

THE CULTURAL DEFENSE: UNDERMINING THE POLICIES AGAINST DOMESTIC VIOLENCE

A Hmong tribesman from Laos kidnapped his intended bride in California and raped her in order to officiate their marriage as is the tradition in his native country.¹ In New York, a Chinese man beat and killed his wife after learning of her marital infidelity.² In California, a Chinese mother killed her son in an attempt to commit parent-child suicide after discovering her husband's adultery.³

The above examples are cases occurring in the United States involving immigrants' violence against family members.⁴ Due to the large influx of immigrants, particularly Asians, to the United States in recent years, the criminal justice system has encountered defendants who commit acts of violence that are illegal in the United States but which are condoned in the defendants' homelands.⁵ These crimes often involve domestic violence, highlighting the differences between American attitudes regarding women, children and family interactions and the attitudes of other cultures.⁶ Through a "cultural defense," defendants attempt to negate or mitigate their criminal liability by arguing that they believed they were reasonably committing such acts because their cultural background and beliefs permit, and even encourage, such behavior.⁷ Several defendants have successfully used a cultural defense to reduce the crimes they are charged with or to mitigate their sentences.⁸ As a result, defense attorneys across the

¹ See Carolyn Choi, Note, *Application Of A Cultural Defense In Criminal Proceedings*, 8 PAC. BASIN L.J. 80, 83 n.37 (1990) (People v. Moua, No. 315972 (Fresno Super. Ct. 1985)). See *infra* notes 53-71 and accompanying text for a discussion of this case.

² See 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 & n.169 (1991) (People v. Chen, No. 87-7774 (N.Y. Sup. Ct. March 21, 1989)). See *infra* notes 72-93 and accompanying text for a discussion of this case.

³ People v. Wu, 286 Cal. Rptr. 868, 872-73 (Cal. Ct. App. 1991). See *infra* notes 94-140 and accompanying text for a discussion of this case.

⁴ See Choi, *supra* note 1, at 80; Spatz, *supra* note 2, at 621, 624-25.

⁵ Choi, *supra* note 1, at 81; Julia P. Sams, Note, *The Availability of the "Cultural Defense" As An Excuse For Criminal Behavior*, 16 GA. J. INT'L. & COMP. L. 335, 352 (1986); Spatz, *supra* note 2, at 621.

⁶ Myrna Oliver, *Immigrant Crimes: Cultural Defenses—A Legal Tactic*, LOS ANGELES TIMES, July 15, 1988, at 1.

⁷ See Choi, *supra* note 1, at 81.

⁸ See Spatz, *supra* note 2, at 620-21.

country are employing the defense.⁹ Many immigrants, therefore, have received the message that the American judicial system will allow them to get away with violence that may be illegal in the United States, but that ultimately can be attributable to their cultural background.¹⁰

In contrast to the increasing use of the cultural defense, which appears to condone crimes against women and children, activists have worked in recent years to change the way the United States' legal system reacts to violence against women and children.¹¹ Within the last two decades, American society has acknowledged the violence occurring within the family unit and has taken steps to overcome such abuses.¹² One example of society's growing intolerance of domestic abuse has been the legal community's development of a defense strategy for battered women who kill their abusers.¹³ This defense strategy, which has been termed the "battered women's defense," on its face seems similar in theory to the cultural defense because both appear to uphold the rights of the traditionally oppressed—abused women and cultural minorities.¹⁴ When examined more closely, however, it is evident that the theories and policies behind the two defenses are different.¹⁵ In fact, the cultural defense undermines much of the policy lying behind the battered women's defense.¹⁶

This Note explores how the cultural defense comports with advances made in the United States to combat violence against women and children. Section I examines the current status of the cultural defense and explores three recent cases that relied on the defense.¹⁷ Section II looks at the battered women's defense and how it functions within the criminal law.¹⁸ Section III analyzes how the cultural defense

⁹ See *id.* at 624.

¹⁰ See *id.* at 623.

¹¹ See Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1294 (1991).

¹² See Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1254-55 (1987).

¹³ See MacKinnon, *supra* note 11 at 1294. As Catherine MacKinnon writes, "battered women's normal survival response to years of assault has begun to be reflected in the law of self-defense, so that those situations in which women are most likely to need to kill to save themselves are beginning to shape doctrine." *Id.*

¹⁴ Compare Cathryn Jo Rosen, *The Battered Woman's Defense*, in *CONTROVERSIES IN CRIMINAL LAW—PHILOSOPHICAL ESSAYS ON RESPONSIBILITY AND PROCEDURE* 89, 89 (Michael J. Gorr & Sterling Harwood eds., 1992) with Choi, *supra* note 1, at 81.

¹⁵ See *infra* notes 213-42 and accompanying text for a discussion of the differences between the two defenses.

¹⁶ See Spatz, *supra* note 2, at 623-27; see also Mihajlovich, *supra* note 12, at 1254-55.

¹⁷ See *infra* notes 21-161 and accompanying text.

