

ARTICLES

I COULDN'T HELP MYSELF—MY CULTURE MADE ME DO IT: THE USE OF CULTURAL EVIDENCE IN THE HEAT OF PASSION DEFENSE

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INTRODUCTION

In 1987, a year after Dong Lu Chen immigrated to the United States, he confronted his wife about their sexual relationship only to discover that she had been cheating on him.¹ He proceeded to hit her eight times with a claw hammer until she was dead.² Dong Lu Chen, who was charged with second-degree murder, used his culture as a defense, and was subsequently found guilty of the lesser crime of second-degree manslaughter and sentenced to five years of probation.³ This is but one example of a homicide case⁴ where the defendant used aspects of his culture to mitigate the charges against him.

Immigrants who come to the United States bring their culture and way of life into this country. This article discusses several cases where an immigrant's culture or foreign values clash with fundamental principles of American law. This clash can lead to punishing immigrants for (1) actions they did not believe were illegal, or (2) for knowingly committing illegal actions that are acceptable in their homeland. This conflict between cultural beliefs on one hand and principles of U.S. law on the other is the

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1. No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989), cited in Melissa Spatz, Note, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men who Kill Their Wives*, 24 COLUM. J. L. & SOC. PROBS. 597, 621-22 (1991).

2. *Id.*

3. *Id.* at 622.

4. This case and others are discussed more fully in Part I.B.2.

basic premise of the cultural defense. This tension is particularly apparent in murder cases where the defendant pleads a “heat of passion” defense.

State homicide laws are divided into multiple degrees of murder and manslaughter, and when a defendant raises a cultural defense, it is necessary to define each category of homicide in order determine whether the defense is relevant. “Murder,” in general, is defined as “the killing of a human being with malice aforethought.”⁵ Within the several categories of murder the most egregious is first-degree murder, which is defined as “murder that is willful, deliberate, or premeditated”⁶ In many of the cultural defense cases discussed below, the defendants were convicted of first-degree murder. Their defense strategy was to either mitigate their sentencing by using a cultural defense, or to plead guilty to a lesser crime of voluntary manslaughter. Manslaughter,⁷ like murder, is further reduced into two separate categories: voluntary and involuntary⁸ manslaughter. Voluntary manslaughter, the more relevant of the two categories with respect to cases involving the cultural defense, is defined as “[a]n act of murder reduced to manslaughter because of extenuating circumstances such as adequate provocation (arousing the ‘heat of passion’⁹) or diminished capacity.”¹⁰

Reviewing the definitions of “murder” and voluntary manslaughter, one common theme is that in most instances the defendant is putatively aware of his actions. However, in instances where an immigrant’s particular conduct is generally deemed acceptable in his home country, it is debatable whether that immigrant was aware that that same conduct is illegal in the United States. One can explain or reconcile the conflict between an immigrant’s cultural values and the principle of American law that holds the individual accountable for his or her intentional conduct with the cultural defense. A defendant raises a cultural defense—which has not been formally adopted in any state—when he claims ignorance of the law or that his cultural beliefs compelled his actions. Under an absolute cultural defense a defen-

5. Black’s Law Dictionary 1043 (8th ed. 2004).

6. *Id.*

7. Like murder, manslaughter is defined as the unlawful killing of a human being; however, unlike murder, there is no “malice aforethought” requirement for manslaughter. *Id.* at 983.

8. Defined as a “[h]omicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony-murder rule.” *Id.*

9. “Heat of Passion” is defined as “[r]age, terror, or furious hatred suddenly aroused by some immediate provocation, usu[ally] another person’s words or actions. At common law, the heat of passion could serve as a mitigating circumstance that would reduce a murder charge to manslaughter.” *Id.* at 740.

10. *Id.* at 983.

dant would be deemed entirely unaccountable for his or her conduct. However, an absolute cultural defense would give rise to a number of problems. These problems include: (1) promotion of stereotypes, (2) undermining the rights of immigrant women and children, (3) unequal application of the defense, and (4) lack of fairness in applying the defense to all cases involving immigrant defendants. Instead, I propose that that cultural evidence be used as a mitigating factor in “heat of passion” cases in order to obtain results that are more just and respectful of an immigrant defendant whose omnipresent cultural background influenced his or her conduct.

Part I will review statistics on the increase in the number of foreign-born persons within the U.S., define the absolute cultural defense, and review the leading cases on the use of the cultural defense in homicide cases. Part II will review the psychological reasons why culture plays such an important role in an individual’s life and thus why it is important to consider culture in the heat of passion defense. Finally, Part III will discuss the problems associated with an absolute cultural defense and how a defendant can use cultural evidence that speaks to cultural values in a heat of passion case to mitigate the charges from murder to manslaughter.

I. LAW AND THE ABSOLUTE CULTURAL DEFENSE

This Part will focus on the factors that explain why there has been an increase in the use of the absolute cultural defense, as well as the various components of the defense. In addition, this part will review the core of cultural defense cases to understand the application of the defense, and the varying levels of success the defense has enjoyed.

