Maine Law Review

Volume 50
Number 2 *Symposium: Law, Feminism & The Twenty-First Century*

Article 13

June 1998

Paying Attention to the Little Man Behind the Curtain: Destroying the Myth of the Liberal's Dilemma

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I. INTRODUCTION

In the classic film *The Wizard of Oz*,[1] Dorothy and her companions travel a long and arduous journey in order to eventually stand before the "great and powerful Oz," and they are most assuredly awed by his presence and force upon first sight of him. Within a short time, and with the assistance of a curious canine, however, their attention is drawn to some activity previously concealed behind a curtain. With some examination—inadvertently encouraged by the hasty assurances of the "great and powerful Oz" that reality is as he urges it and that all observations to the contrary are to be disregarded—Dorothy and her friends discover the little man behind the curtain and the truth behind the façade. This Comment urges the discovery and examination of that little man behind the curtain responsible for the projection of an awesome, but false, dichotomy between the interests of feminism and multiculturalism regarding the role of cultural evidence in criminal prosecutions.

Generally, feminists and other liberals, and in particular multiculturalists, share the common goal of seeking to make American law reflective of a greater variety of voices and experiences beyond those of the dominant, white-male culture. There currently exists an issue, however, about which feminists find it necessary to depart from this goal: whether to permit a criminal defendant to introduce exculpatory cultural evidence.[2] Much of the feminist literature on the use of the "cultural defense" argues that introduction of such evidence serves only to deny immigrant women and children the same protections afforded others in our criminal justice system because the defendants invoking such a "defense" tend to be immigrant males charged with crimes against women or children pursuant to conduct that is tolerated as part of the defendant's patriarchal, immigrant culture.[3]

This Comment will address the tension between the larger goals of feminism and the current opposition to the use of a "cultural de-

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1. THE WIZARD OF OZ, (Metro-Goldwyn-Mayer 1939).

2. Several writers have argued that the admission of evidence of a criminal defendant's culture, while nominally advancing the goals of multiculturalism, must not be permitted to the extent that its admission compromises other significant feminist goals. *See, e.g.*, Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1095-98 (June 1996); Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. LAW 523, 534-37 (1996); Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 167 (1994).

3. *See* Sacks, *supra* note 2, at 534-35; Coleman, *supra* note 2, at 1095-98; Goldstein, *supra* note 2, at 162-64.

fense"—what has been called the "liberal's dilemma."[4] In Part II, this Comment explores the historical uses of cultural evidence in criminal prosecutions and the recent role such evidence has played. Part III summarizes the perceived dilemma as expressed in feminist legal writing. Part IV examines the practice of female genital mutilation as exercised in the United States and the unique opportunities it affords for an examination of the role of cultural evidence in criminal prosecutions, because female genital mutilation is traditionally perpetrated upon girls by women.[5] Finally, Part V attempts to resolve the "liberal's dilemma," arguing that the dilemma arises from an overly narrow definition of culture that is Eurocentric, racist, and sexist and from a misunderstanding of the role of law in American society.

II. PAST AND PRESENT USE OF THE "CULTURAL DEFENSE"

A "cultural defense" is a legal strategy used to mitigate culpability or to completely excuse behavior that would otherwise be deemed criminal.[6] The defense is often explained as an offspring of the underlying premise that the American criminal justice system should recognize that persons from non-dominant cultures are entitled to express their cultural identities even when that expression may embody values that differ from those of the dominant culture.[7] There are two principal rationales for such a defense. First, a person of a different culture, newly arrived in the United States, should not be held responsi-

4. The "liberal's dilemma" has been used to define the tension between the following two positions: On the one hand, it is argued that admission of cultural evidence may expose some women and children to violent and oppressive customs that would otherwise be criminal in the United States, effectively adopt immigrant customs into American law, and reinforce cultural stereotypes; on the other hand, it is argued that the failure to admit evidence of a defendant's culture impermissibly imposes American culture and cultural demands upon immigrants while ignoring the validity of other cultures. *See* Coleman, *supra* note 2, at 1096.

5. Female genital mutilation involves the cutting away of portions of the female genitalia and the subsequent sewing up of the remaining tissue. It is traditionally performed by women. *See infra* Part IV. Immigrant women facing criminal charges in the United States arising out of the practice of female genital mutilation provide an interesting venue for the examination of the role of cultural evidence in criminal proceedings for the very reason that the defendants are women charged with crimes of violence against other women and female children. These dynamics remove much of the supposed dichotomy between the interests of multiculturalism and the interests of feminists in the protection of immigrant victims from violence at the hands of immigrant males allegedly acting consistently with the patriarchal norms of their cultures. The focus of much feminist legal writing has been on violence committed by men upon women and children, ignoring incidents of violence and oppression committed by women upon each other and their children in alleged pursuance of cultural norms. *See, e.g.*, Coleman, *supra* note 2, at 1095-96; Sacks, *supra* note 2, at 534-35; Goldstein, *supra* note 2, at 162-64. In addition, these dynamics necessitate that the feminist either choose between the interests of a female defendant or a female victim or depart from the propensity for dualism and establish a principled solution which will best advance the interests of all marginalized populations in the American criminal justice system.

6. *See* Sharon M. Tomao, *The Cultural Defense: Traditional or Formal?*, 10 GEO. IMMIGR. L.J. 241, 241 (1996).

7. *See, e.g., id.*

ble for unwitting transgressions of American law and customs that are new to her.[8] Second, the American legal system values individualism and should respect various cultural practices, notwithstanding their conflict with the expressed laws of the United States and each of the individual states.[9] This Author contends that the "cultural defense" is best understood in light of the latter rationale.

The idea that a person from a different culture ought not to be held responsible for "unwitting transgressions" is a misunderstanding of the role that evidence of culture plays in the criminal justice process. Evidence of culture is not offered to mitigate or excuse behavior that would otherwise be criminal, absent evidence that it was consistent with the defendant's cultural origins. It is offered in rebuttal to the prosecution's case to mitigate or excuse behavior that would otherwise be criminal, absent evidence that the defendant lacked the requisite state of mind because of his or her cultural beliefs or background.[10] This country has clearly rejected ignorance of the law as a defense to a crime charged.[11] To this end, American jurisprudence does not recognize a formal cultural defense, which in and of itself would be sufficient to mitigate the culpability of a defendant.

Cultural evidence has, however, been introduced by defendants within an established procedural context, either before trial as part of the plea-bargaining process, during trial as evidence of a lack of mens rea or of insanity, or after trial as a consideration during sentencing.[12] Evidence of non-dominant culture is introduced, not as an "ignorance of the law" defense, but as one factor to be considered among many in evaluating the existence of mitigating factors.

Considerations of culture are not new to the American legal system. Criminal courts have considered culture in the trial and sentencing of defendants for over a hundred years. In 1888, in *United States v. Whaley*,[13] the Circuit Court of the Southern District of California allowed defendants charged with murder to plead to the lesser offense

8. *See The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1299 (1986).

9. *See* Coleman, *supra* note 2, at 1118-22.

10. *See, e.g.*, People v. Wu, 286 Cal. Rptr. 868, 887 (Cal. Ct. App. 1991).

11. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199 (1991).

12. *See, e.g.*, United States v. Ezeiruaka, Crim. A. No. 94-42 (JEI), 1995 WL 263983, at *5-6 (D.N.J. May 3, 1995) (admitting evidence of culture at sentencing); United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1888) (considering evidence of culture in plea-bargaining process); People v. Wu, 286 Cal. Rptr. at 887 (admitting evidence of culture as relevant to defendant's state of mind).