¹⁸ See *infra* notes 162-212 and accompanying text.

differs from the battered women's defense and actually undermines advances made in this country to reduce the violence experienced by women and children.¹⁹ Ultimately, this Note will argue that cultural defenses should not be used because the United States should not allow other cultures, which do not respect individual liberty and equality in the same manner as American culture does, to subvert the value we place on preventing domestic abuse.²⁰

I. THE CULTURAL DEFENSE IN THE CONTEXT OF CRIMINAL DEFENSES GENERALLY

By definition, a "cultural defense" negates or mitigates criminal responsibility for acts that are committed under a reasonable, good faith belief in their propriety based upon the defendant's cultural background.²¹ The cultural defense has been used primarily in cases of domestic violence against women and children.²² United States courts have not created a formal cultural defense, but rather have incorporated cultural factors into existing defenses.²³ Recent immigrants have employed defense strategies that combine cultural factors with traditional criminal theories such as the "mistake of fact" defense and the "diminished responsibility" defense.²⁴ This section will explain these traditional criminal law defenses and then will illustrate how cultural factors are incorporated into these defenses by examining three cases that have used cultural factors in the defendant's defense strategy.²⁵ Finally, this section will explore the rationale behind incorporating cultural factors into a defendant's case and the effects of using a defendant's cultural background as part of the defense strategy.²⁶

A. *Traditional Criminal Law Defenses Used to Incorporate Defendants' Cultural Backgrounds*

Traditional criminal defenses focus on the defendant's state of mind.²⁷ The American criminal justice system requires that a guilty act,

¹⁹ See *infra* notes 213-42 and accompanying text.

²⁰ *Id.*

²¹ Choi, *supra* note 1, at 81; John C. Lyman, Note, *Cultural Defense: Viable Doctrine Or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 98 n.17 (1986).

²² See Spatz, *supra* note 2, at 626.

²³ See Choi, *supra* note 1, at 85.

²⁴ See Note, *The Cultural Defense In The Criminal Law*, 99 HARV. L. REV. 1293, 1294-95 (1986) [hereinafter *Cultural Defense*]; Sams, *supra* note 5, at 339-45; Spatz, *supra* note 2, at 620.

²⁵ See *infra* notes 27-140 and accompanying text.

²⁶ See *infra* notes 141-61 and accompanying text.

²⁷ See *Cultural Defense*, *supra* note 24, at 1294.

actus reus, exist with a culpable state of mind, *mens rea*, at the time the defendant committed the crime in order to find the defendant criminally liable.²⁸ For example, for a court to find a defendant guilty of assault, the defendant must use force against another person with the intent to injure that individual.²⁹ Together, the *actus reus* and the *mens rea* make defendants criminally liable for their actions.³⁰

The state of mind necessary to find a defendant guilty of a crime varies with different types of crimes.³¹ There are several types of *mens rea* used by the common law and statutes in defining crimes; they are generally classified in modern criminal law as: 1) crimes requiring that the defendant committed the forbidden act *intentionally* or *purposefully*; 2) crimes requiring that the defendant had *knowledge* of the nature of the act or the result that followed; 3) crimes requiring that the defendant acted *recklessly* in committing the act or committing the result; and 4) crimes only requiring that the defendant *negligently* committed the act.³² In order to be criminally liable for an act, a defendant must have possessed the mental state or states necessary to be convicted of that particular crime.³³

Many traditional criminal law defenses operate by negating the existence of the mental state required for a specific crime.³⁴ In other words, many defenses establish that at the time the crime was committed, the defendant did not possess the mental state required to be convicted of the crime.³⁵ The mistake of fact and diminished responsibility defenses are among those that operate by demonstrating that the required mental state did not exist.³⁶

The mistake of fact defense works by negating the mental state necessary to find a defendant guilty of a particular crime.³⁷ If a defendant is mistaken as to the facts surrounding the crime, the defendant may not be able to form the requisite intent to be convicted of the

²⁸ Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 752 (1987).

²⁹ Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 258 (1987).

³⁰ See *id.*

³¹ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.4, at 212 (2d ed., 1986).

³² *Id.* § 3.4(c) at 214. It should be noted that "intent" is sometimes defined so that it includes knowledge. *Id.* § 3.5(b) at 218. For example, it is often said that people intend certain consequences when they desire their acts to cause those consequences or know those consequences are substantially certain to occur if they act. See *id.* The modern view, however, generally draws a distinction between intent (or purpose) and knowledge. *Id.*

³³ See *id.* § 3.4 at 212.

³⁴ *Id.* § 3.4(e) at 216.

³⁵ See *id.*

³⁶ LAFAVE & SCOTT, *supra* note 31, § 3.4(e) at 216, § 4.7 at 368.

³⁷ *Id.* § 5.1 at 405.

crime.³⁸ For example, if a person walks out of a restaurant and takes the wrong umbrella, that person may have been mistaken as to which umbrella belonged to the person.³⁹ The person did not intentionally take the wrong umbrella if the person was mistaken as to the facts.⁴⁰ The mistake of fact defense negates the defendant's liability by making it impossible for the defendant to have formed the requisite intent to be guilty of the crime.⁴¹