A. *The Absolute Cultural Defense*

In today’s global society, immigration and international tourism have increased the number of foreign-born persons in the United States. From January to August 2006, over 29 million international tourists from dozens of nations have visited the United States.¹¹ Immigration statistics also provide compelling evidence of the increased use of, and the need to expand, the use of cultural evidence.¹²

11. Office of Travel and Tourism Industries, *International Arrivals – 2006 First Quarter Analysis*, <http://www.tinet.ita.doc.gov/view/m-2006-I-001/table1.html> (last visited November 19, 2006).

12. See Nicole A. King, Comment, *The Role of Culture in Psychology: A Look at Mental Illness and the Cultural Defense*, 7 TULSA J. COMP. & INT’L L. 199, 223 (1999) (“Though still in a relatively early stage, as international tourism and immigration increases, the cultural defense will exceedingly expand.”) (citation omitted);

According to the 2000 census, over 11.1% of the entire U.S. population of 281,421,906 was born outside of the United States, translating into approximately 31 million foreign born persons within the U.S. in 2000.¹³ This number has increased to approximately 37 million foreign born persons within the U.S. in 2005, with an estimated 11.1 million (roughly 30%) undocumented immigrants included among them¹⁴ —a number that was expected to reach almost 12 million by March 2006.¹⁵ This represents an increase of almost 4 million undocumented immigrants since the 2000 census.¹⁶ The increase in the number of undocumented immigrants is both a result of the economic opportunities available to them and an economic benefit to the American populace. Most of the immigrants who come to the U.S. illegally do not intend to remain here permanently. Notably, today's undocumented immigrants "plan to stay only long enough to make some money and then go back home," though "few ever do."¹⁷

These foreign born persons bring with them a lot more than their desire to see the U.S. or to find a job—they also bring their cultural values. However, culture is a concept that has been "variously and ambiguously" defined.¹⁸ Culture has been defined as "a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential."¹⁹ It is also defined as "patterned ways of thinking, feeling and reacting, acquired and transmitted mainly by symbols, constituting the distinctive achievements of human groups, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e., historically derived and selected) ideas and especially their attached values."²⁰

Spatz, *supra* note 1, at 621 ("One explanation for the current use of the cultural defense is the increase in international tourism and immigration.") (citation omitted).

13. U.S. Census Bureau, *USA QuickFacts from the US Census Bureau*, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 29, 2006).

14. JEFFREY S. PASSEL, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY* (2006), <http://pewhispanic.org/files/reports/61.pdf>.

15. *Id.* at i.

16. *Id.* Census 2000 estimated that there were approximately 8.4 million illegal immigrants present in that year. See also U.S. Census Bureau, *ESCAP II: Demographic Analysis Results*, <http://www.census.gov/dmd/www/pdf/Report1.PDF> (last visited Mar. 29, 2006).

17. Anthony DePalma, *15 Years on the Bottom Rung*, N.Y. TIMES, May 26, 2005, at A1.

18. King, *supra* note 12, at 204.

19. ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 10 (2004).

20. King, *supra* note 12, at 204 (citation omitted). Culture includes the products of the behavior of others, especially others who preceded us. It connotes a set of social stimuli that to a very great extent have existence prior to us. Put very simply,

There is no formal definition of the absolute cultural defense and no state has formally adopted any variation of a cultural defense.²¹ Despite the lack of a formal definition, the absolute cultural defense is generally understood to “allow a minority immigrant defendant to introduce evidence of his native culture to explain his criminal action.”²² It has also been defined as:

[A] legal strategy that defendants use in attempts to excuse criminal behavior or to mitigate culpability based on a lack of requisite *mens rea*, the affirmative presentation of foreign customs as exonerating evidence in criminal cases, and a defense asserted by immigrants, refugees, and indigenous people based on their customs or customary law.²³

Based on these definitions, defendants, in raising the absolute cultural defense, attempt to use their cultural heritage to explain their conduct.

The absolute cultural defense is comprised of two components: one cognitive and the other volitional.²⁴ The cognitive component comes into effect in situations where the individual does not believe that his or her actions are in violation of any law.²⁵ Under this scenario the individual is in effect pleading that his ignorance of the law should excuse, or at least mitigate, his or her criminal culpability. While this argument seems to be in direct conflict with the principle of law that “ignorance of the law is not an excuse,” it is nevertheless argued that “fairness to the individual defendant suggests that ignorance of the law ought to be a defense for persons who were raised in a foreign culture . . . as a vindication of the principles of fairness and equality that underlie a system of individualized justice.”²⁶

The volitional component, which differs from the cognitive component, proposes that while the defendant may knowingly vi-

culture is already there for all of us as we begin life. It contains values that will be expressed and a language in which to express them. It contains a way of life that will be followed by most of us, who through most of our lifetimes will unquestioningly assume that there is no better. . . It includes rules, norms, and standards. It includes hopes and fears, beliefs and attitudes, convictions and doubts, at least to the extent that such are shared, inculcated, and transmitted from people to people. *Id.*

21. See Neal A. Gordon, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809, 1811 (2001); Damian W. Sikora, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1699 (2001).