13. 37 F. 145 (C.C.S.D. Cal. 1888). In *Whaley*, four members of a Native American tribe had killed another member of the same tribe on the Tule River Indian Reservation. *See id.* at 145. The decedent was an Indian doctor who had been so unsuccessful in his treatment of patients that about 20 of them had died, causing members of the tribe to believe that he was poisoning them. *See id.* When a popular member of the tribe became sick under the decedent's treatment, the tribe held a council and informed the decedent that he would be killed if his patient died. *See id.* The patient did die under the decedent's care, and a council was held wherein it was determined that the defendants would carry out the council's resolution to kill the doctor, which they did the following morning. *See id.* It was for this killing that they were charged. *See id.*

of manslaughter after discussing the relevance of the defendants' "Indian nature, their customs, superstition, and ignorance."[14] Some years later, a study titled *The Immigrant's Day in Court* cited a number of cases in which judges accepted a defense to culpability based upon evidence of differences between the defendant's culture and the culture and legal system of the United States.[15] Courts have increasingly been willing to consider evidence of a defendant's culture to mitigate culpability.[16] This trend is consistent with an evolution in sentencing philosophy during the past two decades towards more individualized justice.[17] Although it is arguable that the Federal Sentencing Guidelines[18] marked a shift away from individualized sentencing, criminal defendants are generally afforded a subjective evaluation of their conduct in the sentencing phase of their prosecution.[19]

Today, there is little agreement among courts as to whether, and to what extent, cultural evidence should be permitted to be introduced during the criminal justice process to mitigate a defendant's culpability. In *Vang v. Toyed*,[20] the Ninth Circuit stated that "expert testimony on issues of culture is properly admitted when relevant and not unfairly prejudicial."[21] Courts differ, however, on their interpretation of what is relevant.

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14. *Id.* at 146. The court allowed the defendants to plead to manslaughter on the grounds that the requisite malice for murder was wanting. *See id.*

15. *See* KATE HOLLADAY CLAGHORN, THE IMMIGRANT'S DAY IN COURT 101 (1923). The study described a number of cases involving Italian immigrants in which men abducted women who were under the age of consent to marriage in the United States and whose parents refused to consent, rendering the men technically liable for the charge of rape, despite the fact that the women were of appropriate marrying age in Italian culture. *See id.* The study concluded that the cases therein described indicated that the mental state of the immigrant defendant must be understood in order to deal properly with such situations and that it was improper to analyze them under fixed, legal definitions of crimes in the United States such as rape or adultery. *See id.*

16. *See* Sacks, *supra* note 2, at 523; Tomao, *supra* note 6, at 241.

17. *See* Coleman, *supra* note 2, at 1114-18.

18. FEDERAL SENTENCING GUIDELINES MANUAL (1998).

19. *See* Coleman, *supra* note 2, at 1114. "In enacting [the Federal Sentencing Guidelines], Congress sought to achieve three primary sentencing goals: honesty, uniformity, and proportionality." United States v. Williams, 891 F.2d 962, 963 (1st Cir. 1989).

20. 944 F.2d 476 (9th Cir. 1991) (ruling on civil rights action brought by female Hmong refugees and their husbands against employee of the state government employment security office who allegedly raped the women when they contacted him individually about obtaining employment).

21. *Id.* at 481 (relying on several criminal cases in stating the role cultural evidence may play in trial). In this case, evidence of the victim's Hmong culture was admitted to explain her behavior subsequent to the alleged acts of the defendant for the purpose of rebutting testimony that the victim's behavior towards the defendant was inconsistent with one who had previously been raped by him. *See id.* at 482. Much of the feminist legal writing expressing opposition to the use of cultural evidence to excuse or mitigate the culpability of criminal defendants struggles to make principled exceptions for the inclusion of such evidence to explain a victim's behavior. *See infra* Part III.

In *Ha v. Alaska*,[22] the court allowed evidence of the defendant's culture to be admitted for purposes of establishing that the defendant acted in self-defense "to the extent that an understanding of [defendant Ha's] Vietnamese culture was relevant to evaluating [the victim's] motivation or readiness to kill Ha."[23] The court found such evidence relevant to the determination of the reasonableness of the defendant's perception of imminent harm.[24] The court distinguished the permissible use of such evidence from that which would not be permissible, noting that it would not allow the defendant to argue that "the law of self-defense should make exceptions for people whose culture encourages vendettas, killings to assuage personal honor, or preemptive killings to forestall future harm."[25] This is a principled distinction that allows for the admission of cultural evidence to the extent that it is relevant to establish elements of the crime charged or the establishment of a legally recognized defense, while rejecting it to the extent it is offered merely in support of arguments that a defendant's culture alone is enough to excuse or mitigate his culpability.

Similarly, the court in *People v. Wu*[26] allowed the admission of evidence of the defendant's culture and held that the defendant was "entitled to have the jury instructed that it may consider evidence of defendant's cultural background in determining the existence or non-existence of the relevant mental states."[27] The court expressly distinguished the permissible purposes for which this evidence was admitted from the impermissible admission of such evidence for the purpose of showing that the defendant was ignorant of the law and therefore excused from its application to her case.[28]

Evidence of the defendant's culture has also been admitted in a hearing on a defendant's motion to suppress evidence on the grounds that he did not knowingly waive his constitutional rights.[29] The court determined that such evidence was relevant to the issue of whether the defendant knowingly waived his constitutional rights because an individual's "[c]ultural heritage clearly has some impact upon an individual's full awareness of his or her rights and necessarily assumes a role in the 'totality of the circumstances' analysis . . . ."[30] The court

22. 892 P.2d 184 (Alaska Ct. App. 1995).

23. *Id.* at 195.

24. *See id.*

25. *Id.*

26. 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).

27. *Id.* at 887 (allowing evidence of defendant's Chinese culture to explain the level of stress experienced by the defendant prior to the killing of her son and to show that the defendant intended to kill herself and believed that she must kill her son to ensure that he would be taken care of after her death).

28. *See id.* at 881.

29. *See* Liu v. Delaware, 628 A.2d 1376, 1379 (Del. 1993).

30. *Id.* at 1380; *see also* Moran v. Burbine, 475 U.S. 412, 421 (1986) (reiterating the "totality of the circumstances" test for determining whether a knowing waiver of constitutional rights had been made).

made it clear, however, that "[t]he fact that a defendant's alien status may have prevented him from understanding the full, tactical significance his decision to [waive certain rights] will not invalidate his waiver."[31] It is not the defendant's culture that is ultimately significant but, rather, the extent to which his culture goes to prove that his waiver was not knowingly, intelligently, or voluntarily made—the required element for suppression of evidence on the grounds of failure of the defendant to knowingly waive his constitutional rights.[32]

Courts have admitted evidence of a defendant's culture in the sentencing phase of trial as well, to attempt to show the existence of mitigating factors.[33] Such evidence is not admitted in support of the argument that the defendant is entitled to be sentenced less harshly than a defendant of the dominant culture solely because he or she acted consistently with his or her cultural background. It is admitted because it is relevant to the determination of a defendant's sentence in accordance with the general principles of the relevant state's criminal law and the factors for consideration laid out therein.

One court has admitted cultural evidence as relevant to the defendant's motion to dismiss a prosecution pursuant to the state's de minimis statute.[34] The statute allowed the court to dismiss a prosecution if, "having regard to the nature of the conduct alleged and the nature of the attendant circumstances," the court finds that the defendant's conduct was not of the nature envisioned by the legislature to be prohibited.[35] The court in this case granted the motion to dismiss the prosecution of the defendant for gross sexual assault based upon evidence of the defendant's culture, which showed that his acts in kissing his son's penis were done as a sign of affection consistent with his culture and were not in the nature of those acts which the legislature intended to prohibit by its gross sexual assault statute.[36]

Evidence of the defendant's cultural background has also been admitted when offered by prosecutors to show that the crimes with which the defendant is charged are consistent with practices accepted in the defen-

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31. Liu v. Delaware, 628 A.2d at 1381 (alterations in original) (quoting U.S. v. Yunis, 859 F.2d 953, 965 (D.C. Cir. 1988)).