Like the mistake of fact defense, the diminished responsibility defense also works by negating the mental state necessary to find a defendant guilty of a particular crime.⁴² Defendants use a diminished responsibility defense to argue that they suffered from a mental condition, which was insufficient to constitute legal insanity but nonetheless interfered with their ability to reason at the time the crime was committed.⁴³ In other words, defendants argue that they suffered from a mental condition that affected their state of mind when the crime was committed, and thus prevented them from possessing the requisite mens rea.⁴⁴ Consequently, defendants, under the diminished responsibility defense, argue that they cannot be convicted of crimes for which they could not form the required mental state.⁴⁵ As a result of the diminished responsibility defense, courts reduce charges against defendants.⁴⁶ The defendants' diminished mental state prevents courts from convicting them of more serious offenses.⁴⁷ Thus, the defendants' diminished mental capacity can be a mitigating factor that reduces the defendants' punishment.⁴⁸

Defense attorneys have incorporated a defendant's cultural background into traditional criminal defenses when developing defense strategies for recent immigrants.⁴⁹ The defense strategies rely primarily on the diminished capacity and mistake of fact defenses outlined above.⁵⁰ These cultural defense strategies usually are used by defen-

³⁸ See *id.* § 5.1(a) at 406.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See LAFAYE & SCOTT, *supra* note 31, § 5.1(b) at 407.

⁴² *Id.* § 5.1 at 405.

⁴³ See *id.* § 4.7 at 368.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See LAFAYE & SCOTT, *supra* note 31, § 4.7(b) at 370.

⁴⁷ See *id.* § 4.7(b) at 370.

⁴⁸ See *id.*

⁴⁹ See *Cultural Defense*, *supra* note 24, at 1294; Sams, *supra* note 5, at 339-40; Spatz, *supra* note 2, at 620.

⁵⁰ See Sams, *supra* note 5, at 339-45; Spatz, *supra* note 2, at 620.

dants who have committed violent crimes against women and children.⁵¹ The following three cases exemplify how a defendant's cultural background is used as part of these defense strategies.⁵²

B. *People v. Moua*:⁵³ *The Cultural Defense Applied to Rape Through a Mistake of Fact Defense*

In 1985, a California Superior Court in *People v. Moua* reduced rape charges against a defendant after concluding that the defendant's Hmong culture mistakenly led him to believe that his victim was consenting to his sexual advances.⁵⁴ The defendant, a Hmong tribesman from Laos, argued that he had interpreted the victim's protests as signs of consent because his culture's marriage ritual involved abducting a woman and consummating the relationship despite her protests.⁵⁵ After considering the defendant's cultural background in light of the other evidence in the case, the judge reduced the charges to false imprisonment.⁵⁶

The defendant in *Moua* was a Hmong tribesman from Laos.⁵⁷ The Hmong tribesmen practice a form of marriage called "zij poj niam," or marriage by capture.⁵⁸ In the marriage by capture ritual, a man abducts a woman and takes her to his family's home, where the marriage is consummated.⁵⁹ The tradition calls for the woman, in a display of virtuousness, to protest the man's sexual advances.⁶⁰ The man is supposed to continue his sexual advances despite the woman's protests in order to demonstrate that he is worthy of being her husband.⁶¹

The defendant in *Moua* went to the Fresno City College Campus where he abducted his intended bride, taking her to his cousin's house.⁶² The defendant then had sexual relations with the victim, despite her protests.⁶³ The victim filed a criminal complaint, claiming that the defendant's actions constituted kidnapping and rape.⁶⁴ At trial,

⁵¹ See Spatz, *supra* note 2, at 626.

⁵² See *infra* notes 53-140 and accompanying text.

⁵³ See Choi, *supra* note 1, at 83 n.37 (*People v. Moua*, No. 315972 (Fresno Super. Ct. 1985)).

⁵⁴ See Sheybani, *supra* note 28, at 774-75.

⁵⁵ See Choi, *supra* note 1, at 83-84.

⁵⁶ See Choi, *supra* note 1, at 84; Sheybani, *supra* note 28, at 774-75.

⁵⁷ See Oliver, *supra* note 6, at 1.

⁵⁸ Choi, *supra* note 1, at 83.

⁵⁹ See *id.* at 83-84.

⁶⁰ *Id.* at 84.

⁶¹ *Id.*

⁶² Oliver, *supra* note 6, at 1.

⁶³ See *id.*

⁶⁴ See Choi, *supra* note 1, at 84; Oliver, *supra* note 6, at 1.

the defendant argued that he did not have the intent needed to charge him with rape because when the incident occurred, he mistakenly believed that the victim was consenting, and therefore did not intend to have sexual intercourse with her against her will.⁶⁵ He believed that the victim's protests were the traditional signals of consent to the marriage by capture ritual.⁶⁶ The judge in *Moua* believed both that the defendant genuinely thought the victim was consenting to the marriage by capture ritual and that the victim genuinely did not consent.⁶⁷ The prosecutor in the case argued that the victim had a right not to be kidnapped or raped, regardless of the defendant's perceptions as shaped by his Hmong traditions.⁶⁸ The judge ultimately reduced the charges against the defendant from kidnapping and rape to false imprisonment.⁶⁹ The defendant served a much lighter sentence than he might have served had he been charged with kidnapping and rape.⁷⁰ Thus, the defendant successfully combined the traditional mistake of fact defense theory with evidence regarding his cultural background to demonstrate that he lacked the requisite intent to charge him with rape.⁷¹

C. *People v. Chen*:⁷² *The Cultural Defense Applied to Wife Murder Through a Diminished Capacity Defense*

In 1989, a New York Supreme Court in *People v. Chen* reduced the charge against a defendant and mitigated his sentence after concluding that the defendant's Chinese background affected his mental state and, therefore, made it impossible for him to form the intent necessary for murder.⁷³ The defendant in *Chen* killed his wife after she informed him that she was sexually involved with someone else.⁷⁴ The judge in the case believed that it was impossible for the defendant to form the

⁶⁵ See Choi, *supra* note 1, at 84.

