defendant's identity within her "cultural" group. Because the defense explained Helen Wu's actions on the basis of cultural determinism—in other words, that she acted in a particular way because of who she was—the focus of the inquiry became *who she was* rather than *what she did*. If Helen Wu could not meet the threshold test of showing that she fit into the category "traditional Chinese woman," as translated by the trial court as a "good mother," then she would not receive the benefit of cultural information that might have helped explain her actions.

The particular threshold test that the trial court applied to Wu relied on a stereotype of Asian women as the self-sacrificing woman/mother.[145] We can speculate that the trial court felt persuaded that Helen Wu should not benefit from such a defense because she gave birth to Sidney out of wedlock and was thus not a "traditional Chinese woman." Thus, women

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[143] As discussed *supra* note 45, Chen's actions could have been compared to the American provocation doctrine. Such a comparison would have demonstrated that what is often referred to as a sign of the barbarity and misogyny of Asia—that "Asian men kill their wives for looking at other men"—is in fact encoded into our common law as justifiable. The function of this omission is to deny the reality of oppression against women that has been sanctioned by the judicial system while exaggerating "difference."

[144] *See Wu*, 286 Cal. Rptr. at 886–87.

[145] For a critique of the stereotype of the self sacrificing Asian woman/mother, see Yoko Yoshikawa, *The Heat is On* Miss Saigon *Coalition: Organizing Across Race and Sexuality, in* THE STATE OF ASIAN AMERICA, *supra* note 81 (discussing the stereotype as employed in the opera *Madame Butterfly* and the musical *Miss Saigon*, and describing the movement against the Broadway production of *Miss Saigon*).

whose actions do not fit whatever cultural stereotype the court adopts will not be able to utilize a "cultural defense." Alternatively, women whose actions do fit stereotypes that a jury or judge finds distasteful will not be treated leniently in either case.[146]

Positing a relationship between identity and behavior that, rather than using culture to explain what an individual was thinking, tries to fit an individual into general group behavior, risks reducing cultural information to stereotype. This reduction takes place through the creation of a group-based identity such as "the Chinese immigrant battered woman" and what her "typical" reactions are.[147] Such a shift in inquiry from a defendant's behavior to her identity is one reason why a formalized "cultural defense" should not be advocated.

V. THE RISK OF A FORMALIZED DEFENSE

In this Part, I outline the risks of a formalized "cultural defense," using battered women's syndrome as an example. I also explore the dangers of describing an individual's behavior as "cultural," especially for Asian women. Despite these drawbacks, I still advocate the admission of cultural information for immigrant defendants in strategic contexts, in an effort to explain the state of mind of a defendant whose actions may stem from multiple oppressions.

An examination of how the battered women's syndrome defense operates in some jurisdictions to evaluate women by their characteristics and not by the reasonableness of their actions helps explain the risks of a formalized defense. Feminist legal theorists developed the idea of using expert testimony for battered women who kill their partners in self-defense "to educate the judge and jury about the common experiences of battered women, [and] to explain the context in which an individual battered woman acted, so as to lend credibility and provide a context to her explanation of her actions."[148] The great majority of experts who testify in cases involving battered women who act in self-defense rely upon a model of battered women's syndrome that evolved out of the work of the sociologist Lenore Walker.[149] Walker developed her model of domestic violence to explain why battered women stay in

[146] As an example, imagine a woman who is described at trial as having emigrated to the United States through marriage: this can be conceptualized as a "green card marriage" laden with the image of a deceitful, conniving, scheming Asian woman trying to take advantage of the United States.

[147] Expert witness Terry Gock's expert testimony for Helen Wu fell into this trap to some extent.

[148] Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 201 (1986).

[149] LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984).

battering relationships; she describes a cycle theory of violence[150] and the theory of learned helplessness.[151] Battered women's syndrome looks for these two factors and post- traumatic stress disorder—all factors describing women as passive and helpless.[152]

Expert testimony on battered women's syndrome has been ruled admissible in the majority of courts that have addressed the issue.[153] Replacing existing criminal standards with a separate standard for battered women, however, has not guaranteed an outcome favorable to battered women's interests. Some courts have created an objective standard of the "reasonable battered woman who kills," which is difficult for many women to meet.[154] The creation of a generalized model of battered women invites courts to prevent fair trials of women who are not "model" battered women.[155] Furthermore, since battered women's syn-

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[150] Walker describes the cycle of violence as consisting of three phases: (1) tension building; (2) acute battering; and (3) loving contrition. The cycle theory, however, does not appear to characterize many women's situations accurately. *See id.* at 97 (showing that only 65% of all cases showed evidence of a "tension building" phase, and only 58% of cases showed evidence of "loving contrition" after a battering incident). Many domestic violence advocates thus prefer to describe domestic violence as characterized by abuses of power and control. *See, e.g.*, DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES, *supra* note 47.