32. *See id.* at 1379 (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

33. *See, e.g.*, United States v. Ezeiruaku, Crim. A. No. 94-42 (JEI), 1995 WL 263983, at *5-6 (D.N.J. May 3, 1995) (admitting evidence of the defendant's culture to show coercion); Gutierrez v. State, 920 P.2d 987, 989 (Nev. 1996) (admitting evidence of the defendant's culture to show that he acted under the influence of extreme mental or emotional disturbance).

34. *See* State v. Kargar, 679 A.2d 81, 83 (Me. 1996).

35. *See id.* (quoting ME. REV. STAT. ANN. tit. 17-A, § 12 (West 1983)). The statute also allows for the dismissal of a prosecution where the defendant's conduct did not cause the harm which the legislature had intended to protect when passing the criminal statute under which he was charged. *See* ME. REV. STAT. ANN. tit. 17-A, § 12 (West 1983).

36. *See id.* at 83, 86.

dant's culture[37] and to challenge witness credibility.[38] Prosecutors have also sought to admit evidence of the victim's culture to explain the victim's post-incident behavior.[39]

Some courts have, however, rejected requests to introduce evidence of culture, finding such evidence irrelevant. In one case, a judge ruled that the defendant had been exposed to United States culture for a sufficiently lengthy period to make evidence of the defendant's native culture irrelevant.[40] In other cases, courts have rejected evidence of the defendant's culture where the evidence sought to be introduced had no bearing on the elements of the crime.[41] Courts have also refused to allow either the introduction of evidence of a defendant's culture or jury instructions that would interpret a reasonable-person standard in terms of a reasonable person of the defendant's culture.[42] In another case, the court rejected evidence of the common culture of the defendant and the victim, which the defendant sought to introduce in order to show how the victim would have understood his behavior, ruling that it was irrelevant to his defense.[43]

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37. *See, e.g.*, Varughese v. State, 892 S.W.2d 186, 193 (Tex. Ct. App. 1994) (admitting evidence of the prevalence of wife-burning in India, the defendant's native country, in his prosecution for the murder of his wife by immolation).

38. *See, e.g.*, State v. Her, 510 N.W.2d 218, 220-21 (Minn. Ct. App. 1994) (allowing the admission of evidence of relations between the sexes in Hmong culture, the culture of both the defendant and the victim, in the defendant's trial for rape to support the victim's testimony and to rebut the defendant's testimony that the victim consented).

39. *See, e.g.*, United States v. Calvin, No. ACM 30944, 1995 WL 755285, at *1 (A.F. Ct. Crim. App. Nov. 30, 1995) (allowing the victim to explain her failure to report the alleged rape by the defendant by explaining that reporting such things to the authorities was contrary to her Navajo tribal custom). Interestingly, feminist legal writing generally supports the use of evidence that explains victim behavior during and following the incident in this manner, engaging in significant philosophical maneuvering to create a principled distinction between the use of such evidence and the use of relevant evidence of a defendant's culture to mitigate or excuse otherwise criminal behavior. *See infra* Part III.

40. *See* United States v. Ojo, 1997 WL 66725, at *1 (A.F. Ct. Crim. App. Feb. 6, 1997) (finding evidence of the defendant's Nigerian culture irrelevant where the defendant had lived in the United States for almost three years and had been in the United States military for almost two years at the time of his offense).

41. *See, e.g.*, United States v. Washington, 836 F. Supp. 192, 198 (D. Vt. 1993) (denying the defendant's request for funds for a witness who would testify to the purposes that young black urban males may have for carrying a firearm because the purpose of carrying a firearm was irrelevant to the firearms offense with which the defendant was charged); State v. Girmay, 652 A.2d 150, 152 (N.H. 1994) (excluding testimony about the Ethiopian defendant's social, cultural, and political world in which he lived most of his life on the ground that the defendant had failed to show its relevance to his state of mind at the time of the murders with which he was charged).

42. *See, e.g.*, State v. Wanrow, 559 P.2d 548, 559 (Wash. 1977) (refusing to allow evidence of the effect of the defendant's Indian culture on her perceptions where she claimed that she acted in self-defense, but finding a jury instruction that imposed a standard of reasonableness that suggested a reasonable male standard was reversible error).

43. *See* People v. Rhines, 182 Cal. Rptr. 478, 483 (Cal. Ct. App. 1982) (ruling, in a rape trial, that evidence that African Americans tend to speak very loudly to each other was irrelevant to the defendant's defense that he reasonably believed the victim consented to have sex with him).

Evidence of a defendant's culture has been rejected by one court as entirely irrelevant on the grounds that "persons in America are bound to abide by American legal doctrine and American courts are obligated to apply such doctrine."[44] This argument fails to recognize that cultural perceptions may well be relevant to various elements of the "American" law that the courts apply. It assumes that the introduction of cultural evidence to mitigate culpability is done outside of the established criminal justice procedure of this country and is an exception to that procedure which is unavailable to members of the dominant culture.

The *Truong* court's reasoning is consistent with the same faulty analysis which explains the introduction of cultural evidence to mitigate or excuse culpability in terms of an ignorance-of-the-law defense, which, though generally unavailable to criminal defendants, should be made available to immigrants presumably unaware and unfamiliar with the laws of this country.[45] The argument completely fails to understand the role that evidence of a defendant's non-dominant culture plays within the procedural context in which it is introduced. The *Truong* court argument contends, instead, that the role of such evidence can be explained only in terms of an exception to the criminal justice procedure that is unavailable to defendants of the dominant culture.[46] The argument assumes that evidence of a defendant's non-dominant culture is being introduced to show that, merely because the defendant acted consistently with his culture, his culpability should be mitigated. In fact, such evidence is introduced because it is relevant either to prove that some element of the crime charged did not exist or that some element of a defense does exist. It is the successful rebuttal of proof of an element of the crime charged, or the successful proof of the elements of a defense posed, that mitigate the defendant's culpability. Were the evidence of the defendant's culture irrelevant to either of these two issues, it would be inadmissible to mitigate the defendant's culpability.

The failure to consider the procedural context within which cultural evidence is introduced, and the resultant view of the use of such evidence as an exception to that procedure that is unavailable to members of the dominant culture, creates tension for the feminist.[47] She, who would generally justify the existence of such exceptions as necessary to facilitate the inclusion of non-dominant peoples' influence and power in a legal system, finds herself opposing such exceptions because, viewed in this context, they result in excusing violence towards women and children that otherwise would be criminal were it not for the

44. People v. Truong, 553 N.W.2d 692, 699 (Mich. Ct. App. 1996).

45. *See, e.g., The Cultural Defense in the Criminal Law*, *supra* note 8, at 1299.

46. *See* People v. Truong, 553 N.W.2d at 699.

47. The Author uses the term "feminist" with caution, recognizing that it describes a diverse population with differing agendas. The term is used narrowly throughout this Comment to refer to those feminist legal scholars who have identified and attempted to resolve the "liberal's dilemma." In the broader sense, the Author uses it to refer to all those who are concerned with the inclusion of the experiences and wisdoms of all marginalized populations in this country's legal system.

behavior's consistency with the immigrant defendant's cultural background.[48] She focuses on cases in which immigrant male defendants are charged with crimes against women and children and seek to introduce evidence of the permissibility of their actions in their cultural background to mitigate their culpability.[49] She understands any resultant mitigation of culpability as an unjust and unfair result for the victims of the defendants' violence, believing that they have been afforded less protection from patriarchal oppression than are women of the dominant culture.[50] She weighs the interests of immigrant defendants in having evidence of their culture introduced at trial to mitigate culpability with the interests of immigrant victims in being afforded the same protections as victims of the dominant culture, and she determines that the interests of the victims must prevail.[51] Therefore, she opposes the introduction of cultural evidence by defendants to mitigate culpability, despite the general value she places on the inclusion of non-dominant voices in the power structure of the dominant culture, including the legal system.[52]

The tension is then intensified when she is faced with cases of differing factual scenarios, such as when the defendant is an immigrant female charged with violence against her children who wishes to introduce evidence of her culture to mitigate her culpability,[53] or when the prosecution wishes to introduce evidence of the victim's culture to explain her pre- and post-incident behavior when such behavior is inconsistent with the behavior expected by and from members of the dominant culture in similar circumstances.[54] Opposing the introduction of evidence of a criminal defendant's culture generally, she must then attempt to make a principled argument for the admittance of evidence of the victim's culture and of female immigrant defendants' culture when it assists in holding the perpetrators of gender violence and oppression accountable. Such philosophical gymnastics are the direct result of a failure to understand the current use of cultural evidence within the procedural context of the criminal justice system and will be analyzed in greater detail in Part III.