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1311 (1991).

⁷⁰ See *id.* The judge sentenced the defendant to 90 days in the county jail. Choi, *supra* note 1, at 84. In addition, the defendant was fined \$1000, with \$900 going to the victim as reparation. *Id.*

⁷¹ See Choi, *supra* note 1, at 84; Sheybani, *supra* note 28, at 774-75.

⁷² See Spatz, *supra* note 2, at 621 n.169 (*People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989)).

⁷³ See *id.* at 622; Rorie Sherman, "Cultural" Defenses Draw Fire: Double Standard?, NAT'L L.J., Apr. 17, 1989, at 3.

⁷⁴ See Sherman, *supra* note 71, at 3.

necessary intent for a murder conviction, because the defendant's Chinese culture had influenced his mental state at the time of the crime.⁷⁵ Thus, the judge reduced the charge against the defendant and lowered his sentence.⁷⁶

On September 7, 1987, Jian Wan Chen admitted to her husband that she had been having an extra-marital affair.⁷⁷ Dong Lu Chen became so enraged after learning of his wife's infidelity that he took a claw hammer and smashed her skull eight times until she died.⁷⁸ Mr. Chen, who had emigrated to the United States from China one year before his wife's murder,⁷⁹ confessed to killing her.⁸⁰

At trial, Mr. Chen argued that his cultural background affected his mental state at the time of the murder, rendering him incapable of forming the intent necessary to charge him with murder.⁸¹ At trial, an expert testified that in traditional Chinese culture, a wife's infidelity is considered proof of a husband's weak character.⁸² Even if the man and woman get divorced, according to the expert, traditional cultural beliefs label the husband undesirable.⁸³ In addition, the Chinese consider divorce a great shame to one's ancestors.⁸⁴ As a result of these societal beliefs, when a Chinese man learns that his wife has committed adultery, he may threaten to kill her.⁸⁵ The rest of the community in China, however, usually stops him before he can carry out his threats.⁸⁶ Mr. Chen argued that in the United States he did not have a tight-knit Chinese community to stop him from murdering his wife.⁸⁷

Mr. Chen asserted that he was suffering from diminished capacity at the time he killed his wife because his cultural beliefs affected his state of mind.⁸⁸ Mr. Chen therefore argued that he was unable to form the intent necessary to be legally responsible for his wife's murder.⁸⁹ Mr. Chen's arguments regarding the effect of his cultural background

⁷⁵ See Spatz, *supra* note 2, at 622; Alexis Jetter, *Fear Is Legacy of Wife Killing In Chinatown: Battered Asians Shocked By Husband's Probation*, N.Y. NEWSDAY, Nov. 26, 1989, at 4.

⁷⁶ See Sherman, *supra* note 71, at 28.

⁷⁷ Jetter, *supra* note 73, at 4.

⁷⁸ Sherman, *supra* note 71, at 28.

⁷⁹ *Id.*

⁸⁰ Spatz, *supra* note 2, at 622.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Sherman, *supra* note 71, at 28.

⁸⁴ *Id.*

⁸⁵ Spatz, *supra* note 2, at 622.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ *Id.*

on his mental state at the time of the crime were effective.⁹⁰ The Brooklyn Supreme Court concluded that Mr. Chen "was driven to violence by traditional Chinese values about adultery and loss of manhood," and found Mr. Chen guilty on a reduced charge of second-degree manslaughter.⁹¹ The judge sentenced Mr. Chen to the lightest possible sentence for second-degree manslaughter—five years probation.⁹² The defendant successfully used the traditional diminished capacity defense combined with evidence of his cultural background to reduce the charge against him and mitigate his sentence.⁹³

D. *People v. Wu*:⁹⁴ *The Cultural Defense Applied to Attempted Parent/Child Suicide Through the Diminished Capacity Defense*

In 1991, the California Court of Appeal held, in *People v. Wu*, that a defendant is entitled to have the jury consider the defendant's cultural background when determining whether the relevant mental states existed in deciding if the defendant is guilty of murdering her son.⁹⁵ In *Wu*, the state charged a Chinese mother with murder for killing her young son after discovering her husband's infidelity.⁹⁶ The court reasoned that the defendant's cultural background may have affected her mental state at the time she committed the crime.⁹⁷ Consequently, the court concluded that the defendant was entitled to have the jury instructed that it could consider her cultural background in deciding whether she had the requisite intent to be guilty of murder.⁹⁸

The defendant, Helen Wu, was a native of China.⁹⁹ Her husband, Gary Wu, emigrated to the United States in 1963.¹⁰⁰ At the time, the defendant and Mr. Wu were not married.¹⁰¹ It was not until 1978 or 1979 that the defendant was contacted by Mr. Wu about the possibility

⁹⁰ See Spatz, *supra* note 2, at 622.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *id.*

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

⁹⁵ *Id.* at 887. The court only considered whether it was error not to give the jury instructions regarding cultural background in order to guide the trial court on retrial. *Id.* The court had already determined that the judgment of the trial court must be reversed because of the trial court's refusal to instruct the jury on the defense of unconsciousness. *Id.*

⁹⁶ *Id.* at 872-73.