22. Sikora, *supra* note 21, at 1699.

23. Gordon, *supra* note 21, at 1811 (citations omitted).

24. *Id.* at 1813-14.

25. See Gordon, *supra* note 21, at 1813; Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1299 (1986).

26. See Note, *supra* note 25, at 1299 (arguing further that a reason to allow ignorance of the law as a defense is because new immigrants to the U.S. have not had the same opportunities as those individuals born in the U.S. to absorb “the norms underlying this nation’s criminal laws”).

olate the law his native values and cultural influences compel him to act.²⁷ The rationale behind this component is that the law is most effective in modifying behavior when individuals internalize the underlying norms in such a way that the law reinforces moral values.²⁸ It is argued that once a law has acquired this moral dimension, it is difficult for an individual to comply with laws that reify conflicting moral values.²⁹ Moreover, an individual's cultural beliefs drive that individual to act in a particular manner, even if he knows that his conduct is illegal.³⁰

B. *The Cultural Defense Cases*

There have been a number of attempts to use the cultural defense in criminal cases, some of which have resulted in varying degrees of success. These cases are essential in understanding the different ways the cultural defense has been applied and the rarity with which it meets success in courts. It is important to note that while the cases below all involve Asian immigrants, the cultural defense and the use of cultural evidence in the heat of passion defense is by no means limited to this group. Asian immigrants have a very proud and rich cultural heritage and it is purely coincidence that all of the cases below involve this group.³¹

1. *People v. Kimura*³²

Fumiko Kimura, a Japanese immigrant, intended to drown herself and her two young children in the ocean after learning her husband had a mistress. This practice in which a mother drowns herself and her children is known in the Japanese culture as "oya-ko shinju."³³ Kimura decided to kill herself and her children in order to purge herself of the shame and humiliation

27. See Gordon, *supra* note 21, at 1814; Note, *supra* note 25, at 1300.

28. Note, *supra* note 25, at 1300.

29. *Id.*

30. See Sikora, *supra* note 23, at 1697.

31. Other groups that have used cultural evidence and the cultural defense include Ethiopians (In re Wendemagengehu, No. H027715, 2005 WL 2769014 (Cal.App. 6 Dist.) (arguing during his murder trial that the trial court erred in not admitting evidence of his culture)), American Indians (United States v. Birdinground, 114 Fed.Appx. 841 (9th Cir. 2004) (arguing that the district court erred in denying expert testimony on Crow Indian culture and tradition)), and Hispanics (People v. Romero, 81 Cal. Rptr. 2d 823, 824 (Cal. Ct. App. 1999) (seeking to introduce expert testimony on the "sociology of poverty, and the role of honor, paternalism, and street fighters in Hispanic culture," in order to mitigate his murder charge)).

32. No. A-091133 (L.A. Super. Ct., Nov. 21, 1985).

33. See Michele Wen Chen Wu, Comment, *Culture is No Defense for Infanticide*, 11 AM. U.J. GENDER SOC. POL'Y & L. 975, 994 (2003); Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 527 (1996).

caused by her husband's adultery.³⁴ Kimura survived but her two children drowned.³⁵ She was subsequently charged with two counts of murder to which she pleaded not guilty.³⁶

At her trial no absolute cultural defense was pled. However, she did plead an insanity defense that was permeated with cultural factors.³⁷ Although she was ultimately convicted of voluntary manslaughter,³⁸ the trial court allowed her to admit evidence that was probative of her cultural norms to establish that she was, in following the Japanese tradition of oya-ko shinju, temporarily insane.³⁹

2. People v. Chen⁴⁰

In this case a Chinese immigrant used the absolute cultural defense to justify the murder of his adulterous wife. Dong Lu Chen had immigrated to the United States a year before the murder.⁴¹ One night Dong Lu decided to speak with his wife about their sexual relationship, at which point she confessed to having an affair.⁴² After this admission, Chen left the room, picked up a claw hammer and bludgeoned his wife's skull with it eight times until she died.⁴³ He was originally charged with first-degree murder,⁴⁴ which carries a penalty ranging from twenty years imprisonment to the death penalty.⁴⁵

At trial, Chen's attorney argued that cultural pressures rendered Chen unable to form the requisite intent for premeditated murder.⁴⁶ An expert then testified on Chen's behalf, stating that in traditional Chinese culture a wife's adultery speaks to a husband's weak character, and that divorce is not an option because it is considered a shameful recourse.⁴⁷ The expert went on to testify that the traditional Chinese man will threaten his wife upon learning of infidelities, but the Chinese community usually prevents him from carrying out the act.⁴⁸ However, since Chen

34. Wen Chen Wu, *supra* note 33, at 995.

35. *Id.*

36. *Id.*

37. *Id.* at 996.

38. Sacks, *supra* note 33, at 527.

39. *Id.* at 997. Her attorney also stated at trial that Kimura was "mentally deranged at the time—with a Japanese flavor, a Japanese fashion." *Id.* at 996 (citation omitted).