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48. *See, e.g.*, Coleman, *supra* note 2, at 1095, 1166-67.

49. *See id.* at 1095 (noting that victims of crimes for which the defendant charged seeks to introduce evidence of his culture to mitigate his culpability are "almost always minority women and children").

50. *See, e.g., id.* at 1095; Sacks, *supra* note 2, at 534-35; Tomao, *supra* note 6, at 252; Goldstein, *supra* note 2, at 162-63.

51. *See* Coleman, *supra* note 2, at 1097-98.

52. *See id.*

53. *See, e.g.*, People v. Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).

54. *See, e.g.*, United States v. Calvin, No. ACM 30944, 1995 WL 755285 (A.F. Ct. Crim. App. Nov. 30, 1995) (allowing a Navajo rape victim to explain her failure to report a rape by stating that it was against tribal custom to report such events to the authorities and that the family dealt with such matters).

III. THE DILEMMA FOR FEMINISTS AS EXPRESSED IN FEMINIST LEGAL WRITING

In 1994, Leti Volpp, challenged the assumption, inherent in the notion of a "cultural defense," that the law of the United States and each individual state therein is acultural.[55] She explained how such an assumption serves to subordinate members of the non-dominant culture by distancing that culture from an "expert" American legal system and placing the power unquestioningly in the hands of the expert to define the "other" culture.[56] She explained that this assumption depends upon the "problematic positioning of recent immigrants . . . as 'not American,' [while] [r]eserving the term 'American' for those who seem fully assimilated."[57] Labeling populations in this way, she argued, denies the "fluid and shifting nature of American identity" and disregards the fact that immigrant experiences are a legitimate part of the identity of the United States.[58]

Volpp also examined the division between white feminists and feminists of color on the issue of the use of cultural evidence to mitigate culpability and noted that white feminists expressed complete opposition to the use of such evidence while feminists of color wanted to retain the possibility of using such evidence in some circumstances.[59] She noted

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55. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 61-62 (1994) [hereinafter Volpp I]. The article was written "from the subject position of an Asian American woman," *id.* at 58, and focuses on two cases involving Asian women and the introduction of cultural evidence to mitigate the culpability of the defendants. *See id.* at 59. In *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), the defendant was permitted to introduce evidence of his Chinese cultural background during trial and sentencing to demonstrate that he lacked the requisite state of mind to be found guilty of murder or manslaughter in the first degree. *See id.*; Volpp I, *supra*, at 64. The defendant was sentenced to five years probation for killing his wife, also a Chinese immigrant, with a hammer after learning that she had committed adultery. *See* People v. Dong Lu Chen, No. 87-7774; Volpp I, *supra*, at 64. The cultural evidence explained that it would be expected that a Chinese man would react to such information in a much more volatile, violent way than would someone in the United States. *See* People v. Dong Lu Chen, No. 87-7774; Volpp I, *supra*, at 66. In *People v. Wu*, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991), the defendant successfully sought to introduce evidence of her Chinese culture to demonstrate that she lacked the requisite state of mind to be convicted of murder. *See id.* at 887; Volpp I, *supra*, at 86-87. The defendant was charged with the murder of her son, after she strangled him and attempted immediately thereafter to take her own life. *See* People v. Wu, 286 Cal. Rptr. at 872; Volpp I, *supra*, at 86. The cultural evidence, explained in the testimony of a transcultural psychologist, was that "'in the Asian culture when the mother commits suicide and leave [sic] the children alone, usually they'll be considered to be a totally irresponsible behavior [sic], and the mother will usually worry what would happen if she died.'" People v. Wu, 286 Cal. Rptr. at 885; Volpp I, *supra*, at 88. Volpp discussed how, in both cases, the cultural evidence introduced is used to compare a presumably acultural United States legal system with Chinese culture, in the first instance, *see* Volpp I, *supra*, at 64-72, and with transcultural psychology, in the second instance. *See id.* at 87-90.

56. *See* Volpp I, *supra* note 55, at 62.

57. *Id.* at 61.

58. *Id.*

59. *See id.* at 77 (discussing the response of feminists to the *Chen* case).

that white feminists' rejection of any use of culture in the courtroom denies the existence of the culture inherent in the United States legal system,[60] and refuses to consider the subordination of women of color along race lines.[61] In this way, Volpp recognizes the false dichotomy underlying the "liberal's dilemma": the feminists' position against the introduction of cultural evidence on the ground that such evidence will result in the disparate treatment of immigrant defendants charged with crimes of violence against women and children, versus the position in favor of the introduction of such evidence when necessary to prevent the subordination of members of the non-dominant culture.

Unfortunately, Volpp's articulation of a compromise between the two positions fails to consider the procedural context in which such evidence may be introduced. Although rejecting the adoption of a formal, independent cultural defense on the ground that it would serve only to reduce cultures to rigid stereotypes defined by the "expert" United States legal system,[62] Volpp proposed an analysis of the decision when to introduce cultural evidence that would center on the value of antisubordination.[63] Valuing antisubordination, Volpp explained, "is more than a game of hierarchical rankings of 'who's most oppressed'; it means a serious commitment to evaluating and eradicating all forms of oppression."[64] She argued that evidence of a defendant's culture should not be used to impose stereotypes but to address the defendant's location within his or her "community, . . . in the diaspora and [his or] her history."[65]

Volpp used such arguments to explain why she felt that use of the "cultural defense" was appropriate in a case where an Asian woman was charged with killing her child and inappropriate where an Asian man was charged with killing his spouse.[66] She explained that an antisubordination evaluation of the two cases reveals that the cases are truly about the Asian woman defendant in the first instance and the Asian woman victim in the second instance.[67] She differentiates

60. *See id.* at 78.

61. *See id.* at 81-82. Volpp argued that "[m]any white feminists repeatedly fail to recognize [the] multiple subordination [of race and gender], and continue to deny that subordination along lines other than gender gravely impacts women of color." *Id.* at 81.

62. *See id.* at 93-94.

63. *See id.* at 97. Volpp described antisubordination as a principle that "does not posit that those who suffer oppressions lack agency due to their victimization and therefore are not responsible for their crimes." *Id.* at 98. She described the principle as mandating an evaluation of a defendant's agency within the context of her oppression along multiple lines (such as race, gender, and poverty) and subject to the pressures of forces within and outside her community. *See id.* She argued that evidence of culture should be admitted in a manner that does not "explain or close off any story into being just one story." *Id.*

64. *Id.* at 98.

65. *Id.* at 100.

66. *See id.* at 97-100 (analyzing People v. Dong Lu Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), and People v. Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991)).

67. *See* Volpp I, *supra* note 55, at 98.

between the two defendants by explaining that the female defendant "resisted what she perceived as subordination out of a set of very narrowly defined choices," while the male defendant "acted to constrain his wife's choices further."[68]

This is Volpp's attempt to articulate a principled distinction between the use of cultural evidence by immigrant male defendants to mitigate their culpability with regard to crimes of violence against women and children with which they are charged and the use of cultural evidence by immigrant female defendants to mitigate their culpability with regard to the crimes with which they are charged. It is an impractical and unprincipled distinction, however, made necessary by Volpp's failure to consider the procedural context within which cultural evidence should be introduced.