⁹⁷ *Id.* at 883, 887.

⁹⁸ *Id.* at 882.

⁹⁹ *Wu*, 286 Cal. Rptr. at 870.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

of moving to the United States and marrying him because he wanted to have children.¹⁰² Mr. Wu's first wife was unable to bear children.¹⁰³ The defendant came to the United States and although she did not marry Mr. Wu, she gave birth to his son.¹⁰⁴ The defendant then returned to China, leaving her son with Mr. Wu, because in China it is considered humiliating to bear a child out of wedlock.¹⁰⁵

After several years of difficult relations with Mr. Wu and demands from him for money, the defendant ultimately moved to the United States and married Mr. Wu.¹⁰⁶ Soon after they were married, her son informed her that his father treated him badly and was romantically involved with another woman.¹⁰⁷ Extremely distraught, the defendant cut the cord off a window blind and strangled her son.¹⁰⁸ The defendant then wrote a note to her husband and tried to strangle herself.¹⁰⁹ When she was unsuccessful, she slashed her left wrist with a knife in the hope of killing herself and lay down next to her son's body.¹¹⁰ Mr. Wu later discovered his son's body and the defendant, who was still alive.¹¹¹

The defendant was charged with murder and a jury convicted her of second degree murder.¹¹² The trial judge refused to give two sets of jury instructions requested by the defense counsel.¹¹³ The judge refused to tell the jury that it could choose to consider evidence of the defendant's cultural background when assessing her mental state at the time of the crime.¹¹⁴ The refusal to issue this jury instruction was based on the judge's decision not to endorse the defendant's actions merely because they would have been acceptable in China.¹¹⁵ The judge denied the defendant's motion for a new trial and sentenced her to fifteen years to life in prison.¹¹⁶

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Wu*, 286 Cal. Rptr. at 871.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 871-72.

¹⁰⁷ *Id.* at 872.

¹⁰⁸ *Id.*

¹⁰⁹ *Wu*, 286 Cal. Rptr. at 872.

¹¹⁰ *Id.*

¹¹¹ *Id.* The defendant had only cut the veins in her wrist, not reaching the arteries. *Id.* at 872-73. She was still alive, although she exhibited signs of unconsciousness. *Id.* at 872.

¹¹² *Id.* at 873.

¹¹³ *Id.* at 870.

¹¹⁴ *Wu*, 286 Cal. Rptr. at 870. In addition, the trial judge would not instruct the jury about the unconsciousness defense. *Id.*

¹¹⁵ *Id.* at 880.

¹¹⁶ *Id.* at 869.

Arguing that the trial court's refusal to instruct the jury on the defendant's cultural background constituted reversible error, the defendant appealed to the California Court of Appeal.¹¹⁷ On appeal, the court addressed whether the trial court should have given the instruction on the defendant's cultural background.¹¹⁸ The court explained that the defendant was entitled to have the jury instructed that it could consider evidence of the affect of her cultural background on any relevant mental states.¹¹⁹ The instruction did not direct the jury's attention to particular testimony, but rather indicated that there had been conflicting evidence, which the jury could choose to consider, regarding the defendant's ties to her cultural background.¹²⁰ The defendant had argued that at the time of the killing she was in a highly overwrought emotional state that could be explained by the affect her cultural background had on her perception of the circumstances surrounding her son's death.¹²¹ The court indicated that the defendant's cultural background was relevant in determining the presence or absence of the mental states essential to the crimes with which she was charged.¹²² According to the court, the mental states at issue were premeditation and deliberation, malice aforethought and specific intent to kill.¹²³ The court indicated that the defendant's cultural background was relevant to deciding all three mental states because her cultural background could have provided the trier of fact with a reasonable doubt that one of the necessary mental states existed.¹²⁴

First, the court explained that the evidence of the defendant's cultural background was relevant to determining the existence of premeditation and deliberation.¹²⁵ The court indicated that the evidence of the defendant's cultural background could suggest that her killing of her son was not deliberate and premeditated.¹²⁶ Rather, it was an emotional reaction to learning that her husband had mistreated her son and was unfaithful to her.¹²⁷ The court suggested that a jury could have found the defendant was shocked when she discovered her hus-

¹¹⁷ *Id.* at 869-70.

¹¹⁸ *Id.* The court addressed the instructions regarding the defendant's cultural background in order to guide the trial court on retrial. *Id.*

¹¹⁹ *Wu*, 286 Cal. Rptr. at 887.

¹²⁰ *Id.* at 880-81.

¹²¹ *Id.* at 881.

¹²² *Id.* at 882-83.

¹²³ *Id.* at 883.

