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**A CRITICAL RACE THEORY INTERVENTION INTO THE CULTURAL DEFENSE
DEBATE**

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Abstract

The cultural defense is an informal term that describes the use of cultural information to mitigate criminal responsibility, often used in conjunction with traditional defense strategies such as provocation or insanity. Arguments for the cultural defense include respecting cultural practices under the liberal narrative that frames the United States as a multicultural and pluralistic society. Advocates of the cultural defense recognize the harmful effects of the false universalism of the law. However, the cultural defense has been criticized as essentialist and harmful as it has been used in high profile cases to justify violence against women of color. The cultural defense superficially prioritizes the needs of marginalized communities by acknowledging the importance of culture in the administration of the criminal law. The rationale behind the cultural defense is politically appealing, but the impacts of the defense are incompatible with the goals of antisubordination, which will be further described by Critical Race Theory. Because the debate surrounding the cultural defense has yet to make significant advances, I argue that Critical Race Theory offers an essential starting point in intervening in the debate, ultimately transforming the realm of legal jurisprudence through its explicit race consciousness and examination of racialized power. In particular, I will examine the concepts of intersectionality and interest convergence which will offer valuable perspective into the cultural defense debate.

“Within a society, there are specific places where most of the activities that make up social life within the society simultaneously are represented, contested, and inverted. Courts are such places: like mirrors, they reflect where we are, from a space where we are not. Law the mechanism through which courts carry out this mirroring function, has a curious way of recording a culture’s practices of telling and listening to its stories.” (Torres and Milun, 1995).

Introduction

In the United States, the law is characterized as an equally accessible tool for all to remedy social inequality and pursue justice. However, the inequality inherent within the law and the criminal justice system often precludes the most vulnerable from accessing the law’s restorative power, leading many scholars to question if law can be used to pursue social justice and sustainable, meaningful social change, or if it is another element of oppression. Other questions include if the adversarial nature of the criminal justice system predetermines American law to sacrifice the needs of the most vulnerable to pursue a more tenuous and abstract goal of individualized justice. Which narratives are privileged by the law, and ultimately, who does the law protect?

The demographics of the United States are constantly changing. In 2014, 42.4 million people, or 13.3% of the total population, were estimated to be foreign-born immigrants and approximately 81 million people, or 26% of the overall population, are estimated to be children of immigrants, the second generation, or beyond.¹ The increased diversity in the population and accompanying multiplicity of cultural perspectives these immigrants bring has a tangible impact upon conceptions of morality and justice. In particular, the fluidity of culture in our present era of globalization comes with many implications for the status of fixtures such as law and order within American racial common sense. Many immigrants arrive with varying levels of legal competency and differing understandings of law and justice. In extreme cases, what is commonplace or normalized in one cultural context can be condemned in the next. In my thesis,

¹ Zong and Batalova, 2016, Migration Policy Institute

I will explore the cultural defense. I hope to interrogate the implications a culturally competent jurisprudential mechanism could have on American legal jurisprudence. In doing this, I also hope to expand upon both the potential benefits of adopting a more culturally competent evidentiary framework by examining the various historical uses of cultural evidence.

First, I will use Critical Legal Studies (CLS) to examine competing notions of law and justice and what law is meant to accomplish. I will then use a Critical Race Theory (CRT) framework to illustrate how the current legal system falls short in addressing the needs of an increasingly multicultural society with a particular focus on the Asian American and Pacific Islander community and gendered violence. CRT provides a poignant location of intervention into the stagnant debate regarding the utility of the cultural defense by questioning the foundational constructs of American racial common sense, exposing the constructed nature of Anglo-American legalism and providing the tools to construct an alternative narrative universe for the work of furthering the work of antiracism and liberation. I hope to complicate the debate that frames law and culture as mutually exclusive and requires law to adapt to culture or culture to assimilate to law. It is clear that traditional legal analyses of the cultural defense are insufficient in reconciling the multiplicity of oppression faced by immigrants and women of color in the United States. Because of its commitment to deconstructing commonsense ideologies regarding law and order and the distribution of racial power in the United States, Critical Race Theory offers an expansive rhetorical and political toolkit that can be useful in reconciling divergent perspectives on the necessity of a cultural defense in preserving “American” values of multiculturalism and equal protection.

In whose name does the law speak?

According to traditional definitions of law, law arises from the command of a sovereign law giver and imposes an obligation on the citizen, which is underpinned by the threat of sanction and punishment by the state if disobeyed. Whether the sovereign is God or the people, the legal meaning expressed by their commands is imbued with coercive authority. Law is also conceived of as a conduit for expressing social values by symbolically endorsing certain values and behaviors and censuring others. An offshoot of American legal common sense, and by extension racial common sense, is grounded in a belief in equal protection and radical nondiscrimination drawn from constitutional principles. In this framework, law is a colorblind, neutral, timeless, and objective standard that is universally applicable to all citizens. However, many critics from various disciplines have shown how it is impossible for law to live up to that standard. Schools of thought such as CLS and Marxists believe that laws are commands and expressions of ideology issued on behalf of a ruling class used to legitimate an underlying economic and concomitant social order. Marxists have shown how law speaks the language of concentrated capital and feminists have pointed out that law is written from the male perspective. CRT demonstrates how law is written from the perspective of white men to protect white supremacy. Appeals to the preeminence of the rule of law reinforce the timeless and abstract status of law in the American legal imagination. From this perspective, the necessity of developing a counter-narrative to the institutionalized common knowledge surrounding law and legality becomes evident.