On the ground that the defendant had acted as an agent of oppression, Volpp would deny an immigrant male defendant an opportunity to introduce evidence relevant to the requisite state of mind of the crime charged or to an element of an available defense to the same extent afforded all other criminal defendants.[69] She would not deny the same to female defendants, however, because she sees them as victims of oppression rather than agents of it.[70] In essence, she personalizes the subordination, failing to recognize that the culture and communities within which they live act with equal force upon both parties. In addition, she fails to provide a procedural mechanism for rendering the antisubordination evaluation that she prescribes. The reader is left wondering just who will render this analysis and how.

A few months after the publication of Volpp's article, Taryn F. Goldstein concluded that a formal, independent "cultural defense" should not be recognized in the American criminal justice system in part because such a defense "only harms the very groups it purports to protect."[71] Goldstein noted that opponents of a formal cultural defense contend that it is really an "ignorance of the law" defense, which is not recognized by courts in the United States,[72] and used this position to support her argument against the adoption of a formal, independent cultural defense.[73] Goldstein relied on examples of the use of cultural evidence in recent cases to mitigate the culpability of the defendant.[74] She failed, however, to distinguish clearly the use of a formal cultural

68. *Id.*

69. *See id.* at 97-101.

70. *See id.*

71. Goldstein, *supra* note 2, at 167. Goldstein stated that a formal, independent cultural defense would excuse violence towards immigrant women and children. *See id.*

72. *See id.* at 158-59.

73. *See id.* at 167-68.

74. *See id.* at 147-55 (analyzing People v. Kimura, No. A-091133 (Santa Monica Super. Ct. Nov. 21, 1985); People v. Moua, No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985); People v. Dong Lu Chen, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989); People v. Croy, No. 52587 (Placer County Super. Ct. Apr. 1990)).

defense from the procedural context in which cultural evidence was introduced in these cases.[75] A formal cultural defense, wherein evidence that the conduct giving rise to the criminal charge was consistent with the culture of the defendant is offered to mitigate the defendant's culpability solely on the ground that a defendant should not be held liable for such actions, has not been recognized by any state or by the United States. A formal cultural defense differs greatly from the introduction of evidence of culture because of its relevance to proof of a defense or to the rebuttal of proof of elements of the crime charged.

Goldstein's failure to consider the role of cultural evidence in each of the trials in which it was introduced was more blatant than Volpp's and is evidenced by her statement that the cultural defense has often been used by defendants to excuse their crimes.[76] Goldstein misconceived the use of cultural evidence in the criminal justice process. Obviously, the defense is not superimposed after a finding of guilt to reverse that finding. The defense is not a "cultural defense." Rather, the evidence of culture is introduced as relevant to show a lack of the requisite elements of the crime charged or to show a requisite element of a traditional defense, such as provocation or self-defense. When the evidence successfully rebuts the prosecution's proof, or proves a defense, the defendant is found not guilty. The defendant's crime has not been excused; he or she has been found not guilty of committing it. This is an essential procedural distinction that Goldstein missed because of her failure to consider the use of such evidence in a procedural context.

Goldstein's article also evidenced many of the concerns discussed by Volpp. Goldstein's discussion assumed the existence of an acultural legal system within the United States,[77] and failed to consider that an important aspect of the United States identity is its immigrant culture and populations.[78] Such a perspective allowed her to disregard the subordination of peoples along color, race, and class lines, and to focus on gender oppression as a justification for opposing the use of cultural evidence to mitigate culpability.[79]

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75. Goldstein acknowledged that none of the cases that she discussed employed a "pure cultural defense," but argued that they demonstrate the ambivalence of courts in the United States regarding the recognition of a formal defense. Goldstein, *supra* note 2, at 167.

76. *See id.* at 146. In discussing the use of the cultural defense by Native Americans, she stated that they "have also argued a cultural defense to excuse their crimes." *Id.*

77. *See generally id.* While Goldstein acknowledged a "clash of cultures," *see id.* at 141, 167, presumably recognizing the existence of culture within the legal system of the United States, her discussion demonstrated an ethnocentric examination of the topic wherein she emphasized the differentness of other cultures from the purportedly objective position of the dominant culture. In this way, she failed to recognize the varied and rich culture of the United States and reduced it to the culture of the dominant group, positioning Native Americans, African Americans, Asian Americans, Hispanic Americans, and "any minority who has suffered an inhibiting 'experience' in America" outside of that culture. *Id.* at 159.

78. *See id.*

79. *See id.* at 162-64.

Holly Maguigan, in her 1995 article, *Cultural Evidence and Male Violence*,[80] discussed the tension between feminists and multiculturalists regarding the use of cultural evidence in criminal trials.[81] Similar to Volpp and Goldstein, she rejected any formal, independent cultural defense as impractical to implement and impossible to define in any meaningful way.[82] She argued that the debate regarding the implementation of a separate, formal cultural defense "is misguided because the use of cultural information is not new, a workable legal definition of culture is impossible to develop, and the information is not being offered in court to create a separate defense."[83] Maguigan contended that the debate regarding the creation of a formal cultural defense merely obscured the real need to attempt to bring together seemingly conflicting reform agendas.[84]

Maguigan recognized the procedural framework in which cultural evidence is currently being introduced into criminal trials, analyzing the use of such evidence in various procedural stages of the criminal justice process from pre-trial to sentencing.[85] She acknowledged that cultural evidence is frequently relevant to a defendant's mens rea and should not be excluded merely because it explains a defendant's state of mind that is "unacceptable or incomprehensible" to that of the trial judge.[86] Allowing such discretion, she argued, permits a judge to impose the norms of the dominant culture against which the jury must evaluate the defendant's conduct.[87]

Maguigan's solution to the feminist-multiculturalist debate is a compromise which allows for the inclusion of cultural evidence to the extent that it is relevant to prove a defendant's state of mind.[88] Maguigan recognized this as the first step in the process, however, and argued that prosecutors have the burden of challenging the introduction

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80. Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995).

81. *See id.*

82. *See id.* at 44.

83. *Id.* at 45.

84. *See id.* Maguigan focused on the seeming tension between the goals of multiculturalists and feminists regarding the use of cultural evidence in criminal trials, dismissing the debate about the creation of a formal cultural defense as an impediment to reconcilination of that tension and irrelevant to the current use of cultural evidence. *See id.* at 43-60.

85. *See id.* at 62-86. Maguigan discussed the use of cultural evidence in plea bargaining and sentencing, *see id.* at 62-69, in determining culpability, *see id.* at 71-79, and in assessing reasonableness of perception, *see id.* at 79-86.

86. *See id.* at 99. Maguigan explained that a "quick fix" which permits the judge to exclude evidence of the defendant's state of mind on the basis of the evidence's content is unacceptable because women and people of color are "routinely perceived as having states of mind unacceptable to the dominant culture." *Id.* She argued that the current overrepresentation of people of color in prison in the United States is a result, in part, of just such an unwillingness to consider and attempt to understand alternative states of mind. *See id.*

87. *See id.*

88. *See id.* at 87-88.

and substance of the evidence to ensure that it is not being introduced to enforce cultural stereotypes.[89] She argued that the skepticism of prosecutors and jurors in considering cultural evidence introduced by the defense is an important safeguard against the use of such evidence to trivialize violence committed against women and children.[90] Acknowledging the social costs of using cultural information to trivialize such acts, she maintained that these costs were not a justification for precluding considerations of culture in criminal trials but, rather, an incentive for the prosecution and jury to continually view such evidence with a critical eye.[91]

Maguigan's procedural approach provides a coherent and practical solution to the "liberal's dilemma." By her own admission, the solution is neither quick nor perfect.[92] It does reconcile the concerns of multiculturalists and feminists, however, and avoids the shortsightedness of proposing either a complete ban on the introduction of cultural evidence or the creation of a formal defense. This Comment reaffirms her approach and expands upon it in Part V.