[151] Learned helplessness is a term from social learning theory that Walker applied to explain "why women stay." *See generally* MARTIN E. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1982). Many domestic violence advocates find the concept of learned helplessness inaccurate. *See, e.g.*, Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 230 (1986). The appropriate inquiry may be "why do men batter?" rather than "why women stay."

Battered women are often active and resourceful in their efforts to avoid violence for themselves and their children within the context of the relationship. *See* JULIE BLACKMAN, INTIMATE VIOLENCE: A STUDY OF INJUSTICE 48–52, 133–52 (1989). Some advocates thus prefer to view battered women as engaged in covert resistance. *See, e.g.*, Hyun Sook Kim, Theorizing Marginality: Violence Against Korean Women, Address before the Asian American Studies Conference, Cornell University (June 4, 1993) (unpublished manuscript, on file with the *Harvard Women's Law Journal*).

[152] Battered women's syndrome, thus, while attempting to explain why women *act*, is problematically premised on a theory describing women as passive.

[153] Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1420–21 (1993) (identifying the courts that have admitted and refused to admit expert testimony on battered women's syndrome).

Even when admitted, however, the content and scope of expert testimony permitted by courts varies among states. Some states have limited expert testimony to a general description of battered women's syndrome without reference to the specific defendant, for example. Others have permitted experts to offer an opinion on the ultimate question of whether a woman's actions were reasonable under the circumstances. *See id.* at 1421; Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PENN. L. REV. 379, 429–30 (1992).

[154] *See* Maguigan, *supra* note 153, at 445.

[155] Such redefinitions specific to a particular class of defendants are susceptible to narrow application by trial judges. *See id.* at 444–45; *see, e.g.*, State v. Donna F. Williams, 787 S.W.2d 308, 310 (Mo. Ct. App. 1990) (overturning trial court ruling that

drome exemplifies a stereotype of passive married middle-class white women, it may be especially difficult for battered women of color and gay men and lesbians to fit the model.[156]

Thus, the experience with battered women's syndrome shows that creating a formalized separate standard can lead to defendants either being refused access to expert testimony or being unable to benefit from that testimony for the reason that they do not adequately fit the characteristics of the defense. Similarly, a formalized "cultural defense" could be disastrous for Asian women, since the pertinent characteristics defendants would need to show to fit an "Asian woman" standard are likely to be based on reductive stereotypes, and the behavior *or* identity of many defendants would not fit the standard. Finally, making a link between identity and behavior[157] entails particular risks for Asian American women since we live in communities where notions of "culture" often mask the interaction of multiple oppressions.

Discourse about "race" or "culture" must not obliterate the intersectional oppressions of Asian women, who exist at a nexus of societal racism and sexism in multiple contexts. "Cultural defenses" that focus solely on "cultural difference" with no analysis of gender subordination serve to block out gender oppression and gender difference *within* Asian American communities. Thus, in the *Chen* case, the "cultural defense" masked the fact that Jian Wan Chen suffered subordination as a woman and as a victim of gendered violence. The deployment of the "cultural defense" where gender subordination is at issue requires that we examine not only the way that "cultural practices" among Asian men and Asian women are an expression of particular power arrangements, but

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excluded expert "battered spouse testimony" because defendant was not married to the batterer).

[156] *See* Sharon Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991); Bricker, *supra* note 153, at 1379.

[157] How to think about the relationship of identity, experience and behavior is a contested issue, fought on the terrain of identity politics. Joan Scott describes the complex nature of this inquiry:

> How can we historicize "experience?" How can we write about identity without essentializing it? Answers to the second question ought to point toward answers to the first, since identity is tied to notions of experience, and in ways that I am suggesting they ought not to be. It ought to be possible . . . to, in Gayatri Spivak's terms, "make visible the assignment of subject-positions," not in the sense of capturing the reality of the objects seen, but of trying to understand the operations of the complex and changing discursive processes by which identities are ascribed, resisted, or embraced and which processes themselves are unremarked, indeed achieve their effect because they aren't noticed.