Many legal theorists conceptualize law as not merely a set of rules, but narrative commitments that comprise the normative universe in which we all exist in and construct each day. According to Robert Cover, the role of culture is important in a way that neither Marxists or

traditional legal theory acknowledge. Cover theorizes that law is “not merely a system of rules to be observed, but a world in which we live” (Cover, 1995). This world is formed by the collective interpretive commitments of a community, whether they are small and private or immense and public. The creation of legal meaning that all members of society participate in is “jurisgenesis” In this regard, law can be seen as a reflection of shared values established by the polity. Narrative provides the tools necessary to begin looking outside of our own normative universe and understand the *nomos* constructed in immigrant communities. CLS and CRT points to the indeterminacy of the law as evidence of law’s contextual and constructed nature. As a precursor to critical race scholarship, CLS remains useful but has been criticized for failing to incorporate an analysis of the reality of race consciousness as an element of social power. The necessity of undertaking an intersectional analysis to examine the cultural defense is apparent. CRT can provide this framework and intervene in this stagnant debate on the validity of the cultural defense in law, and more significantly the role that cultural evidence can have in transforming the American legal system.

What is the purpose of the criminal law?

The theories of punishment are generally described as deterrence, retribution, incapacitation, restitution, and rehabilitation. In the utilitarian perspective, the criminal law is intended to prevent harm to society and protect its citizens by deterring future criminal acts and incapacitating criminal offenders. It accomplishes this goal by exercising disciplinary measures and punishing through the state’s monopoly on violence. Under these theories, the cultural defense subverts the purposes of punishment such as retribution, as the punishment would not be considered proportional to the crime.

What is culture?

Culture is often defined as a set of rules or standards shared by members of a society which produces behaviors and practices. These behaviors and practices fall within a spectrum of what members of the culture would consider appropriate. It is vital to acknowledge that although immigrants do not exactly reproduce the cultural understandings, meanings, and symbols brought with them, to some extent their “choices of lines of action continue to be influenced by values and norms, as well as by actual patterns of behavior that they had internalized at home” (Kubal, 2011). However, attributing too much validity and power to such anthropological definitions of culture risks framing culture as the only factor in influencing behavior as well as framing culture as stagnant rather than in flux and constantly redefined. These perspectives, if not applied in a nuanced way, can be prone to abuse. By juxtaposing “the behaviour of ‘they’, the others (the immigrants or members of minority groups) which tends to be regarded as culturally conditioned,” with the behavior of the dominant group, the dominant group’s normative status is reinscribed. In this view culture becomes “envisaged as the antithesis of normality” (Ballard, 2010 cited by Kubal, 2011).

With these interpretations of culture, appeals to culture appear to have the legitimacy offered by populist approval. However, when considering the power dynamics of definitional control, it is imperative to recognize that “cultures often are defined, not by the masses of a particular society, but by the power elite in that society” and labeling a practice or tradition as cultural may be a generalization which defines a practice of “political, economic, or social domination which is forced upon the subordinated group rather than created and developed by it” (Kim, 1997).

What is the cultural defense?

The cultural defense is an informal term for the use of cultural evidence to excuse or justify a defendant's actions in the commission of a criminal offense. There is no official rule that governs the admissibility of cultural evidence in criminal proceedings. Currently, no state has recognized the use of a formal cultural defense as an official affirmative defense, although throughout various points in American legal history the use of cultural evidence has emerged in response to criminal charges for offenses such as human trafficking, female genital mutilation, mother-child suicide, child marriage, domestic violence, rape, kidnapping, homicide, and corporal punishment. While there has been significant concern that the cultural defense would be used to excuse or justify the defendant's actions and thus destabilize the criminal justice system, it is notable that the majority of attempts to admit cultural evidence have been to supplement a traditional defense strategy rather than act as a complete excuse.

When examining the cultural defense, it is necessary to dissect the anatomy of a crime. Crime is considered to be comprised of the *actus reus* and *mens rea*, and both elements need to be satisfied and proven beyond a reasonable doubt. *Actus reus* describes the commission of the criminal act. *Mens rea*, or "guilty mind," describes the intent requirement that engenders criminal liability. The various cases involving the use of cultural evidence generally only required that the defendant act in good faith in the propriety of their acts based on their cultural heritage, in the most high profile cases mitigating whatever criminal responsibility they would have been found liable for in any other circumstance. In general, the cultural defense "attempts to excuse criminal behavior or to mitigate culpability based on a lack of requisite mens rea" (Volpp, 1994). The cultural defense is extremely controversial in this regard because there is

often unequivocal evidence of deliberation, demonstrating that in other circumstances the requirements to prove criminal intent would be met.

What is the debate?

What is evident in this debate is the need to resolve the clash of legal cultures, whether it is a dilemma faced by the individual defendant to violate their cultural values or the criminal law of their new country to the extent that majority values are embodied in the criminal law. The legitimacy of cultural evidence in criminal proceedings also incorporates major tensions over assimilation.

Doriane Lambelet Coleman explores the “liberal’s dilemma” of navigating the equally liberal values of individualizing justice and equal protection with balancing multiculturalism, which applies to victims as well. Coleman casts doubt in the framing of the cultural defense as the silver bullet in balancing society’s interest in multiculturalism with preserving continuity and consistency in law and order. Dana Chiu explores the cultural defense debate through the “guilty liberalism” perspective. “Guilty liberalism” is a hybrid of attitudes that promote exclusion and assimilation while purporting to recognize and tolerate difference.