A year after Maguigan's article, Doriane Lambelet Coleman addressed what she called the "Liberal's Dilemma"—that use of the "cultural defense" is at once advancing the goals of multiculturalism and progressive criminal defense philosophy and at the same time is providing diminished legal protections to immigrant women and children.[93] This is so, she argued, because the defense is used most often by immigrant males to mitigate culpability for crimes committed against women and children.[94] While this latter statement appears to be true when "culture" is defined as she used it, namely to connote immigrant, patriarchal, non-Western culture, the argument falls apart when a broader definition, inclusive of the experiences of both genders and all social classes within a given culture, is employed.[95]

She also argued that the results of the admission of such evidence, although introduced "in the guise of traditional analysis," comprise a

89. *See id.* at 90.

90. *See id.* at 93-97.

91. *See id.* at 97.

92. *See id.* at 98-99.

93. *See* Coleman, *supra* note 2, at 1094-96.

94. *See id.* at 1094-95.

95. Coleman defines the cultural defense as "[t]he affirmative presentation of foreign customs as exonerating evidence in criminal cases where both the defendant and his victim are from the same culture." *Id.* at 1100. Such a definition carefully avoids consideration of cases in which cultural evidence was introduced by defendants charged with crimes against non-immigrant people and cases in which evidence of non-foreign customs, such as those of a non-dominant culture within the United States, are introduced. In addition, Coleman illustrated the present use of the cultural defense with cases whose fact patterns support her limited view of the present use of culture by criminal defendants to mitigate culpability. *See id.* at 1105-11. Finally, she described the practice of female genital mutilation and insinuated that there had been cases in which a defendant charged with such acts had successfully made use of cultural evidence to avoid culpability in a thinly-veiled attempt to inflame sentiment against use of cultural evidence in criminal proceedings. *See id.* at 1111-13.

"range of leniencies—from outright exoneration to mitigation—for the immigrant defendant" that are inconsistent with traditional notions of mens rea.[96] In this argument, Coleman confused substance with form. Evidence of culture has not been introduced in the "guise of traditional analysis," but rather by way of the vehicle of "traditional analysis." Coleman's argument fails to consider that the very admissibility of the evidence was premised on a finding that it was relevant to an element of the crime or the defense posited. The framework against which evidence of culture is sought to be admitted is the traditional framework of the criminal justice system of each of the united states, historically defined by white males within that culture. The fact that the content of the evidence sought to be introduced differs from the values and perspective of the dominant culture is not enough to make it irrelevant and, therefore, inconsistent with traditional notions of mens rea.

Coleman concluded by setting forth a resolution of the "liberal's dilemma" in a balancing test which weighs the defendant's interest in using cultural evidence and the victim's interest in gaining protection and relief.[97] She explained that such an approach requires an articulation of the arguments on both sides of the issue, as well as the social policies supported and opposed by the respective positions, and provides a framework for the reconciliation of the competing interests.[98] She then proceeded to enunciate the interests at stake—the interests of victims of crime committed by immigrant defendants in ensuring that they are afforded the same protections as victims of similar crimes by non-immigrants, and the interests of immigrant defendants in obtaining a subjective determination of their culpability and sentence[99]—and concluded that the balancing test always weighs in favor of the victims.[100]

The test Coleman articulates has three major flaws. First, it goes against a traditional and underlying principle of the criminal justice system wherein the accused's rights are measured against the interests of society and not of the particular victims involved. The crime charged is a crime against the state, not against the individual, and the rights of the defendant cannot be mitigated by considerations for the victim.

Second, Coleman's test assumes that the consideration of cultural evidence equals a complete and successful defense of the crime charged. There is no room for the defendant to introduce evidence of culture to show that an element of the crime has not been proven or to demonstrate that an element of a legal defense has been established. Nor, presumably, is there room for such evidence in the consideration of plea bargaining, sentencing, or de minimis motions. Third, a "balancing test"

96. *See id.* at 1103-04.
97. *See id.* at 1155-57.
98. *See id.* at 1156.
99. *See id.* at 1157.
100. *See id.* at 1161.

that is set forth with a prescription for its result in each and every case is not a balancing test.

Finally, Leti Volpp, responding to Coleman's article, explained that Coleman's position arises from an imperialist feminism that depicts feminism as Western or Euro-American and defines non-European culture from a male perspective.[101] She argued that such a feminist theory also eclipses racial and class-based oppression in the name of gender oppression.[102] Equally narrow in scope, Volpp argued, is Coleman's definition of culture, a definition which excludes the effects of race, poverty, the state, and the dominant culture.[103] Volpp also contended that Coleman's use of the term "multiculturalism" failed to acknowledge the current debate as to its definition.[104]

Volpp proposed an antisubordination approach to the determination of when to allow the introduction of evidence of culture by a criminal defendant.[105] She compared her antisubordination approach to Coleman's antidiscrimination approach, noting that both seek to eliminate inequality, but that the latter does so by treating people in a race-neutral manner while the former is explicitly color conscious.[106] She renewed her suggestion proposed in her 1994 article[107] that we consider who is seeking to advance the cultural evidence and whether it is being advanced to further stereotypes and subordination or for the purpose of assisting the triers of fact in understanding the defendant's location in "her community, diaspora, and history."[108]

IV. FEMALE GENITAL MUTILATION: AN EXAMPLE OF THE "LIBERAL'S DILEMMA" AND THE FLAWS IN THE CURRENT APPROACH TO IT

"Female genital mutilation"[109] is a practice performed in many Asian

101. *See* Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1576 (1996) [hereinafter Volpp II].

102. *See id.* at 1581-82.

103. *See id.* at 1588-94.

104. *See id.* at 1608. Volpp discussed the current debate regarding "whether multiculturalism is anti-racist or in fact oblivious to racism; whether multiculturalism means cultural autonomy or revisiting a common culture; whether multiculturalism is grounded in grassroots alliances or diversity management; and whether multiculturalism links politics and culture or separates them." *Id.* at 1608-09.

105. *See id.* at 1612; *see also* Volpp I, *supra* note 55.

106. *See id.* at 1594-95.

107. *See* Volpp I, *supra* note 55.

108. Volpp II, *supra* note 101, at 1612.

109. There is currently much debate about the accuracy of this term. Leti Volpp refers instead to "female genital surgeries," on the ground that the phrase "female genital mutilation" is a Eurocentric projection of a "negative moral assessment" of a Third World cultural practice and the phrase "female circumcision" falsely "implies a mild operation equivalent to male circumcision." Volpp II, *supra* note 101, at 1578 n.26 (citing Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 193 n.15 (1992)).

and African cultures.[110] There are several forms of female genital mutilation which vary in their severity.[111] The least severe form involves the partial or total removal of the clitoris.[112] The most severe involves the removal of the clitoris, labia minora, and parts of the labia majora and the suturing together of the labia majora until only a small hole is left for the passage of urine and menstrual flow.[113] The procedure is often done without anesthesia and with unsanitary and dull cutting implements.[114] Complications from the procedure range from severe pain and shock, to chronic infections, infertility, incontinence, inability to orgasm, and sometimes death.[115] The World Health Organization estimates that as many as two million women and girls are subject to this procedure each year.[116] Forms of female genital mutilation were practiced in the United States from the late nineteenth century until the mid-1930s, as a result of physicians' emphasis on the physiological origins of women's mental disorders,[117] and are increasingly being performed in the United States and other countries as the practice is brought with the immigrants who settle here.[118]

The United States has recently passed a federal law prohibiting female genital mutilation[119] and several states have passed similar laws or have prohibited it as a form of child abuse.[120] Many feminists argue for the eradication of this practice and support laws prohibiting it.[121] Furthermore, they contend that a "cultural defense" should not be available to mitigate the culpability of those charged with performing such procedures.[122]

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110. *See* Lori Ann Larson, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?*, 17 WOMEN'S RTS. L. REP. 237, 237 (1996) (citing Rone Tempest, *Female Genital Mutilation Under Scrutiny at Hearing*, USA TODAY, Feb. 11, 1994, at 3A, *available in* 1994 WL 11081188).