Joan Scott, *Experience*, *in* FEMINISTS THEORIZE THE POLITICAL 33 (Judith Butler & Joan Scott eds., 1992).

also the different means by which these practices are maintained and legitimated.[158]

For example, the fact that domestic violence in Asian communities is frequently explained by both Asians and non-Asians as caused or promoted by "Asian culture"[159] is particularly troublesome. This explanation was precisely the "cultural defense" given to Dong Lu Chen. Popular conception in the United States too often understands Asians to be governed by cultural dictates. This misconception is related to the association of "Asian" with "foreign" and "culture" with "other," and leads to dehumanizing descriptions of Asians.[160] I do not mean to deny that there is something we can call "culture" that may explain behavior. My concern is that domestic violence among Asian American communities is explained as "cultural," when a similar description is rarely given to domestic violence in the heterosexual white community. This masks the severity of violence against Asian women by describing it as a "practice" rather than as a political problem. Moreover, to explain behavior as "cultural" implies that it is insular to Asian communities and that the dominant society bears no relationship to that behavior.[161] This hides the fact that Asian women are also subject to oppression from forces outside of Asian communities.

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[158] Kimberlé Crenshaw makes this point for "cultural defenses" attempted for African American men. *See* Crenshaw, *Whose Story is it Anyway?*, *supra* note 3, at 431.

[159] *See, e.g.*, Nilda Rimonte, *Domestic Violence Amongst Pacific Asians*, *in* MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN (Asian Women of California United ed., 1989):

> [Domestic violence occurs because of] the Pacific Asian family's traditionally patriarchal system and the attendant belief in the supremacy of the male; the socialization goals and processes which favor the family and community over the individual; the cultural emphasis on silent suffering versus open communication of needs and feelings; and the enormous adjustment pressures which test the limits of immigrants' and refugees' survival skills. Cultural norms and values directly or indirectly sanction abuse against women and tend to minimize it as a problem in the community.

Id. at 328; Rimonte, *supra* note 20.

[160] The dehumanization to which I refer is illustrated by descriptions of Asian communities as governed by "culture" when the behavior of the dominant community is described as explainable by "psychology" or political forces.

[161] For example, immigrant women's difficulty in gaining access to the battered spouse waiver to the Marriage Fraud Amendments is not perceived as linked to the lack of translated materials or to the absence of laws that promote the interests of poor immigrant women. Rather, that lack of access is often explained as caused by a woman's "culture." *See, e.g.*, Deeana Hodgin, *Mail-Order Brides Marry Pain to Get Green Cards*, WASH. TIMES, Apr. 16, 1991, at E1 (quoting Tina Shum, a family counselor, describing the Battered Spouse Waiver: "This law sounds so easy to apply but there are cultural complications in the Asian community that make even these requirements difficult . . . . Just to find the opportunity and courage to call us is an accomplishment for many.").

While a formalized "cultural defense" is problematic because it will force defendants' actions to be defined through a group-based identity and reify cultural stereotypes, in some circumstances a defense that presents cultural background will be appropriate. In formulating a legal recourse to the predicament of a particular individual whose behavior was influenced by forces such as racism, sexism and subordination in the form of violence, admission of cultural factors should not function as a reductive "explanation" of that individual's actions as fitting into group behavior or "culture." Rather, the choice to provide an individual defendant with cultural information should be made for the purpose of explaining that individual's state of mind, in much the same way that the criminal law allows other information about a defendant's life history to mitigate sentences or charges in a criminal trial. Even when we attempt to use cultural information to explain an individual's oppressions or her state of mind, we are forced to label and define, in other words, to essentialize, certain behavior as "cultural." This can be done in the spirit of what might be called "strategic essentialism"[162]—consciously choosing to essentialize a particular community for the purpose of a specific political goal.[163] Strategic essentialism ideally should be under-

[162] Gayatri Spivak has argued for strategic essentialism in the following specific context:

> I would read [the Subaltern Studies Group text], then, as a *strategic* use of positivist essentialism in a scrupulously visible political interest . . . . This would allow them to use the critical force of anti-humanism . . . even as they share its constitutive paradox: that the essentializing moment, the object of their criticism, is irreducible.