Strictly liberal conceptions of law dictate that formal legal rules are objective and no discretion should be applied because the rules need to apply equally to all people, and the use of external factors such as culture are biased. The tension between these perspectives intersect with other aspects of American legal common sense. The dangers of perpetuating Anglo-American ethnocentricity by invalidating the cultural norms of minorities are clear as well as the political project of maintaining law and order by punishing individuals who violate legal norms. When operating under a strictly legal framework for which to utilize the cultural defense, several questions confronting proponents and opponents of the cultural defense include logistical

questions such as the length of time a defendant needs to have resided in the United States for the cultural defense to be appropriate. Other considerations include whether it is possible to quantify and measure one's understanding of American norms and assimilation into mainstream culture to determine in which cases the cultural defense can be properly applied. It has been noted that this project of creating a rule that is both flexible but broadly applicable to be infeasible and unsustainable. Current policies within the legal system may prevent the creation of a viable standard (especially for Asian immigrants) in this conception of the cultural defense, as "the tendency to isolate or exclude Asian American metadifference may adversely impact the creation of a workable, sensible standard by destroying its objectivity" (Chiu, 1994). Within our normative universe shaped by the rule of law, the law as currently conceived cannot truly acknowledge the dynamics of culture without reproducing hegemonic ideology.

Liberalism and Multiculturalism

Liberal political ideology prioritizes equal protection, individual rights, and the formulation of a neutral state apparatus. The intelligibility of legitimate cultural claims in our American milieu influenced by liberal political thought is often obscured because we do not have the language necessary to comprehend it. The differential power dynamics inherent within our American cultural milieu is obscured by the rhetoric of multiculturalism. In its most basic form, multiculturalism is based on the belief that all cultures are of equal value and that there is no one culture better than the other. Under multiculturalist ideology, it is also useful to distinguish "strong multiculturalist" and "boutique multiculturalist" perspectives. Strong multiculturalists most fervently support the cultural defense, as they would advocate against ethnocentrism. According to Stanley Fish, unlike strong multiculturalists, boutique multiculturalists "will always stop short of approving other cultures at a point where some value at their center generates an act

that offends against the canons of civilized decency as they have been either declared or assumed” (Coleman, 1996). Both strong and boutique multiculturalists have facilitated a reexamination of established legal doctrines such as the reasonable person standard by analyzing its ethnocentricity.

On the surface, multiculturalism does valuable political work because it borrows from postmodernist thought in that acknowledges how the law “necessarily emerges from the particular *cultural* milieu and orientation of its authors and, therefore...existing American jurisprudence is principally Anglo-American, rather than objective and true in any grander sense” (Coleman, 1996). However, the acknowledgment of multiculturalism within liberal thought offers an opportunity for further neutral state building, as the state is able to legitimize its authority by affirming its dedication to fairness and objectivity.

Arguments for the cultural defense

Advocates point to the false universalism of the law as why a cultural defense is necessary. Various scholars have advocated different approaches to the use of cultural evidence in courts such as formally adopting an evidentiary framework permitting the admission of cultural evidence to explain the defendant’s state of mind. In certain cases, the cultural defense is positioned as an affirmative defense motivated by the premise that “current criminal law defenses fail to meet the needs of cultural defendants because the law does not reflect the social and moral norms to which they are accustomed” (Chiu, 1994). Scholars such as Alison Dundes Renteln argue that a formal cultural defense is necessary because ignoring cultural factors in influencing what is viewed as crime would result in a gross miscarriage of justice. Renteln further argues that because enculturation plays a concrete role in influencing an individual’s perceptions and actions despite being a largely unconscious process, culture as evidence should

not be dismissed. To prevent defendants and attorneys alike from taking advantage of and abusing the cultural defense, Renteln proposed safeguards such as considering if the defendant is a member of the ethnic group, if the group has such a tradition, and if the defendant was influenced by the tradition when they acted.

Arguments against the cultural defense

The danger in formalizing a cultural defense lies in essentializing culture and reifying the boundaries between American and foreign culture, to the extent that saying “there should be no ‘culture’ in the courtroom is to claim that non-immigrant Americans have no ‘culture’” (Volpp, 1994). Rather than formalizing a cultural defense, certain scholars contend that a judicial commitment towards ending “all forms of subordination should [be promoted as the basis of informing] the decision of whether or not to support the informal use of cultural information” (Volpp, 1994). This commitment to antiracism would entail “a simultaneous recognition of material and descriptive oppression based on factors such as race, gender, immigrant status, and national origin” (Volpp, 1994).

In addition, theorists and scholars express concern over the “two-fold discriminatory effect of the cultural defense,” whereby a formalized cultural defense would violate the principle of equal protection because it would create a system of “formal dual laws based on race, national origin, and gender” (Coleman, 1996). The concept that focusing on a defendant’s personal history recognizes differences in culpability that exist among defendants accused of the same crime has further implications in that “when the American legal system chooses to recognize such traditions in the context of pursuing individualized justice for the defendant, it condones the chauvinism that is at the core of these traditions” (Coleman, 1996). To resolve these conflicts, Coleman asserts that there must be a balancing mechanism that weighs a defendant’s interest in

using cultural evidence against the interest of victims and potential victims in obtaining protection and relief through a non-discriminatory application of the criminal law.