111. *See id.* at 238.

112. *See id.* (citing Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (June 1993)).

113. *See id.*

114. *See id.* at 238-39.

115. *See id.* at 239 (citing Note, *supra* note 112, at 1948).

116. *See* Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U.J. GENDER & L. 415, 419 (1996).

117. *See* Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321, 332 (1995) (citing Ben Barker-Benfield, *Sexual Surgery in Late-Nineteenth-Century America*, 5 INT'L J. HEALTH SERVICES 279, 283-85 (1975)).

118. *See id.* at 333.

119. *See* 18 U.S.C. § 116 (West Supp. 1997).

120. *See, e.g.*, CAL. PENAL CODE § 273.4 (West Supp. 1998); DEL. CODE ANN. tit. 11, § 780 (Michie Supp. 1996); 720 ILL. COMP. STAT. ANN. § 5/12-34 (West Supp. 1998); MINN. STAT. ANN. § 609.2245 (West Supp. 1997-1998); N.D. CENT. CODE § 12.1-36-01 (Michie 1997); TENN. CODE ANN. § 39-13-110 (Michie 1997); WIS. STAT. ANN. § 146.35 (West 1997).

121. *See, e.g.*, Bashir, *supra* note 116, at 454; Larson, *supra* note 110, at 257.

122. *See, e.g.*, Coleman, *supra* note 2, at 1166; Larson, *supra* note 110, at 245.

The irony in this argument is that those charged with such an offense are often women.[123] Consequently, those feminists who argue the complete disregard of cultural evidence which mitigates the culpability of the defendant will be forced to refuse a female defendant, herself subjected to the procedure as a part of an arguably patriarchal culture, a voice in the courtroom as to her position in her world. Can this be the desired end of these feminists?

Perhaps it could be argued that, in this case, the rights of the child victim are more urgent than the rights of the woman defendant—that the woman may be silenced when it is a child that she has harmed.[124] Although this argument surely has merit, an antisubordination approach may be more instructive on the issue of when and to what extent evidence of culture ought to be admissible to mitigate the culpability of a defendant charged with the crime of female genital mutilation. Such an approach would avoid an analysis which attempts to discern who is most oppressed or to name the "real" victim. It would avoid Coleman's positioning of the victim's interests in protection from violence against the defendant's interests in an equal opportunity to present all evidence relevant to demonstrating a lack of the requisite state of mind.[125] The antisubordination approach would instead look to the defendant's position within her culture and community and would explore her actions within the choices available to her. It would allow evidence of culture to the extent that it would educate the finders of law and fact as to her circumstances at the time of her commission of the act for which she is charged. Such evidence might well reveal an understanding of the defendant's act, which was previously foreign to members of the dominant culture, and should be admissible to the extent that it is relevant to show an element of a defense to the crime charged.

The practice of female genital mutilation may be better understood in light of its justifications within the cultural context of those populations that practice it. The justifications advanced for the continued practice of female genital mutilation include "religion, custom, decreasing the sexual desire of women, hygiene, aesthetics, and the facility of sexual relations and fertility."[126] In certain cultures, it is a condition of acceptance into the socio-cultural group and may be a prerequisite to marriage.[127] The practice often has its roots in economic survival in that it facilitates the marriage of the one upon whom it is performed, whose marriage may well be necessary to the economic survival of that woman within her culture. Such evidence may demonstrate the elements of a defense to the crime charged and should not be excluded merely because

123. *See* Larson, *supra* note 110, at 246 (citing Note, *supra* note 112, at 1946).

124. *See id.* at 247.

125. *See* Coleman, *supra* note 2, at 1155-57.

126. Larson, *supra* note 110, at 240 (citing Anna Funder, *De Minimus Non Curat Lex: The Clitoris, Culture and the Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 417, 436 (1993)).

127. *See id.* (citing Note, *supra* note 112, at 1961; Funder, *supra* note 126, at 436).

its substance is unusual and even abhorrent to the norms of the dominant culture.

In seeking to prohibit the practice of female genital mutilation, caution should be exercised so that the means for its prohibition do not become a catalyst for racism and ethnocentrism. Evidence that is relevant under the established laws of the states of the United States should not be excluded on the grounds that any state of mind that condones the practice is inherently barbaric. The tendency to position the legal systems of the states as the advanced society against which all other cultures will be measured merely serves to deny the rich and varied culture of the United States and to subordinate non-dominant cultures.

Defendants charged with the perpetration of such a practice must be viewed within their specific cultural framework to the extent that the framework is relevant within the existing criminal justice process, a process admittedly created and imposed by the dominant culture in a courtroom generally controlled by the dominant culture. This does not necessarily mean that the defendant would be excused from responsibility. It means merely that, in the context of the proof of the elements of the crime and the existing defenses available to the defendant under the relevant law, the defendant's culture and voice will be considered.

V. RESOLUTION OF THE "LIBERAL'S DILEMMA"

A. Aims of the Criminal Justice System: Individualized Justice?

A thorough analysis of the superficiality of the "liberal's dilemma" requires a brief examination into the presumptions underlying the law. Thomas Aquinas, in his work *Summa Theologica*, defines law as the rational ordering of things which concern the common good, promulgated by whoever has as his or her charge the care of the community.[128] Aquinas contemplated law as inherently moral and just.[129] In contrast, Thomas Hobbes, in his work *Leviathan*, defines law as that which is necessary to preserve the life of the individual.[130] Hobbes rejects any notion of morality in law and contends that "good" and "evil" are only meaningful when considered in relation to the individual defining them.[131]

The distinction in these two approaches to law is relevant to the discussion of this Comment. It is only when one considers an underlying morality in the law that one can impose upon it disregard for the context of the doer and the deed. Such notions are evident in much of the feminist writing on the "cultural defense," which tends to evaluate the

128. THOMAS AQUINAS, SUMMA THEOLOGICA Art. 4, concl. (J. G. Dawson, trans., 1952).

129. *See id.* at 111.

130. *See* THOMAS HOBBES, LEVIATHAN, 66-67 (Everyman Classics ed., The Guernsey Press Co. 1987) (1651).

131. *See id.* at 24.

conduct of the defendants in light of an American law that is somehow more enlightened and progressive, and consequently more moral, than the culture from which the defendants come.

In contrast, a truly multiculturalist approach recognizes the need to define conduct and culpability in light of the context in which it occurs. Morality, it recognizes, is influenced and predetermined to a degree by the culture of the moralist. It recognizes that morality shifts from community to community and from role to role within a community.

Experience reinforces this reality. The morality of an American military combat unit differs from the morality of an American family in peacetime. In addition, the morality of a soldier in combat is different from the morality of that same person as a family member in peacetime. Although few argue this point to these extremes, many contend that a line does exist beyond which lay actions universally recognized as immoral. Any attempt to define this line, however, results in a series of proposed acts, which the proponent believes are generally recognized as abhorrent, followed by a series of responses that attempt to create a circumstance in which the proposed behavior would make moral sense. Universal morality can be defined only to the extent that the definer is incapable of contemplating circumstances different from her own which would morally justify the behavior. It is antithetical to a multiculturalist approach.

The law must, therefore, provide the procedural mechanisms for considering the variant circumstances of the act that is alleged to be criminal, recognizing that the criminality of the act depends upon the absence or presence of those circumstances. In the alternative, the law must be clear that it is superimposing the morality of its makers, determined in accordance with their circumstances and experiences, on all those who are subject to it, regardless of their circumstances. It is the superimposition of the lawmakers' morals upon others in the name of a universal morality that is dangerous and oppressive because it permits the dominant culture, the lawmakers, not only to define morality but also to dismiss any variant experience as immoral.