40. No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989), cited in Spatz, *supra* note 1, at 621-22.

41. Spatz, *supra* note 1, at 621.

42. *Id.* at 622.

43. *Id.*; King, *supra* note 12, at 221.

44. Sacks, *supra* note 33, at 528.

45. See Practice Commentary to N.Y. PENAL LAW § 125.27 (McKinney 2004).

46. Spatz, *supra* note 1, at 622.

47. *Id.*

48. *Id.*; King, *supra* note 12, at 221.

was outside of the Chinese community there was no one to stop him.⁴⁹

During sentencing, Judge Edward Pincus found that Chen “was driven to violence by traditional Chinese values about adultery and loss of manhood,” making him more susceptible to committing murder.⁵⁰ In addition, Judge Pincus stated that “Chen was the product of his culture . . . the culture was never an excuse, but it is something that made him crack more easily.”⁵¹ In the end, Chen was found guilty of second-degree manslaughter and sentenced to five years probation.⁵²

3. *People v. Wu*⁵³

At the age of 19 Helen Wu left her home in China, and moved to Macau where she married and had a daughter.⁵⁴ It was there that she met Gary Wu, who was also married at the time.⁵⁵ After Helen’s first husband died, she was approached by Gary, who told her that he planned to divorce his wife because of her inability to bear children.⁵⁶ Gary eventually divorced his wife and met Helen in the U.S. where they conceived a child, Sidney. They did not marry and as a result Helen returned to Macau leaving Sidney in the care of Gary’s mother because in China a child born out of wedlock was considered to be shameful.⁵⁷

Years later Helen returned to the U.S. and eventually married Gary.⁵⁸ Soon after the wedding, Sidney told his mother that he was beaten by Gary, and that Gary maintained a girlfriend on the side.⁵⁹ In a rage due to Gary’s infidelity and abusiveness, Helen cut the cord off from a window blind, strangled Sidney to death, and unsuccessfully attempted suicide.⁶⁰

One of the experts at her trial testified that Helen’s actions were the result of a mother’s love and responsibility.⁶¹ A second expert testified that Helen’s cultural background influenced her

49. Spatz, *supra* note 1, at 622; King, *supra* note 12, at 221.

50. Spatz, *supra* note 1, at 622.

51. King, *supra* note 12, at 221.

52. Spatz, *supra* note 1, at 622.

53. 286 Cal. Rptr. 868 (1991).

54. *Id.* at 870.

55. *Id.*

56. *Id.*

57. *People v. Wu*, 286 Cal. Rptr. at 871.

58. *Id.* at 871-72.

59. *Id.* at 872.

60. *Id.*

61. *Id.* at 885 (stating that Helen’s actions were “a mother’s altruism,” which “may be very difficult for the Westerner to understand. . .”). The expert further testified that “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. . . .” *Id.*

mental state because in her mind, she had no other option but to kill herself and take Sidney along with her so that she could care for him in the next world.⁶² The Court of Appeals reversed Helen's second degree murder conviction stating that evidence of her cultural background was relevant in determining premeditation and deliberation. This evidence reduced her conviction to voluntary manslaughter.⁶³

4. Bui v. State⁶⁴

The appellant, Bui, was convicted of capital murder for the killing of his three children. The case began when Bui's estranged wife became concerned for the safety of her children, and called the police asking them to check up on the children.⁶⁵ When the police arrived they found that each child's throat had been fatally cut, and that Bui had also cut his own throat, but was not dead.⁶⁶ When advised of his rights, Bui stated that he killed his children because he did not want his wife to have them.⁶⁷

Bui's trial strategy was to plead a cross-cultural defense in order to mitigate the charges against him. The cross-cultural defense is essentially the same as the absolute cultural defense, and in this case Bui's attorney argued that

[T]he appellant's values and perceptions were formed by the Vietnamese culture of which he was a product, that the appellant had experienced overwhelming difficulties in assimilating to life in the United States after his involuntary departure from his homeland, that the appellant was despondent because of his wife's infidelities, that the appellant's state of mind at the time of the offense and his actions in killing his children were to some degree understandable—even "normal"—in terms of the Vietnamese culture, and that, therefore, the law should not hold him culpable to the fullest extent for his actions and at least not culpable of the offense of capital murder.⁶⁸

The expert who testified on Bui's behalf further stated that his wife's adultery caused the husband to lose face, and since his wife could not return to her family now that they were in the U.S., the only way that he could save face was by killing himself and his children.⁶⁹ The trial court did not find the defense convincing, holding that the crime committed was especially "heinous, atro-

62. Wen Chen Wu, *supra* note 33 at 1002.

63. *Id.* at 1000-01.

64. 717 So. 2d 6 (Ala. Crim. App. 1998).

65. *Id.* at 10.

66. *Id.* at 11.

67. *Id.*

68. *Id.* at 14.

69. *Id.* at 15.

cious or cruel.”⁷⁰ The court also found that Bui’s cultural background was not the cause of the homicide because he had the capacity to understand that his actions were wrong.⁷¹ Therefore, his conviction for capital murder was affirmed.