Coleman traces an evolution in sentencing philosophy that characterizes much of the liberal approach to punishment. These perspectives include a shift toward individualized justice. Within a liberal framework, individualized, or particularized, justice parallels the totality of the circumstances test in that it suggests defendants be treated as “uniquely individual human beings” (Coleman, 1996). However, individualized justice may very well exculpate justifiably culpable defendants, as under this model the focus of criminal proceedings shifts to “the degree of moral culpability of the defendant, rather than on the threshold question of whether he was responsible for the crime with which he was charged” (Coleman, 1996). With its focus on determining the degree of moral culpability attributable to the defendant rather than determining responsibility for the crime, individualized sentencing appears fundamentally incongruous with utilitarian purposes of punishment.

What is Critical Race Theory?

Critical Race Theory is an academic movement created by progressive intellectuals that critically confronts the central role law has played in historically upholding white supremacy and concomitant hierarchies of socioeconomic class, gender, and sexual orientation. The scholarship of CRT was born out of a critique of CLS and traditional civil rights discourse because “traditional civil rights work has often resulted in court opinions advocating color-blind constitutionalism, which provides only incremental improvement while legitimizing racial domination” (Chang, 1994). Major figures such as Patricia Williams, Derrick Bell, and Kimberlé Crenshaw speak to the urgency of intersectionality and how CRT is instructive in uncovering the

ongoing dynamics of racialized power and its embeddedness in practices and values which have been shorn of any explicit, formal manifestations of racism.

With its explicit embrace of race-consciousness, CRT reexamines the terms by which race and racism have been negotiated in American consciousness “to recover and revitalize the radical tradition of race-consciousness among African-Americans and other peoples of color—a tradition that was discarded when integration, assimilation, and the ideal of colorblindness became the official norms of racial enlightenment” (“Critical Race Theory,” p. xiv). Critical Race Theorists reject the liberal conceptualization of race as a natural category, “understanding race instead to be constituted through a social process of meaning attribution in which law has played a central role” (“Critical Race Theory,” p. 354). Several of the principles and themes of CRT include the use of narrative and storytelling, constructing a revisionist history, intersectional analysis, interest convergence, material determinism, and racial realism. CRT can be an informative framework in expanding much of the existing knowledge and analysis about the utility of the cultural defense in balancing the goals of respecting multiculturalism and pluralism with creating an equitable society for all regardless of identity.

A Critical Race Theory Intervention

Rather than asking if culture, or primarily non-Western culture, is assimilable to American legal traditions, CRT questions the foundational elements of law by advancing the idea that law maintains white supremacy through promoting narratives of neutrality and objectivity. Liberal ideology conceptualizes any form of race consciousness as oppression. Oftentimes feminist and antiracist discourses treat categories such as race and gender as “vestiges of bias or domination—that is, as intrinsically negative frameworks in which social power works to exclude or marginalize those who are different,” and in accordance with this understanding, the

objective of these movements would be to “empty such categories of any social significance” (Crenshaw, 1995). However, Critical Race theorists note that “the problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences” (Crenshaw, 1995). Liberal integrationist ideology is precisely structured so that some social practices, such as the social and political practice of promoting multiculturalism, “are taken out of the economy of race relations and understood to be undistorted by racial power” (Peller, 1995). In response to the liberal political vision of emptying racial categories of their social significance and historicized meaning in pursuit of a colorblind society, CRT is explicitly race conscious and acknowledges how racial power permeates every social structure.

What happens in courtrooms where cultural claims are asserted is a “modern project of racialization, namely a more ‘sophisticated’ version of the blunt attribution of inferior traits to non-Whites that thereby attaches the inferiority label not to the individuals but rather to their culture” (Lee, 2007). Despite arguments that superficially recognizing cultural evidence is better than not recognizing culture at all, it is vital to recognize that “tokenistic, objectifying, voyeuristic inclusion is at least as disempowering as complete exclusion” (Matsuda, 1995). CRT would consider the one-dimensional multiculturalist logic behind the uncritical application of the cultural defense highly questionable because accepting one aspect of culture becomes conflated with being tolerant of all aspects of culture. These issues emphasize the necessity of incorporating an intersectional analysis within this legal context. The supposed neutrality and objectivity of the law normalizes the positionality of whiteness as dominant while simultaneously denying such construction. The descent into cultural relativism is not productive to the goals of intersectional political work. The criminalization of immigrants and

pathologization of difference is also a real concern. In certain cases, attorneys would construct a defense for their client on the grounds that the client was mentally ill or suffering from temporary insanity when in fact their clients would otherwise be considered legally competent.

The debate surrounding the cultural defense in communities of color may be tense, as on the surface the defense protects immigrants by providing a defense strategy to use in court but disempowers women by conveying that they are not worthy of justice or reparations for their injuries. However, it is vital to acknowledge that “intersectional subordination need not be intentionally produced” and in fact, it is frequently “the consequence of the imposition of one burden interacting with pre-existing vulnerabilities to create yet another dimension of disempowerment” (Crenshaw, 1995). To remedy this, CRT and intersectionality “provides a basis for reconceptualizing race as a coalition between men and women of color” (Crenshaw, 1995). Underscoring the mutual experiences of oppression, CRT transforms the narrative that privileges only the white male experience of law. As stated by Michel Foucault, “where there is power there is resistance,” and the cultural defense debate offers a unique opportunity for communities of color to advocate for their needs in court and contest the stereotypes that maintain their marginality.