GAYATRI SPIVAK, *Subaltern Studies: Deconstructing Historiography*, *in* IN OTHER WORLDS 197, 205 (1988) (emphasis in original). In other words, it may be useful to practice a "strategic essentialism"—strategic, because it is consciously directed toward a political goal, essentialism because it reinstates some version of the essence of a community, even if only temporarily and for a political purpose. Spivak discusses the description of a particular poor community by elite scholars, who after-the-fact interpret and explain and essentialize the community, taking the effect (the constructed identity) and reading it as a cause (it explains the individuals' actions). She argues that it may be appropriate for the Subaltern Studies Group to, in turn, describe this community in order to combat the dehumanizing description by the elite scholars—all the while recognizing that, through this process, the subsequent description also essentializes the community. *Id.*

Spivak has more recently stated: "The emphasis falls on being able to speak from one's own ground . . . on noting how we ourselves and others are what you call essentialist, without claiming a counter-essence disguised under the alibi of strategy." Gayatri Spivak, *In a Word*, 1 DIFFERENCES 12 (1989). In other words, "strategic essentialism" is not to be used lightly, and cannot be an easy alibi for, for example, white feminists to feel comfortable in describing the lives of women of color.

[163] This process is the essence of identity politics—naming and categorizing oneself as a means of identifying interests for purposes of empowerment. For a discussion of the relationship of identity politics, postmodernism and antiessentialism, see Crenshaw, *supra* note 9, at 1296–99.

taken by the affected community, which is best situated to undertake the process of selecting the appropriate circumstances in which to offer cultural information.

The defendant's community may be an important resource to provide the court with a "subjective" perspective that serves to explain her actions in the context of their own norms. In *State v. Chong Sun France*,[164] for example, a Korean woman who left her small children alone at night and returned to find one dead was sentenced to twenty years for second degree murder and felonious child abuse. The trial transcript demonstrates a hearing rife with gender, race, and cultural biases, as well as incredible communication difficulties between France and the court.[165] Throughout the hearing, the prosecution portrayed France as a bad mother—irresponsible and negligent—and as an opportunistic and promiscuous immigrant woman. The court found France guilty, adopting the prosecution's argument that she deliberately placed her son in the bureau drawer and shut him inside, crushing him.[166]

Chong Sun France would have benefitted from "cultural information" from her community. Expert testimony could have provided information to the judge and jury, interpreting her actions as those of a caring but poor Asian woman with few resources to adequately care for her children. France was released on parole on December 31, 1992, after a massive campaign organized by Korean women, who pointed out the lack of culturally specific information in her representation. The campaign's petition provides "cultural information" explaining France's actions from the perspective of other Korean immigrant women and offering information about child care in Korea.[167] While the community's

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[164] 379 S.E.2d 701 (N.C. App. 1989). France originally emigrated as the wife of an American serviceman, whom she later divorced. After years of physical and emotional abuse, France left her second husband and moved to Jacksonville, North Carolina with her two small children. She began working there as a bartender. With no funds to pay for a child sitter, she left the two children alone in the motel where they were staying, turning the television on, so as not to disturb other residents in case her children cried. Hyun Sook Kim, *supra* note 151, at 3–4.

On May 28, 1987, she returned to find her son Moses dead, enclosed inside the lower drawer of a dresser. The television on top of the dresser, and the dresser had toppled over on him. When the police arrived, France said that her son had died accidentally. But she also screamed in grief, "I killed my son." *France*, 379 S.E.2d at 702.

[165] One police officer described France as "sick," "crazed," and "hateful." Both investigating officers insisted that France must have staged the incident to look like an accident. She was provided with no interpreter, and the court reporter noted that her English was extremely difficult to understand. *See* Hyun Sook Kim, *supra* note 151, at 4.

[166] *See France*, 379 S.E.2d at 704.

[167] The petition circulated by the Free France Committee stated:

> Dear Governor Martin,
>
> I have read about the imprisonment of Chong Sun France and would like to express my hope for your unconditional pardon of her.

presentation of cultural information runs the risk of essentializing Korean immigrant women in the eyes of the court and of popular culture, the risk can be justified in that it was the affected community of Korean immigrant women who made that strategic choice and also made the choice of what characteristics to present as "cultural information."

VI. MOVING TOWARDS HOME

The juxtaposition of the cases of Dong Lu Chen and Helen Wu flushes into view what may seem to be a number of contradictions. How can one argue that the "cultural defense" for Dong Lu Chen was inappropriate while approving the use of cultural information for women like Helen Wu? Both defendants were accused of killing someone over whom they had power. Both alleged feelings of great stress. Both pointed to cultural determinants as a reason for their actions. I reconcile my divergent positions on the two cases by proposing that the value of antisubordination must be a criterion in the decision as to when and how cultural factors should be presented as a defense.