¹²⁴ *See Wu*, 286 Cal. Rptr. at 883.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See id.*

band's behavior.¹²⁸ An explanation for her subsequent actions could be that her immediate reaction was culturally-based.¹²⁹ According to the court, a jury could have concluded that the defendant simply wanted to protect her son and rid herself of her husband's shameful behavior.¹³⁰

In addition, the court explained that the defendant's cultural background was relevant to establishing whether malice aforethought and heat of passion existed.¹³¹ If the act was committed under the heat of passion, this would have eliminated the existence of malice and reduced an intentional killing to voluntary manslaughter.¹³² According to an expert who testified at the trial, in Asian culture, if a mother commits suicide, thereby leaving her children behind, she is considered irresponsible.¹³³ Therefore, the expert suggested that a mother's only option is to kill her children immediately before she takes her own life.¹³⁴

The defendant's cultural background was relevant to explaining how the stress that had been created over a period of time could have been aggravated by her son's statements prior to his murder.¹³⁵ The court indicated that a jury could find that this stress may have constituted sufficient provocation to cause the defendant to kill her son in the heat of passion.¹³⁶ The defendant's cultural background was therefore relevant to determining whether the requisite mental states existed.¹³⁷

The California Court of Appeal concluded that a defendant's cultural background can be considered by a jury when it determines if the mental states relevant to a particular crime existed.¹³⁸ The *Wu* decision represents the first appellate consideration of the "cultural defense" and it suggests to lower courts that if defense counsel requests jury instructions regarding a defendant's cultural background, the instructions should be given if the evidence is relevant and part of the defendant's case.¹³⁹ Thus, the court in *Wu* approved the de-

¹²⁸ See *id.*

¹²⁹ See *Wu*, 286 Cal. Rptr. at 883.

¹³⁰ See *id.* at 883, 886.

¹³¹ *Id.* at 883.

¹³² *Id.*

¹³³ *Id.* at 885.

¹³⁴ See *Wu*, 286 Cal. Rptr. at 885.

¹³⁵ *Id.* at 884.

¹³⁶ *Id.*

¹³⁷ *Id.* at 887.

¹³⁸ *Id.*

¹³⁹ See *Wu*, 286 Cal. Rptr. at 880, 887.

fense strategy used in *Moua* and *Chen*, of using a defendant's cultural background in conjunction with traditional criminal defense theories.¹⁴⁰

E. *How the Cultural Defense Strategy Has Affected Society*

As exemplified in *Wu*, *Chen* and *Moua*, a defendant's cultural background has been incorporated into traditional criminal law defenses that focus on the defendant's mens rea.¹⁴¹ Proponents of the cultural defense strategy have argued that a defendant's cultural background should be considered when determining criminal liability because our society should respect cultural diversity.¹⁴² They assert that the American legal system should not punish an individual because the individual is from a culture that emphasizes different values.¹⁴³ Opponents of the defense strategy have noted, however, that the legal system's respect for cultural differences, in the context of allowing a defendant's cultural background to mitigate a defendant's liability, has negatively affected immigrant communities.¹⁴⁴ This Section will explore the negative impact of the cultural defense strategy.

Using a defendant's cultural background to reduce a defendant's criminal liability could have a negative effect on immigrant communities, the victims of violence and the defendants who commit the crimes.¹⁴⁵ Successful use of the cultural defense often condones family violence that is generally condemned by American society.¹⁴⁶ For example, after *Chen*, there has been an increase in domestic violence within Asian communities in New York.¹⁴⁷ Many Asian women have said that their batterers interpreted the court's decision as allowing batterers to get away with violence.¹⁴⁸ Because their abusers are less intimidated by

¹⁴⁰ See *supra* notes 53-140 and accompanying text for a discussion of *Moua*, *Chen* and *Wu*.

¹⁴¹ See Sams, *supra* note 5, at 337-38; Spatz, *supra* note 2, at 620. It should be noted that courts have not accepted a defendant's cultural background as an excuse for committing crimes. See Choi, *supra* note 1, at 86; Sams, *supra* note 5, at 337. Many people believe that to do so would create an exception to the "ignorance is no excuse" maxim of criminal law when courts have been unwilling to create exceptions for other individual characteristics. Choi, *supra* note 1, at 85; Sams, *supra* note 5, at 337.

¹⁴² See *Cultural Defense*, *supra* note 24, at 1310-11; Donna L. Kotake, Note, *Survey: Women And California Law*, 23 GOLDEN GATE U. L. REV. 1069, 1080 (1993).

¹⁴³ See *Cultural Defense*, *supra* note 24 at 1311.

¹⁴⁴ See Spatz, *supra* note 2, at 623-27.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 623.

¹⁴⁷ See *id.* at 623 & n.189.

¹⁴⁸ See Jetter, *supra* note 73, at 4.

threats to go to the authorities, Asian women have become more frightened.¹⁴⁹ The women are less likely to seek protection from court orders because they believe their batterers ultimately will get away with the violence.¹⁵⁰ The women believe that any efforts on their part would be futile.¹⁵¹ Consequently, immigrant women are facing violence in the United States that may be similar to violence they experienced in their native countries.¹⁵² Ironically, many immigrant women came to the United States in order to escape the ritual traditions of their cultures.¹⁵³ Thus, when the cultural defense strategy mitigates a defendant's criminal liability, immigrant communities have interpreted the courts' decisions as condoning their cultural traditions.¹⁵⁴