The utilization of a cultural defense can further reify notions of American cultural superiority, as the cultural practices of minority groups are labeled as uncivilized. Non-white cultures are stigmatized and pathologized as morally deficient when set against a backdrop of civilized American values. Overall, the cultural defense is dehumanizing and depoliticizing because it uses culture and not structural forces such as racism or economic oppression to explain the existence of problems in Asian American communities and other communities of color. By describing violence against women in the Asian community as a “practice” rather than

a political problem, the severity of violence is further obscured. Furthermore, the cultural defense creates and reinforces the legitimacy of categories distinguishing “good” and “deserving” immigrants. This fuels the toxic impact of existing divisions where society defines only certain individuals as legitimate victims worthy of the protection offered by the criminal law and excludes those who fall short of such definition. An intersectional analysis not only considers the impact of structural forces on the existence of problems within the Asian American community, but also places a premium on these experiences and restores their power in reshaping the dominant narrative.

Critical Race Theory and the Asian American Community

While CRT provides necessary intervention into the stagnant debate regarding the utility and propriety of the cultural defense in our current social context, it has been noted that critical race scholarship tends to focus on the “black-white racial paradigm, excluding Asian Americans and other racial minorities” (Chang, 1993). Thus, to exclusively focus on the black-white racial paradigm is “to misunderstand the complicated racial situation in the United States (Chang, 1993). The black-white racial paradigm ignores nativistic racism and the complexity of a multifaceted racial hierarchy, signaling the necessity of creating an Asian American legal scholarship within the larger scholarship of CRT. One way to accomplish this would be in accordance to the CRT principle of counter-storytelling. Robert Chang states that “narrative will allow us to speak our oppression into existence, for it must first be represented before it can be erased” (Chang, 1993).

Developing an Asian American legal scholarship and counter-narrative requires acknowledging that the Asian American community is “differently situated historically with respect to other disempowered groups” (Chang, 1993). Understanding the unique histories of

Asian Americans and Asian migration to the United States is necessary in unpacking the complicated relationship of Asians with the American legal system. These histories also provide an understanding of the narratives that situate Asians and Asian Americans in relation to the American legal order. From the immigration quotas imposed by the Chinese Exclusion Act of 1882 to the internment of Japanese Americans in World War II, to the murder of Vincent Chin—which is often cited as the catalyst for the Asian American movement—the history of Asian Americans in the United States is fraught with both state sanctioned and extralegal violence. Historically, manifestations of difference by the Asian and Asian American community were managed through reactionary policies of exclusion. These anxieties were even manifested within the most personal and intimate aspects of social life, as anti-miscegenation laws perpetuated xenophobic fears of Asian menace. Another key aspect of Asian American history that calls for further examination is understanding the effects of post-1965 immigration policies on Asian American integration into mainstream American life. Post-1965 immigration policies saw an influx of Asian immigrants with professional degrees, and the socioeconomic successes of these immigrants produced stereotypes of Asian American success that are most notable in the persistence of the model minority myth. The origins of the model minority myth disguise the reality of Asian American exclusion by operating under the facade of multiculturalism, praising the successful assimilation of Asian immigrants while irreconcilably distancing them from the benefits of whiteness.

Certain stereotypes that continue to define Asians and Asian Americans and their interactions with the criminal justice system include the “perpetual foreigner,” or “Asian-as-Foreigner” stereotype, and the “yellow peril.” The “Asian-as-Foreigner” stereotype spawns other deeply entrenched perceptions about Asians and Asian Americans. Asian culture, in contrast to

Western culture, is considered uniquely misogynistic and patriarchal (Lee, 2007). Although the use of the cultural defense provides relief to specific Asian defendants, it is premised upon the accuracy of the yellow peril stereotype. These stereotypes reveal that mainstream white cultures are viewed as continually advancing, but Asian cultures are perceived as incapable of moving beyond their backward practices and ideas. The cultural defense, in accordance with this stereotype, “fails to hold Asian Americans accountable for acts for which they can and should accept responsibility,” fostering the underlying notion that Asians “have a diminished capacity for appreciating and owning up to their acts” (Yen, 2000). Using the cultural defense as excuse underscores the pitfalls of operating under a facade of false multiculturalism. The utilization of judicial and prosecutorial discretion as a form of “mercy” strengthens existing social stratification in a society that still considers Asians as foreign. The defense also fails to appreciate the diversity of beliefs and practices within Asian communities, only embodying limited characteristics in encapsulating the totality of Asian cultures, thus allowing for the cultural traditions defined by the social elite to dictate the norms of that society and its consequent perceptions by the dominant groups.

When narrative is embraced, it can become reconfigured as a form of outsider jurisprudence to demonstrate the inequities of the present situation. The objective voice of law is created by “abstracting from the individual in order to universalize the perspective of the author so that not only does the author, as an abstracted entity, speak as Everyman, the author also presumes to speak for everyone” (Chang, 1993). The power of narrative in restoring definitional agency to the disempowered is demonstrated when objectivity is questioned. Further constructs are then revealed such as the constructed nature of knowledge and evidence as well as the arbitrariness of who is empowered with the agency to make these distinctions. Broadening,

restructuring, and redefining the rules of evidence serves as a way to empower the marginalized because the “disempowered find ourselves in a peculiar position in that the evidence we would use to prove our oppression consists of the very stories that are now disbelieved or excluded because they are only stories” (Chang, 1993). By exercising one’s own voice through narrative, the individual complicates the supposedly commonsense notions of justice.