Antisubordination is a value that the legal system must factor into whether to present testimony as to a defendant's cultural background.[168]

> I am also a Korean American who initially came to America with very little knowledge of English or the American culture. Now that I have been in the States for some time, I see some of the difficulties involved in making the transition. It is very difficult to live a successful life here if you are unprepared and uneducated. Nowadays, both the husband and wife must work in order to maintain a decent lifestyle. As a result, there is little time for learning the language and the culture of your new country.
>
> When little children come along, it is even more difficult. Korean people often leave the children alone when we go out to work because in Korea neighbors and friends look after each others' children. There is no such thing as a babysitter in Korean culture. Most of us cannot conceive of the idea of, and cannot financially afford, paying a stranger to watch our children.
>
> Mrs. France was wrong to leave her child alone, and it is against the law, but considering the cultural differences, I am sure that she did not murder her child. I pray for her release. Thank you for your consideration.

New York Free France Committee, Statement on Behalf of Chong Sun France (1992) (on file with the *Harvard Women's Law Journal*).

[168] Mari Matsuda writes:

> Critics . . . ask how one knows who is oppressed and who isn't . . . . The larger question is how one knows anything in life or law. To conceptualize a condition called subordination is a legitimate alternative to denying that such a condition exists. In law, we conceptualize. We take on mammoth tasks of discovery and knowing. We can determine when subordination exists by looking at social indicators: wealth, mobility, comfort, health, and survival tend to mark the rise to the top and the fall to the depths.

Valuing the principle of antisubordination is more than a game of hierarchical rankings of "who's most oppressed"; it means a serious commitment to evaluating and eradicating all forms of oppression.[169] In the cases of Helen Wu and Dong Lu Chen, it can involve making identity-based claims to knowledge about the appropriate political choices to make in balancing the risks of perpetuating stereotypes against fairness to the parties involved. As described above, this process can be called strategic essentialism.

Antisubordination does not posit that those who suffer oppressions lack agency due to their victimization and therefore are not responsible for their crimes. Rather, the agency of an Asian American woman, or of anyone who is the subject of multiple oppressions, exists within a complex arena of fractured structural forces and pressures. A fair presentation of her situation should evaluate her agency within this context. In cases like *Chen* and *Wu*, such an evaluation reveals these to be cases about Jian Wan Çhen and Helen Wu, both subordinated on the basis of gender as well as impacted by dynamic forces from within and without their communities. The point of antisubordination is not to read every story as a "subordinated woman's story"; rather, it is that one must never explain or close off any story into being just one story.[170]

One step in an antisubordination analysis can be to examine whether the defendant acted with a consciousness of her position within the social structure of her community. Helen Wu resisted what she perceived as subordination out of a set of very narrowly defined choices; Dong Lu Chen acted to constrain his wife's choices further. Understanding someone's location as marginal is crucial to understanding her actions.[171]

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

[169] Mari Matsuda describes the following as "predictable patterns" of oppression:

> —All forms of oppression involve taking a trait, X, which often carries with it a cultural meaning, and using X to make some group the "other" and to reduce their entitlements and power.
> —All forms of oppression benefit someone, and sometimes both sides of a relationship of domination will have some stake in its maintenance.
> —All forms of oppression have both material and ideological dimensions . . . . The damage is real. . . . Language, including the language of science, law, rights, necessity, free markets, neutrality, and objectivity can make subordination seem natural and inevitable, justifying material deprivation.
> —All forms of oppression implicate a psychology of subordination that involves elements of sexual fear, need to control, hatred of self and hatred of others.

Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1188–89 (1991).

[170] This is exemplified in the *Wu* case since it is also a story about the killing of a child by his parent.

[171] *See* bell hooks, *marginality as a site of resistance*, *in* OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES 341 (Russell Ferguson et al. eds., 1990) (under-

While I do not intend to *justify* Helen Wu's killing her son, an antisubordination analysis would consider her position in relation to her family and the narrow options she perceived to ameliorate her suffering.[172]

Antisubordination, as premised on the vastness of oppression along unidirectional lines, such as male oppression of women, and xenophobic oppression of immigrants, must be the value on which we base our choices of whether to support the use of cultural factors in a defense and what information should be presented. Because the use of a "cultural defense" reflects the myriad problems of identity politics, including the perpetuation of stereotypical notions that can operate to exclude other people from benefitting from its use, this tactic will be a complex one to follow. Using a goal of antisubordination, however, to evaluate the appropriateness of these factors both combats decision-making premised on problematic descriptions of Asian women, and reflects a normative vision of what is valuable in our communities. Such a framework will also help dislodge the backdrop of "neutrality" as it exposes the relationship between the dominant and immigrant communities. The baseline from which the "uses and abuses" of "culture" are evaluated must be examined: we must question the unstated presuppositions about the American political and cultural character.