II. THE PSYCHOLOGY OF CULTURE

In a discussion on whether to allow cultural evidence as proof of provocation, it is important to understand what culture is, how it develops, and what makes “culture” an appealing rationale for mitigating or excusing a foreign defendant’s conduct. Moreover, it is essential to understand the psychological goals of describing, explaining, and predicting behavior.⁷² In essence, this will help determine whether cultural beliefs can serve as a legitimate excuse for a defendant’s actions.

Because an individual is born into his culture, the individual will feel compelled to follow the rules of this culture. Given this sense of compulsion coupled with the fact that the immigrant defendant knowingly commits the act in question, it is important to consider how his or her cultural values relate to the “provocation”⁷³ aspect of the heat of passion defense. In this manner, evidence of cultural values can be introduced in order to demonstrate how a particular culture recognizes that, in certain situations, the actions of the victim are sufficient provocation to justify the criminal act. Allowing use of cultural evidence in this manner will not only demonstrate respect for foreign cultures, but it will also foster cultural pluralism, and lead to a more fair and accurate legal system.

As defined earlier, culture is a set of beliefs, behaviors, and ways of thinking shared by a social group.⁷⁴ The process through which an individual becomes part of the culture explains how culture can affect an individual’s behavior. This process, whereby an individual acquires the behavioral rules, is known as socialization or enculturation.⁷⁵ In order for an individual to become a functioning adult in society, that individual must learn:

- (1) [B]asic survival skills that are implicit in the need for biosocial continuity of the human aggregate in question, (2) *a series of rules and regulations governing human interaction and*

70. Wen Chen Wu, *supra* note 33, at 1005.

71. *Id.*

72. Harry W. Gardiner, *Culture, Context, and Development*, in *THE HANDBOOK OF CULTURE & PSYCHOLOGY* 104 (David Matsumoto ed., 2001).

73. Provocation is defined as “Something (such as words or actions) that arouses anger or animosity in another, causing that person to respond in the heat of passion.” *Black’s Law Dictionary* 1241 (8th ed. 2004).

74. *See supra* accompanying text at notes 18-19.

75. RICHARD A. THOMPSON, *PSYCHOLOGY AND CULTURE* 27 (1975) (book not in catalog; request from author).

*the allocation of pertinent social and material resources, (3) general principles defining the place of the individual in the group and the concept of self in ongoing social situations, and (4) a summary scheme for the attribution of meaning and significance to the human condition in the social and natural orders.*⁷⁶

In effect, the individual who is becoming socialized acquires a “specific cultural design for living” which dictates the socially acceptable and appropriate conduct.⁷⁷

There are two attributes of culture that are particularly relevant in this discussion on the use of culture in law: values and beliefs. “Values” are defined as a social group’s expectations of what is “proper, right, and natural” behavior.⁷⁸ A society’s values include the goals of an activity as well as the proper means of achieving that goal.⁷⁹ Through its value system, the social group not only defines how members of that group should behave, but also provides them the socially acceptable means for achieving what that society deems is a proper or natural goal.

Beliefs on the other hand are associated with values in that they are “embedded in the standards against which behavior is perceived and judged.”⁸⁰ They are defined as the collective states of mind of the social group that the group forms about itself and other social groups as a result of their collective past experiences and understandings.⁸¹ Combined with values, these two attributes determine an individual’s worldview, which in turn determines how that individual thinks, speaks, and—most important for the purposes of this paper—*acts*, in specific situations.⁸²

Culture is not something that can simply be learned during childhood because culture is entered into, not just learned.⁸³ An individual does not acquire culture, but it is culture that acquires and allows an individual to become a member of that society.⁸⁴ In this manner, culture is “at the core of [our] personal identity,”⁸⁵ and as such cannot be avoided. Culture is a part of every

76. *Id.* at 26 (emphasis added).

77. *Id.*

78. Eleanor Armour-Thomas, *Assessment of Psychometric Intelligence for Racial and Ethnic Minorities*, in HANDBOOK OF RACIAL & ETHNIC MINORITY PSYCHOLOGY 360 (Guillermo Bernal, Joseph E. Trimble, A. Kathlenn Burlew, & Frederick T. L. Leong eds., 2003).

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.* at 361.

83. GIUSEPPE MANTOVANI, *EXPLORING BORDERS: UNDERSTANDING CULTURE AND PSYCHOLOGY* 16 (2000).

84. *Id.*

85. *Id.* at 121.

individual from the moment they are born, and it forms part of the core of that individual's identity.