Intersectionality and the Asian American Community

When considering the unique forms of oppression women of color face, there is a urgent need to account for multiple grounds of identity when considering how the social world is constructed. Thus, it is also imperative to understand how Asian defendants exist in a particular social context and normative universe, especially in the midst of competing narratives of Asianness, the exoticization of Asian immigrants, and the persistence of Orientalist stereotypes. Chiu delves into specific stereotypes that disempower Asian American women, particularly the myth of ultra-femininity. The myth of ultra-femininity operates as a backlash to the gains made by feminists where Asian women become the objects of male fantasy in restoring traditional gender roles. Asian women displace independent white career women in this fantasy as they are fantasized to be docile, traditional, and unquestioningly devoted to serving men’s emotional and sexual needs. The dual positioning, or double jeopardy of women of color within a system that transmits these stereotypes and overlooks the complexity of identity renders women of color vulnerable to the structural, political, and representational dynamics of both race and gender subordination.

Interest Convergence, Cultural Convergence, and the Asian American Community

Cynthia Lee’s theory of cultural convergence states that the “interests of minority and immigrant criminal defendants in obtaining leniency seem most likely to receive accommodation

when there is convergence between dominant majority cultural norms and the cultural norms relied upon by the immigrant or minority defendant” (Lee, 2007). Lee patterns her theory after Derrick Bell’s theory of interest convergence to address how any gains made by minorities only occurred when they aligned with the interests of the dominant group. Cultural convergence also provides a solution to the question of which experiences and perspectives the cultural defense as conceptualized today privileges and excludes in its use.

There is a sense of superiority and benevolence when the cultural defense is invoked in response to gendered violence, as the defendant’s culture is dismissed as backwards and sexist while American culture is reified as both generous and egalitarian. The cultural defense presupposes that it is possible to accurately distinguish Anglo-American values as superior to those of non-white communities because of the implicit assumption that in America, misogynistic behaviors are criminalized and consistently condemned by society. Feminist legal scholars such as Catharine MacKinnon would differ, noting that “gender-neutral, objective formulations like these avoid asking *whose* expression, from whose point of view? Whose law and whose order?” (MacKinnon, 1987, p. 92). Scholars such as MacKinnon argue that the law is written with an implicit male bias and can never be truly objective. Statistics that reveal the prevalence of sexual violence in the United States also indicate that it is disingenuous for Americans to claim support of feminism and to advancing women’s rights. In addition, the material conditions women, and especially women of color, live in say otherwise. Rather, “that *these* cultural narratives [involving the subordination of women] were successful when the vast majority of cultural narratives are rejected in courtrooms across the country suggests that the persuasiveness of a defendant’s cultural claims may turn on the extent to which the claims converge with dominant subtexts of racism and sexism” (Lee, 2007). When minority and

majority cultural norms converge, the defendant may secure an acquittal or light treatment while reinforcing negative stereotypes about their entire community. By enabling us to understand these double-edged dynamics as well as the selective receptivity of the law towards certain cultural defenses, “cultural convergence theory offers a starting point for scholars and policymakers concerned with the rule of law in an increasingly diverse society” (Lee, 2007). While the cultural defense superficially recognizes cultural difference and variation, the cultural defense works as an operationalized form of xenophobia. The interests of the Asian community in having elements of their culture recognized and the interests of the dominant group in claiming multicultural sensitivity and the perception of condemning sexual violence converge. Several of the most high-profile criminal cases that involve Asian immigrants who introduced cultural evidence into their defense as either mitigating factors or as a factor that influenced the defendant’s state of mind include *People v. Moua*, *People v. Chen*, and *People v. Kimura*.

Within existing literature, *People v. Moua* (1985) has become notorious for its successful use of a cultural defense. In this case, the defendant Kong Moua drove to the Fresno City College campus and kidnapped nineteen-year-old Seng Xiong from her dormitory room in accordance with the Hmong tradition of *zij poj niam* or “marriage by capture.” Moua then brought her to a close relative’s home where he raped her several times. The practice requires men to be aggressive to prove that they could be good husbands and women to protest as a way of demonstrating their purity, and because of this assumption Moua testified that he reasonably believed Xiong consented to sex. Xiong challenged the practice in court by pressing rape and kidnapping charges against him. Moua’s attorneys introduced evidence of Hmong martial customs to mitigate his sentence and negotiated a plea for a misdemeanor, the lesser charge of false imprisonment. Moua served 120 days in jail and paid a fine of \$1,000, which is a

significantly lighter sentence than he would have received if he was convicted of kidnapping or rape. The impossibility for a woman to consent and have agency in this scenario has been noted by many theorists. By introducing the requirement for women to protest the man's advances in addition to the already convoluted definitions of consent in mainstream American society, the intersectional oppression of Hmong women was further compounded. The uncritical application of cultural evidence to the case also disregards the condemnation of marriage-by-capture expressed by the general Hmong community. Rather than acting out of benevolence and tolerance, the defense was ultimately successful "only insofar as white jurors related Hmong patriarchal values to their own traditions of gender subordination" as it was ultimately reduced to an all too common "he said, she said" war of credibility (Yen, 2001).