The effects of the cultural defense on immigrant communities contrasts with the effects of actually convicting and sentencing recent immigrants when they are violent.¹⁵⁵ For example, several years ago Vietnamese men in Los Angeles were surprised when they realized that they could be arrested and prosecuted for battering their wives.¹⁵⁶ After some defendants were prosecuted, word spread through the Vietnamese community and wife battering seemed to subside.¹⁵⁷ Not allowing defendants' cultural backgrounds to mitigate their liability for domestic abuse appears to discourage immigrants from engaging in these culturally acceptable acts.¹⁵⁸

As a corollary to this trend, commentators have argued that by developing a defense strategy that acknowledges cultural diversity, defense attorneys have adversely affected immigrant communities.¹⁵⁹ Immigrants have interpreted courts' decisions in cases such as *Moua*, *Chen* and *Wu* as condoning acts that are ingrained in their cultural background but are often illegal in the United States.¹⁶⁰ As a result, many immigrants are not curtailing their behavior.¹⁶¹

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ *See* Cathy Young, *Equal Cultures Or Equality for Women? Why Feminism and Multiculturalism Don't Mix*, Heritage Foundation Reports, May 5, 1992, The Heritage Lectures, No. 387.

¹⁵⁴ Spatz, *supra* note 2, at 623.

¹⁵⁵ *See id.* at 626; Sherman, *supra* note 71, at 3.

¹⁵⁶ Sherman, *supra* note 71, at 3.

¹⁵⁷ *Id.*

¹⁵⁸ *See id.*

¹⁵⁹ Spatz, *supra* note 2, at 623.

¹⁶⁰ *See* Jetter, *supra* note 73, at 4.

¹⁶¹ *See id.*

II. THE BATTERED WOMAN'S DEFENSE—HOW THE AMERICAN LEGAL SYSTEM ADDRESSES FAMILY VIOLENCE

In contrast to the growing use of the cultural defense that tends to condone violence against women and children,¹⁶² American criminal law has changed in the last two decades to reflect society's growing intolerance of domestic abuse.¹⁶³ Society's attention became focused on battered women as an outgrowth of the feminist movement of the 1960s and 1970s.¹⁶⁴ As recently as 1971, American society ignored the plight of battered women, but since the first battered women's shelter opened in 1974, social activists and the legal system have become increasingly aware of the extent of the problem.¹⁶⁵ According to statistics from the Federal Bureau of Investigation, twenty-eight percent of all women killed throughout the United States from 1985 to 1991 were the victims of present or former husbands or boyfriends.¹⁶⁶ In 1992, the Surgeon General of the United States identified domestic abuse as the nation's single largest cause of injury to women.¹⁶⁷ Society has recognized that efforts must be made to curtail domestic abuse because battering is a learned behavior.¹⁶⁸ Most batterers and battered women grew up with fathers that beat their wives.¹⁶⁹ Therefore, societal forces are working to prevent further battering and to assist battered women in recognizing that they do not need to tolerate the abuse.¹⁷⁰

In conjunction with the societal recognition of domestic abuse, the United States' legal system has made many changes in the way it handles wife battering.¹⁷¹ Foremost among those changes is a strategy

¹⁶² See Spatz, *supra* note 2, at 626.

¹⁶³ See Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding The Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 268-70 (1985); Mihajlovich, *supra* note 12, at 1253.

¹⁶⁴ Mihajlovich, *supra* note 12, at 1254.

¹⁶⁵ *Id.* at 1254-55; see also Waits, *supra* note 163, at 268.

¹⁶⁶ Fox Butterfield, *Parole Advised For Woman Who Killed Abusive Partner*, THE NEW YORK TIMES, Jan. 21, 1993, at A18. There are some states with numbers well above the national average. See *id.* For example, according to the state Executive Office of Public Safety, during the first half of 1991, 75% of the women who were killed under known circumstances in Massachusetts were killed by either husbands or boyfriends. *Id.*

¹⁶⁷ David Bauman, *N.J. Officials Call For Laws To Protect Women, Children*, GANNETT NEWS SERVICE, Aug. 6, 1992, available in LEXIS, Nexis Library, OMNI File.

¹⁶⁸ See Waits, *supra* note 163, at 275; Jane Gross, *Abused Women Who Kill Now Seek Way Out of Cells*, N.Y. TIMES, Sept. 15, 1992, at A16.

¹⁶⁹ See Waits, *supra* note 163, at 275; Gross, *supra* note 168, at A16.

¹⁷⁰ See Waits, *supra* note 163, at 303; Mihajlovich, *supra* note 12, at 1254.

¹⁷¹ Waits, *supra* note 163, at 268.

developed by defense lawyers to defend battered women who kill their abusers.¹⁷² Like the cultural defense, commentators explain that the "battered women's defense" is more of a defense strategy than a formal criminal law defense.¹⁷³ The defense strategy combines the use of expert testimony on the battered women's syndrome with a women's self-defense theory.¹⁷⁴ This Section briefly will outline the defense strategy typically used to defend abused women who kill their batterers.