B. Redefining Culture

Much of the feminist literature that identifies a dilemma in the use of cultural evidence to mitigate culpability discusses "culture" as it relates to immigrant defendants and assumes a culture-neutral legal system.[132] The narrowness of this definition is at the root of the identified dilemma. Such a restricted view of the dynamics at play is a result of a strain of feminism which defines its world in an ethnocentric and gender essentialist manner. The United States is viewed as progressive and feminist while the culture of non-European immigrants is viewed as

132. *See, e.g.*, Coleman, *supra* note 2; Goldstein, *supra* note 2.

backwards and patriarchal.[133] It is argued that cultural evidence should not be allowed because it is predominantly used by immigrant males to mitigate their culpability in acts of violence committed against women and children pursuant to the patriarchal norms of the defendants' cultures.[134]

Little or no attention is directed, however, at the use of cultural evidence to mitigate the culpability of immigrant women defendants. Even less attention is directed to the use of cultural evidence by American women defendants who occupy positions in the many non-dominant cultures of this country (*e.g.*, African American and Native American).[135] Those who do address such uses of the cultural defense attempt to articulate a principled distinction between the use of such evidence by female defendants and the use of the same type of evidence by male defendants. Although they propose a variety of theories or tests for drawing this distinction, the tests all result in the consistent conclusion that, as to crimes committed by and against adults when the defendants are female, the admission of cultural evidence is permissible, but when the defendants are male, it is not.[136]

The dilemma, it appears, is not that cultural evidence should not be allowed because it potentially mitigates the culpability of defendants charged with crimes against women. Rather, the issue is that courts are inclined to allow the introduction of cultural evidence in a racist and patriarchal manner.

One concern is that courts will allow evidence of a defendant's culture to be introduced in a manner which merely serves to reinforce reductive stereotypes and racist beliefs about the defendants and the victims involved. For example, a court may allow the introduction of evidence that "wife beating" is condoned and even expected in a defendant's culture in a manner that suggests that such a defendant is an unthinking agent of that culture. That same court, in contrast, is arguably quite unlikely to allow evidence that a defendant's "white-collar" crimes were merely the almost instinctive and unthinking responses of a defendant immersed in a culture which condones such activities. The court would expect some higher level of morality from this defendant. The fundamental lesson that feminists and multiculturalists should take from these observations is that we must ensure not only that our legal system give serious consideration to the

133. Leti Volpp called such a perspective a replication of "the colonialist feminism of a century ago." *See* Volpp II, *supra* note 101, at 1577.

134. *See, e.g.*, Coleman, *supra* note 2, at 1095; Sacks, *supra* note 2, at 545-46.

135. Doriane Lambelet Coleman summarily rejected the possibility that anyone, including "strong multiculturalists," is seriously willing to extend the cultural defense to non-immigrant Americans. *See* Coleman, *supra* note 2, at 1162, 1164-65. To the extent that cultural evidence is permitted as relevant to an established element of the crime charged or the defense contended, however, such evidence is relevant regardless of whether the defendant is a naturalized citizen of the United States or a recent immigrant.

136. *See, e.g.*, Coleman, *supra* note 2, at 1155-61 (discussing her balancing test).

cultural influences and experiences of each defendant, but, equally important, that our courts never engage in the sort of racist, reductive stereotyping discussed above in the name of multiculturalism. Considerations of culture must not eclipse the consideration of the defendant's agency within that culture.

A second concern is that courts will allow evidence of culture as viewed through a patriarchal lens. This may occur in two ways. First, evidence of the culture of the men of a people may be admitted as a substitute for, and the equal of, the culture of the entire people. Although this is often done inadvertently, it collapses the experience of gender that exists within the non-dominant culture. Second, culture may be defined in a manner which makes cultural evidence relevant only for male immigrant defendants. In other words, it is imperative that courts avoid defining culture in a manner which would find significant the differences between males in the dominant culture and individuals in non-dominant cultures while failing to find significance between males in the dominant culture and females in that same culture. Gender experiences certainly influence the experience of any culture and, therefore, should be considered an element of a defendant's culture.[137]

A third concern is that courts will allow evidence of culture without regard to socioeconomic class. One's cultural experience differs greatly across economic lines and this variable should also be considered as relevant to the examination of cultural evidence. The cultural experiences of people of poverty and people of wealth, though of the same nationality, should not be condensed into a common experience. Socioeconomic status is a relevant factor to the determination and definition of one's culture.

C. The Cultural Defense in Its Procedural Context

Much of the current literature on the "cultural defense" rejects the notion of an independent defense of culture in addition to the already existing mechanisms for introducing evidence of culture to mitigate culpability.[138] An independent defense of culture is no more than a defense based on ignorance of the law, a doctrine long rejected as a defense in this country's criminal justice system. Recognition of such

137. Interestingly, some courts have been more accepting of the role gender plays in the perceptions of a criminal defendant than the role played by the defendant's tribal culture in assessing the elements of self-defense as a defense to the crime charged. *See, e.g.*, Washington v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (concluding that a jury instruction on self-defense that persistently used the masculine gender improperly characterized the law by creating an objective standard of reasonableness, suggesting that the female defendant's conduct was to be measured against that of a reasonable male in the same circumstances, while declining to allow the defendant to present testimony of the effects of her Indian culture on her actions and perceptions in her circumstance).

138. *See, e.g.*, Goldstein, *supra* note 2, at 166-67; Maguigan, *supra* note 80, at 44.

a defense would open the door to other forms of the ignorance-of-the-law defense.

In addition, it would become incredibly burdensome and superficial to attempt to distinguish between those entitled to such a defense and those not so entitled. Would an immigrant ten years in this country, a graduate of a United States university, and employed by a United States company be more entitled to this defense than a citizen born in the United States who was truly ignorant of the law under which she is charged?

Rather than a formal cultural defense, it is best to introduce evidence of culture to mitigate culpability within the existing legal framework. Defendants properly introduce cultural evidence within an established procedural context. It may be introduced before trial as part of the plea bargaining process, during trial as evidence of a lack of mens rea or of the existence of an established defense, or after trial as a consideration during sentencing.

This distinction is essential to an understanding of the role that the evidence of culture plays in the trial. It is not being offered as an alternative to previously established defenses. Evidence of culture is being offered within an established system of defined crimes and defenses. As such, its relevance must be determined according to its relevance to the particular element of the crime or defense for which it is being offered. And as such, to deny the introduction of cultural evidence when it is relevant is to deny an equal opportunity to all defendants to present a defense. The result is not a "special right" offered to immigrant defendants and others. Each and every defendant has a right to present a defense, introducing all factors relevant to such defense.[139]

VI. CONCLUSION

The "liberal's dilemma" is an artificial creation resulting from a failure to consider the relevance of cultural evidence and an overly narrow construction of what constitutes culture. It is presented as an awesome dilemma, but in reality it is as two dimensional as the projected face of the "great and powerful Oz." A careful examination behind the curtain of the supposed dichotomy between the values of multiculturalism and feminism with regard to the introduction of evidence of a criminal defendant's culture to mitigate culpability reveals the source of the illusion. An overly narrow construction of culture and the failure to consider the use of evidence of culture in the procedural context of trial project an image of diametrically opposed interests—multiculturalism versus feminism.

139. *See, e.g.*, Washington v. Texas, 388 U.S. 14, 18-19 (1967) (citing In re Oliver, 333 U.S. 257, 273 (1948)).

But upon examination of the reality behind the curtain, it is evident that evidence of a defendant's culture, offered and admitted to the extent that it is relevant to the elements of the crime charged and the defenses argued, does not compromise any expressed values of feminism any more than the admission of any evidence that is relevant to the mitigation of a defendant's culpability. Such evidence can not be excluded merely because it is offered to mitigate the culpability of an immigrant defendant charged with crimes against a woman or child. Such an exclusion would be a denial of the defendant's rights to a defense in the same manner as is available to any other defendant. Evidence of a defendant's culture is admitted, not as an exceptional defense unavailable to members of the dominant culture, but rather, as relevant to a full evaluation of the defendant's conduct and the circumstances in which he acted to the extent that it is consistent with the established defenses available to all defendants under the laws of the states.

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