An individual's actions can be grouped into two distinct categories: physical compulsion and psychological compulsion.⁸⁶ Physical compulsion is an act that is "unfree," which arises when the individual committing the act is physically compelled to act in a certain way.⁸⁷ The absolute cultural defense is linked to psychological compulsion.⁸⁸ This is because absolute cultural defense, as defined in Part I *supra*, focuses on the fact that the defendant has knowingly undertaken the act in question.⁸⁹

The world of psychological compulsion is divided into self-compelled and culturally compelled actions.⁹⁰ As its name suggests, self-compelled actions are those actions that are purely personal in nature.⁹¹ Accordingly, self-compelled individuals act for personal reasons, with no cultural influences affecting their decisions. On the other hand, while cultural compulsion involves some degree of self-compulsion, it is also governed by cultural dictates.⁹² These dictates involve a series of costs-benefits that will subsequently influence the group to either comply with or violate their norms.⁹³ Whether or not an individual is susceptible to the dictates of a particular culture depends on the extent to which they identify with a particular group.⁹⁴ An individual who was reared in and strongly identifies with a particular culture will find gratification in achieving their society's goals as well as unease when disobeying their culture's foundational models.⁹⁵ This is probative of how culture can influence a person's conduct in particular circumstances.

86. William I. Torry, *Culture and Individual Responsibility: Touchstones of the Cultural Defense*, 59 HUM. ORG. 58, 64 (2000).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* ("Dictates come with significant costs and rewards incorporated into structures of group influence. Violations may evoke ostracism, corporeal punishment, and even death, while compliance rewards by obviating punitive sanctions and possibly leaving compliers better off.")

94. *Id.* ("People who identify with a group in name only will not characteristically acquiesce out of cultural compulsion to the dictates put about by the group, unlike other members who rely on in-group affiliations for guidance and fulfillment.")

95. Mantovani, *supra* note 83, at 85 ("The goals which culture suggests are intrinsically gratifying because people have learned through socialization processes to find pleasure in following the goals which their cultural system indicated and in experiencing unease when abandoning traditionally transmitted models.")

III. CULTURAL EVIDENCE IN THE HEAT OF PASSION

There are more foreign-born persons within the United States than ever before, and it is probable that some will commit a crime. Accordingly, any foreign born person who is within the U.S jurisdiction is bound to obey U.S. law because they are protected by those laws and thus owe a temporary allegiance in return for that protection.⁹⁶ However, a number of immigrant defendants have attempted to mitigate the charges against them by attempting to argue an absolute cultural defense. This Part will review the pros and cons of this defense, and then argue why the admission of cultural evidence to establish provocation is preferable and more just, than the use of an absolute cultural defense alone.

A. *The Absolute Cultural Defense: The Good and Bad*

Proponents of an absolute cultural defense argue that it should be allowed because of two competing principles of American law: (1) the idea that the law should be administered equally to everyone who is similarly situated; and (2) that people shouldn't be held responsible for their actions if they did not possess the requisite state of mind.⁹⁷ They also argue that the adoption of a absolute cultural defense would be beneficial because it would lead to fairer and more accurate results, counteract disdain for immigrant groups, and promote cultural pluralism.⁹⁸

In terms of fairness, proponents of the defense believe that it would place defendants on the same grounds as non-immigrants because the immigrant defendant hasn't had enough opportunities to appreciate U.S. law as opposed to individuals born and raised within the U.S.⁹⁹ The defense would also provide a more accurate account of what happened, and thereby reduce the possibility of pathologizing an immigrant defendant's cultural practices or beliefs.¹⁰⁰ Finally, in terms of cultural pluralism, a cultural defense would support diversity and acknowledge that foreign cultures have something valuable to offer.¹⁰¹ Respecting another's culture would allow the courts to judge each person

96. *Carlisle v. United States*, 83 U.S. 147, 154 (1872).

97. Sacks, *supra* note 33, at 524.

98. Sacks, *supra* note 33, at 529-30; Sikora, *supra* note 21, at 1704 (arguing that the arguments in favor of a cultural defense are (1) fairness; (2) lack of deterrent value; (3) improved accuracy; and (4) public policy).

99. See Sacks, *supra* note 33, at 530 (stating that they are at a disadvantage because "the reasonable person" isn't from their neighborhoods); Sikora, *supra* note 21, at 1705.

100. See Sacks, *supra* note 33, at 530-32; Sikora, *supra* note 21, at 1707.

101. Sacks, *supra* note 33, at 533.

according to the values of his or her culture, and thus preserve the principle of individualized justice.¹⁰²

However, an absolute cultural defense poses a number of problems as evidenced in the cases described in Part I.B. First, the use of a cultural defense could promote stereotypes.¹⁰³ For example, in *Kimura*¹⁰⁴, because the Japanese mother only received five years of probation for having killed her children, this may have inadvertently implied that Japanese children are not valued as highly as American children, and that Japanese women are much less stable than American women.¹⁰⁵

Secondly, allowing a cultural defense could undermine the rights of immigrant women and children.¹⁰⁶ In this instance, tolerance of a defendant's culture could result in a promotion of certain cultural values at the expense of the rights of women and children who are often the victims of violence.¹⁰⁷ In *Chen*,¹⁰⁸ giving Dong Lu Chen only five years probation for bludgeoning his wife to death might appear to condone such behavior in the Asian community. Along with *Kimura*'s drowning of her two children, these drastically reduced sentences resulting from the use of cultural defense might suggest that there is a greater tolerance for domestic violence against Asian women.¹⁰⁹