In *People v. Chen* (1989), Dong Lu Chen, an immigrant from China, was charged with second-degree murder after striking his wife Jian Wan Chen in the head eight times with a hammer. He claimed his actions were provoked by an uncontrollable, visceral reaction to his wife's infidelity, inflamed by his Chinese cultural norms which contributed to his diminished capacity. Burton Pasternak, a white anthropologist "expert" in Chinese culture testified on Chen's behalf to corroborate Chen's story that his behavior was consistent with a "reasonable" Chinese man rather than rely on the standard of reasonableness that exclude those with different cultural norms. On the basis of Pasternak's testimony, Brooklyn Supreme Court Justice Edward Pincus concluded that traditional Chinese values about honor, adultery, and the loss of manhood drove Chen to brutally murder his wife. The success of expert testimony in persuading the judge was unprecedented. The prosecuting attorneys did not attempt to argue against the cultural evidence that was presented because they believed such testimony would be facially invalid. The use of testimony by "experts" who are often removed from the actual cultural context of the

defendants perpetuates harmful stereotypes and further obscures the power dynamics implicit in the definition of legitimate evidence. Experts from the dominant group subordinate those from the foreign culture by exercising descriptive control over defendants and their cultural context through creating an “unrecognizable Other.” In the process of defending Chen, capitalizing on the court’s ignorance of Chinese culture and the prevalence of racist stereotypes about unassimilable Asian men, the defense effectively reduced Chen to a caricature of Asian stereotypes. Because the trial focused on Chen’s culpability rather than his responsibility, the victim of Chen’s violence, Jian Wan Chen, had violence inflicted on her once more as she was effectively erased from the controversy.

The community’s response to the verdict of the Chen case was of fear. Many immigrant women who were already unlikely to seek outside intervention in domestic disputes expressed anxiety over the possibility that they could not expect the criminal justice system to protect them because of the lenient sentence Chen received. Abusers and batterers were essentially empowered by the verdict and no longer intimidated by threats to report them to the authorities. According to Crenshaw, this is an example of the systematic devaluation of women of color in our society. By using the cultural defense, the state is able to claim sensitivity to different cultures while maintaining the status quo that subordinates women. Cynthia Lee notes that while Chen’s case “seems like an example of culture winning out over all other considerations, cultural convergence may have contributed to the outcome.” Rather than being culturally unique, Chen’s claim of having acted reasonably in response to his wife’s confession of adultery “echoes claims of legally adequate provocation made by countless American men who have killed unfaithful wives” (Lee, 2007).

From Nilda Rimonte's subject position as a Filipino woman who works with survivors of sexual violence from Southeast Asian communities, she acknowledges that while it is easy and politically correct to defer to the will of the community in determining which practices are legitimate and deserve protection, exclusively doing so condones such behaviors and perpetuates practices that subordinate women and other marginalized peoples. Without a doubt in both cases, the women faced terrible injury "yet were not seen as victims, either by their native cultures, which allowed both the rapist and the killer to explain away their actions as culturally acceptable, or by the American courts that accepted the assailants' defenses" (Rimonte, 1991). When understood in the context of how the cultural defense creates a narrative of who is a legitimate victim and selectively identifies the crimes that punished under the full force of law, the cultural defense has the effect of decriminalizing domestic violence. When viewing the cultural defense as having a very particular place in the liberal multicultural political agenda, the cultural defense can also be interpreted as an apologetic strategy that legitimizes the very social practices it targets for reform. Through this discourse that ostensibly values cultural sensitivity, domestic violence is often dismissed as aberrational and the survivors of violence are silenced. The rationalization of violence against women, in part encouraged and exacerbated by the abstracting effects of American legalism, corresponds with how white society is able to reinforce its prejudices through the other culture while acting in tolerance of difference.

In *People v. Kimura* (1985), the Japanese practice of *oyako-shinju*, or joint parent-child suicide, is the subject of contention within this case that has also been used as a tragic example of a successful cultural defense. The practice of *oyako-shinju* dictates that a mother who commits suicide dooms her children to a life of stigma and dishonor, so the mother also feels obligated to kill her children so they are not left without a mother to raise them. After discovering that her

husband was having an affair, Fumiko Kimura, a Japanese immigrant woman, walked into the Pacific Ocean with her two young children. Kimura was rescued but her children drowned. Kimura was charged with two counts of first-degree murder and felony child endangerment, but her charges were reduced to manslaughter. However, the Japanese community also advocated on her behalf in a petition signed by 4,000 members of the Los Angeles Japanese American community to demonstrate that while in Japan the practice would still be illegal, it would not be treated as a crime. According to the theory of cultural convergence, Kimura's cultural claim would not have succeeded had her case not resonated with Anglo-American norms. In this circumstance, Japanese gender roles aligned with Anglo-American views about women who kill their children. Women, and especially mothers, are assumed to be inherently nurturing, passive, gentle, and caring. Therefore, a woman who kills her child is assumed to be a victim in need of support, sympathy, and psychiatric treatment, and the conditions that caused her to commit this crime are artfully glossed over.

Proposed Solutions

Several scholars have proposed evidentiary frameworks that consider cultural evidence within the requirements imposed by federal rules of evidence. However, navigating these frameworks are challenging because “most societies are comprised of the dominant and subordinate groups, [and] the recognition of cultural diversity often results in the perpetuation of practices of subordination” (Kim, 1997).

The likelihood of official legislative or judicial recognition of a formalized cultural defense is unlikely. Lee had observed the rise of anti-immigration sentiment after September 11, 2001 noting that “there was little public sympathy for people with different cultural or religious backgrounds who commit crimes of violence purportedly because of these backgrounds” (Lee,

2007). Considering the current political climate, the likelihood of a nuanced cultural defense and leniency being exercised toward immigrant defendants is unlikely due to the reemergence of latent conservative beliefs.