A coherent position on the presentation of "cultural information" that highlights its effect on Asian women thus requires an intersectional analysis, which implicates the use of antisubordination as a value to determine how the defense should be presented and when it should be used. Questions of identity and assimilation, of "strategic essentialism"

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standing marginality as a position of resistance is crucial to oppressed and exploited people); Hyun Sook Kim, *supra* note 151 (women engage in resistance to defend their interests and survive on the margins).

[172] An example of how antisubordination must operate as a criterion for the decision about whether to present cultural information emerges in an article by Mark Kelman. *See* Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798 (1991). Kelman notes that there is a clash in criminal law between defendants asserting what he calls "subcultural defenses" for actions taken against other members of the same "subculture." *See id.* at 808. He finds it difficult to choose between the two parties involved, even while noting that:

> [Defendants most typically are] men claiming that what the dominant culture discerns as criminal is a permissible form of male prerogative in their subculture: for example, what a Hmong defendant would call a ritual of "capture," the complainant would call rape; unless one believes the Hmong defendant misdescribes his culture or (more plausibly in my view) that his culture is anything but unified in its understanding of the contested event, one is forced simply to choose between one oppressed group, women and another, the Hmong refugees.

Id. at 809. Hmong women, however, are members of both the oppressed groups "women" and "Hmong refugees." Thus, Kelman's dilemma is not simply a matter of choosing between one oppressed group and another; rather, it is a question of choosing between one oppressed group and another that it is oppressing within the same community.

and self-determination are important elements of the discussion. In making choices about the use of cultural testimony it is difficult to maneuver among complicated and sometimes contradictory strategic moves within a system that relies on its lack of flexibility as a means of deriving authority.

Creation of a formalized "cultural defense" will result in fossilizing culture as a reductive stereotype, and lead to inquiries into whether a defendant's identity sufficiently matches that stereotype to merit expert testimony. Cultural information should be allowed only as an informal factor to be considered in deliberations, with the following caveats.

Clearly, an awareness that "culture" is something that affects everybody's actions is essential in consideration of a "cultural defense." There must be an acknowledgement of the fluid and interdynamic nature of cultures.[173] Information that explains the actions of a defendant should be articulated by community members who are sensitive to the dynamics of power and subordination within the community of the defendant. For example, in cases involving women who are abused, such as Jian Wan Chen or Helen Wu, input from organizations that work with battered Asian women is imperative, whether in the form of expert testimony or in amicus briefs. Information about the defendant's culture should never be reduced to stereotypes about a community but rather should concretely address the individual defendant's location in her community, her location in the diaspora and her history. The information should be provided so as to give insight into an individual's thoughts, and should not be used for purposes of explaining how an individual fits into stereotypes of group behavior.

Moreover, advocates should be wary lest the presentation of cultural factors does more harm to Asian women defendants than good, given the ease with which Asian behavior slips into stereotype. There may often be sufficient evidence to show that a defendant lacked the requisite mental state, without admitting special cultural testimony. In fact, a careful distinction must be made between assuming that cultural factors are relevant because Asians are governed by culture, and presenting an individual defendant with pertinent cultural background.

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> Cultural identities come from somewhere, have histories. But, like everything which is historical, they undergo constant transformation. Far from being eternally fixed in some essentialised past, they are subject to the continuous "play" of history, culture and power. Far from being grounded in a mere "recovery" of the past, which is waiting to be found, and which, when found, will secure our sense of ourselves into eternity, identities are the names we give to the different ways we are positioned by, and position ourselves within, the narratives of the past.

Stuart Hall, *Cultural Identity and Diaspora*, *in* IDENTITY, COMMUNITY, CULTURE, DIFFERENCE 222, 225 (Jonathan Rutherford ed., 1990).

Highlighting the problematic aspects of "cultural defenses" should engender greater awareness of the complications connected to their use. It should also elucidate the difficult yet imperative nature of committing to a future that fights the subordination of Asian women, whether in forms material or descriptive.