An absolute cultural defense would also be difficult to apply because it would be impossible to ensure fair application of the defense.¹¹⁰ One key issue concerns how cultural groups would qualify for protection under this defense. For example, should the defense be equally available to first generation immigrants and sub-cultural groups?¹¹¹ Moreover, it is unclear how long an immigrant should be entitled to reside in the U.S. and still be allowed to raise an absolute cultural defense.¹¹²

Finally, the adoption of an absolute cultural defense would subject immigrants to an entirely different set of laws than non-immigrant defendants.¹¹³ In effect, this would allow immigrant defendants to successfully plead ignorance of the law as an excuse for their crimes, in violation of one of the law's fundamental

102. Note, *supra* note 25, at 1300 ("The cultural defense is integral to the United States' commitment to pluralism: it helps maintain a diversity of cultural identities by preserving important ethnic values.").

103. Sikora, *supra* note 21, at 1708.

104. No. A-09133 (L.A. Super. Ct., Nov. 21, 1985).

105. Sikora, *supra* note 21, at 1708-09.

106. Sikora, *supra* note 21, at 1709; See Sacks, *supra* note 33, at 535.

107. See Sacks, *supra* note 33, at 535.

108. No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989).

109. Sikora, *supra* note 21, at 1710.

110. See Sacks, *supra* note 33, at 538-39; Sikora, *supra* note 21, at 1711-13.

111. Sacks, *supra* note 33, at 538.

112. Sikora, *supra* note 21, at 1712.

113. *Id.* at 1713.

objectives: the protection of society from harm as well as the protection of the doctrines embodied in the Equal Protection Clause.¹¹⁴ Thus, an absolute cultural defense would create an unfair legal system that is skewed in favor of immigrant defendants, and one that provides immigrant victims less protection than non-immigrant victims.¹¹⁵

B. *The Use of Cultural Evidence in Heat of Passion*

Cultural values “shapes every person’s perception of reality, and as a result guides every person’s behavior.”¹¹⁶ Problems emerge when the values of the majority that form the basis of criminal law force those in the minority to choose between abiding the law and acting against their cultural beliefs.¹¹⁷ Instances where a defendant chooses to act in accordance to his cultural values over the law demonstrate the need for the use of cultural evidence, especially with respect to the heat of passion defense.

The question of what is sufficient provocation to justify the heat of passion defense is a question that, unless defined by the state’s criminal code, is typically left to the court.¹¹⁸ The use of an absolute cultural defense in *Wu* and *Kimura* was problematic because Americans tend to interpret those things that are culturally different as psychologically aberrant. As a result, defendants who raise an absolute cultural defense would receive a mitigated sentence because their culture is used in the same fashion as an insanity defense.¹¹⁹

The admission of cultural evidence can avoid this problem by asking whether the actions of the victim were sufficient in the defendant’s culture to provoke the defendant to act, rather than focusing solely on the defendant’s state of mind. In fact, the use of cultural evidence in this manner fits within the existing legal framework and can easily be adapted to show either extreme emotional disturbance or sufficient provocation for a heat of passion defense.¹²⁰ Arguably, the admission of cultural evidence within the existing legal framework will make “justice more pre-

114. *Id.*

115. Sacks, *supra* note 33, at 545.

116. Wen Chen Wu, *supra* note 33, at 984.

117. See King, *supra* note 12, at 222.

118. *People v. Brooks*, 185 Cal. App. 3d 687, 693 (1986); see *People v. Berry*, 556 P.2d 777, 778 (1976).

119. Lawrence Rosen, *The Integrity of Cultures*, 34 AM. BEHAV. SCIENTIST 594, 604 (1994) (“Even when evidence of culture is accepted by a court, the thrust often remains psychological.”). In fact, “[a] true cultural defense is closely parallel to the insanity defense—both seek to excuse a defendant because he either did not know his actions were wrong or could not control them.” Gordon, *supra* note 21, at 1811.

120. See Gordon, *supra* note 21, at 1812.

cise without sacrificing analytical rigor”¹²¹ because the cultural evidence will only be a single factor in the overall determination of guilt. Specifically, in a homicide case, the cultural evidence should only be used as an individual piece of evidence in the “provocation” analysis.¹²²

Just as in any other heat of passion case, the fact finder would listen to the testimony of various cultural experts and review the cultural evidence produced by the defendant to determine whether the facts and circumstances are sufficient to arouse the passions of the ordinary reasonable man.¹²³ While the reasonable man may not be from the same cultural background as the defendant¹²⁴ any problems arising from the use of reasonable standard can be resolved by using a standard that accounts for the defendant’s cultural values. This approach would serve the same purpose as the absolute cultural defense in that it promotes the principles of fairness and individualized justice.¹²⁵ Moreover, I propose that this standard be limited to homicide cases committed by an immigrant so as to minimize the risk that the standard would be abused in other areas of law. Reviewing the cultural defense cases discussed in Part I.B, *supra*, it is possible to see how the use of cultural evidence within a heat of passion defense is more just and respectful of an immigrant defendant’s omnipresent cultural background.