While it is vital to remain cognizant of the limitations of the cultural defense, the political necessity of devising a tenable solution to the inevitable dilemma of legitimizing oppressive practices through recognizing a formal cultural defense or reinforcing the alienation of immigrants by penalizing difference is imperative. A possibility for systemic change in legal culture would be diversifying law school admissions for the purpose of diversifying the legal profession and better serving marginalized communities. Developing outreach strategies for building trust within communities who are unlikely to seek legal intervention would also be a possible strategy. Another shift in legal culture that could promote sustainable and equitable change would be reconfiguring the American legal norms of professional neutrality and “role separation.” The precedent set for attorneys as standards for professional behavior within this field has far reaching implications, especially as it parallels how the cultural defense works by abstracting the individual defendant from their larger cultural context and reifying them as a representative of the values of that culture (Mah, 2005). Adjusting American professional norms, especially those in the legal field, would have a less harmful impact than allowing cultural norms to eliminate criminal responsibility. An understanding of CRT could also prove transformative for the legal profession, especially because “in cultural defense cases, it is important for attorneys to be aware of and to counter negative and possibly incorrect stereotypes,” and “by not countering the cultural evidence presented, these prosecutors unwittingly assisted the other side” (Lee, 2007).

Conclusion

The debate surrounding the cultural defense is provocative but indicates an entrenched systemic bias in our law and serious concerns about whether our criminal justice system can provide fair and impartial results, especially taking into account the rapidly diversifying American population. In particular, the cultural defense highlights the tension between “the need for clarity and generality in the criminal law’s attempt to set limits on lawful behavior and the sometimes conflicting needs of diverse minority groups to express their cultural identities through practices that may embody values diverging from the values of the mainstream” (Chiu, 1994). The cultural defense debate crystallizes these tensions within the normative legal universe that we have constructed. The proposed solutions to resolving the cultural defense debate have ranged from implementing an official cultural defense to advocating for the formal adoption of an evidentiary framework permitting cultural evidence to establish the defendant’s state of mind. However, it is clear that neither perspectives that advocate for false universalism, neoliberal multiculturalism, or essentialism are adequate for our political needs when considering the complexity of the cases that will inevitably arise,

The debate indicates the necessity and urgency of an intersectional analysis and understanding of interest convergence. Critical Race Theory provides this locus of intervention into the stagnant debate regarding the cultural defense by prioritizing the lived experiences of people of color and their interactions with law to introduce a new dimension to the two-dimensional narrative proffered by the law. The cultural defense is used as a narrative framework for which to make gendered and racialized subordination comprehensible and legible in the overarching narrative of liberal multiculturalism. However, contrary to liberal belief, these narratives are not legible and legally persuasive because they echo the true multicultural and

pluralistic nature of our normative universe but because they reflect latent patriarchal and white supremacist values.

Arguing that a cultural defense is necessary to maintain social order furthers the implicit belief that “a society can function properly only if the mainstream subsumes and controls the difference of those who have different values and practices” (Chiu, 1994). The values of multiculturalism and understanding within the law are admirable and clearly more favorable when considering the “binary structure that pits maintenance of our inherited and unique culture against the state’s forces of coercive assimilation” (Chiu, 1994). However, the necessity of creating a nuanced form of multiculturalism is clear and can be accomplished through valuing the narratives and self-determination of marginalized communities. For culture and its foundational role in many people’s lives to be truly respected, there must be a shift in the social treatment of identity. In the cultural defense debate and in larger society, “the focus must allow for uncertainties and unknowns, and identities must be constructed, not essentialized” (Chiu, 1994). Rather than forcing the abstract, one-dimensional ideal of identity onto all, we should celebrate identities of “shifting, multiple selves, in which no aspect dominates,” and “identities in which contradictions and contradictory selves remain” (Chiu, 1994). The United States can honestly claim the national identity of a truly tolerant society, when “within the context of a democratic polity, [it] respects the cultural foundations for differently conceived notions of the ‘good’ and provides a social space for such conceptions to take on material form” (Torres and Milun, 1995, p. 188). Otherwise, the failure to acknowledge the multiplicity of American identity leaves American identity, and specifically the identity of United States law, as a neutral and unquestioned backdrop.

Multiculturalist rhetoric at best “lays claim to post-raciality, ironically erasing difference as it purports to promote social justice” (Belcher, 2016, p. 493). Multiculturalism does not actually recognize cultural difference but legitimizes the very narratives of patriarchy and racism it purports to undermine. The exclusionary rhetoric of the cultural defense signifies that difference will always mark people of color as inferior and forecloses the possibility of assimilation into whiteness and mainstream American life. Critical Race Theory identifies that there is a difference between culturally competent jurisprudence and proclaiming cursory recognition of a defendant’s culture as evidence of a society’s multiculturalist credentials. While imperfect in providing a concrete solution to the dilemma regarding the use of cultural evidence, Critical Race Theory disrupts narratives of American exceptionalism by demonstrating that the gospel of equal protection and multiculturalism implicitly benefits the dominant group and erases the experiences of the most vulnerable. By capturing the narratives of whom the cultural defense has deprived of a voice, Critical Race Theory plays a pivotal role in restoring definitional agency to women of color and other marginalized communities.

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