In *Kimura*¹²⁶ the mother was on trial for drowning her two children after learning of her husband’s infidelity. During trial, evidence of her cultural background was used to establish that she was temporarily insane, and thus was subsequently convicted of voluntary manslaughter.¹²⁷ As a result, Kimura’s culture was degraded to the level of an insanity plea, and the stereotype that Asians do not value children as highly as Americans was perpetuated. In fact, it was stated that she was “mentally deranged at the time—with a Japanese flavor, a Japanese fashion.”¹²⁸ Given that her culture played such an important role in her decision to kill herself and her children, the use of cultural evidence to establish a defense would likely have achieved the same result as that of a husband who uses infidelity as evidence to raise a heat of the passion defense, thereby preventing Japanese culture from being reduced to a psychological illness.

121. *Id.*

122. *See supra* Part III.A

123. *People v. Brooks*, 185 Cal.App.3d 687, 693 (1986).

124. *Sacks, supra* note 33, at 530.

125. *See Note, supra* note 25, at 1299.

126. *People v. Kimura*, No. A-09133 (L.A. Super. Ct., Nov. 21, 1985).

127. *See Wen Chen Wu, supra* note 33, at 995-97.

128. *Id.* at 996.

One of the best examples is the *Chen*¹²⁹ case, where Dong Lu Chen murdered his wife because he discovered that she had been committing adultery. Allowing the defendant to argue a cultural defense had the unintended result of portraying Asian women as being worth less than American women, as well as depicting Asian men as incapable of controlling their anger. If this case had been tried using a heat of passion defense, with cultural evidence used to establish provocation, it is likely that the charges would have been reduced to involuntary manslaughter because most states recognize a spouse's adultery as sufficient motivation to kill.¹³⁰ While the sentence may have remained the same, using cultural evidence would have avoided the stereotyping and negative associations with the defendant's culture, and thus would be seen as an acceptable and just result.

As with the above cases, it is likely that the court in *Wu*¹³¹ would have reached the same result if cultural evidence had been admitted to establish a heat of passion defense. The Court of Appeals even found that evidence of her cultural background was sufficient to raise the existence of a heat of passion defense.¹³² If that approach had been used from the beginning, there would be less concern about associating filicide with Chinese culture or religion¹³³ because under that approach a defendant would be held to the standard of a reasonable person from his or her respective culture.¹³⁴

Finally, in *Bui*¹³⁵ the court upheld the conviction for capital murder on the grounds that the defendant was able to appreciate the criminality of his actions despite the presence of an emotional disturbance.¹³⁶ What may explain the court's reasoning is that in Anglo-American culture it may be more deplorable for a man than a woman, to kill a child.¹³⁷ The court's effort to couch its reasoning in cogent objective terms ignores how American law and the court's own rational is laden with Anglo-Saxon cultural beliefs, in effect diminishing the relevance and value of the

129. *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989).

130. See Sacks, *supra* note 33, at 544.

131. *People v. Wu*, 286 Cal. Rptr. 868 (1991).

132. *Wen Chen Wu*, *supra* note 33, at 1001.

133. *Id.* (stating that the trial was concerned over giving an instruction on the cultural defense for fear that it would be seen as approving of defendant's actions, which would have been acceptable in China).

134. *Sikora* *supra* note 21, at 1721.

135. *Bui v. State*, 717 So. 2d 6 (Ala. Crim. App. 1998).

136. *Wen Chen Wu*, *supra* note 33, at 1005.

137. *Id.* See also, Kris Axtman, Why Juries Often Spare Mothers Who Kill, *Christian Sci. Monitor*, July 9, 2001, at 3 (reporting that mothers who are viewed as traditional nurturers of the family generally receive lighter sentences than fathers do, because men are not viewed as having the same intense bond with their children).

defendant's cultural beliefs. By making evidence of the defendant's cultural background available in the heat of passion cases, and in applying a reasonable person's standard from the perspective of the defendant's culture, the law could eliminate the bias in favor of American culture by respecting the value and integrity of foreign cultures within the United States.

CONCLUSION

The United States is a country populated since its inception by the immigrants of many other nations. As long as immigrants continue to enter the United States there will be crimes committed in the name of culture. As Guiseppe Mantovani wrote, "[t]he most radical forms of intolerance are those which ignore or discredit the cultural identity, traditions and values of others by taking for granted that the only acceptable system of values is our own, and by requiring others to accept it without question."¹³⁸ The culture of an immigrant defendant therefore, should be taken into consideration because one's culture is an inescapable part of one's being and can explain how an individual reacts in a given situation. While the idea of an absolute cultural defense may be appealing, the use of evidence of a defendant's cultural background for a heat of passion defense is a more sensible approach. Such evidence can be used to demonstrate whether the defendant was sufficiently provoked to excuse or explain his conduct and avoid the problems associated with the reifying of stereotypes and the undermining of the rights of immigrant women and children. *Moreover, the use of cultural evidence in a heat of passion defense would ensure the fair and equitable administration of the law to all and maintain the principles of fairness and individualized justice that form the bedrock of the American legal system.*

138. Mantovani, *supra* note 83, at 18.