The battered women's defense strategy is grounded in affirmative criminal law defenses, which function by justifying or excusing a defendant's actions.¹⁷⁵ Defenses that work as "excuses" excuse the defendant's actions due to the defendant's subjective perceptions.¹⁷⁶ The defendant is excused of committing the criminal act because of subjective circumstances which relieve the defendant of criminal liability.¹⁷⁷ For example, if a defendant committed a crime under duress because he or she was a hostage being threatened by his or her captors, the defendant may be excused from liability for that crime.¹⁷⁸ The defendant is excused because the defendant did all that society could have been expected considering the defendant's unique situation.¹⁷⁹

In contrast to excuse defenses, which rely on the subjective context of the defendant's situation, defenses that work as justifications identify external circumstances that make the defendant's criminal act acceptable.¹⁸⁰ A defendant's actions are justified when the defendant has chosen an action which is morally defensible when considered in the context of the defendant's situation.¹⁸¹ For example, if a starving mother steals bread to feed her child, she will try to argue that her action was justified.¹⁸² It was necessary for her to steal the bread,

¹⁷² See Richard R. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 411 (1993).

¹⁷³ See C. Rosen, *Battered Women's Defense*, *supra* note 14, at 89.

¹⁷⁴ *Id.* at 90.

¹⁷⁵ See Kadish, *supra* note 29, at 258.

¹⁷⁶ See *id.* at 262.

¹⁷⁷ See *id.*

¹⁷⁸ See LAFAYE & SCOTT, *supra* note 31, § 5.3(a) at 433.

¹⁷⁹ See Kadish, *supra* note 29, at 262-63.

¹⁸⁰ Compare LAFAYE & SCOTT, *supra* note 31, § 5.7(c) at 457 with SANFORD H. KADISH & STEPHEN S. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 927-29 (5th ed. 1989).

¹⁸¹ See Kadish, *supra* note 29, at 258.

¹⁸² See *id.*

because if she did not do so, her child would have starved.¹⁸³ Thus, the mother's illegal actions are justified because the circumstances necessitated that these actions be taken.¹⁸⁴

Battered women who kill their abusers have employed a justification theory by modifying the traditional self-defense claim as part of their defense strategy.¹⁸⁵ The traditional self-defense claim acts as a justification of a defendant's actions.¹⁸⁶ It permits people to use force against an aggressor when there is no other way to protect themselves.¹⁸⁷ Generally, in most American jurisdictions, the killing of a person will be justified if the required elements for a self-defense claim exist.¹⁸⁸ First, defendants must have acted to defend themselves against what they reasonably believed was unlawful force by the attacker.¹⁸⁹ Second, defendants must have used force that was proportionate to the force used by the attacker.¹⁹⁰ In other words, defendants could only use deadly force if they were confronted by deadly force.¹⁹¹ Third, defendants must have reasonably believed it was necessary to use the deadly force in order to protect themselves from harm.¹⁹² Finally, defendants must have reasonably believed that the victim's threatened use of force was imminent.¹⁹³ If a defendant meets all of these self-defense claim requirements, then the defendant is relieved of liability for committing the crime.¹⁹⁴

The battered women's defense strategy addresses these four elements, but takes into account a defendant's perspective as a battered woman when determining if she acted reasonably.¹⁹⁵ The battered women's defense strategy is based on the premise that the reasonableness of the female defendant's actions should be judged in a neutral, individualized manner that considers the defendant's personal characteristics and history.¹⁹⁶ In other words, a battered woman's criminal

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See C. Rosen, *Battered Women's Defense*, *supra* note 14, at 89, 90.

¹⁸⁶ Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident On Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 28 (1986).

¹⁸⁷ *Id.* at 27-28.

¹⁸⁸ See LAFAYE & SCOTT, *supra* note 31, § 5.7(a) at 454-55.

¹⁸⁹ See *id.* § 5.7 at 454.

¹⁹⁰ See *id.* § 5.7(b) at 455-56.

¹⁹¹ See *id.* § 5.7(b) at 456.

¹⁹² *Id.* § 5.7(c) at 457.

¹⁹³ See LAFAYE & SCOTT, *supra* note 31, § 5.7(d) at 458.

¹⁹⁴ See *id.* § 5.7(a) at 455.

¹⁹⁵ See C. Rosen, *Battered Women's Defense*, *supra* note 14, at 91.

¹⁹⁶ *Id.*

liability should be determined by examining all of the surrounding circumstances, including the woman's history of being battered, to decide if the woman's use of force was reasonable.¹⁹⁷

To complete their defense strategy, defense lawyers combine the women's self-defense theory with expert testimony on the battered woman syndrome.¹⁹⁸ The battered woman syndrome is a set of emotional characteristics and behavioral patterns that are typical of women who are abused by their spouses or partners.¹⁹⁹ Testimony on the battered woman syndrome is used to prevent juries from using stereotyped prejudices about battered women that could affect their decisions concerning whether the woman's actions were justified under the circumstances.²⁰⁰

Testimony on the battered woman syndrome involves describing the "cycle of violence" that is typical of a battering relationship.²⁰¹ The three phases of the battering cycle, which are repeated in the relationship between the woman and the batterer, are: (1) the tension building phase; (2) the acute battering incident; and (3) the contrite, loving phase.²⁰² During the tension building phase, physical and emotional abuse begins to build.²⁰³ In the second phase, the batterer severely beats the woman.²⁰⁴ In the third phase, the batterer is loving toward the woman; he feels remorse for his actions and may promise her it will not happen again.²⁰⁵ After testifying about the battering cycle, experts will explain that the repeated cycle leads to both the batterer's aggression and the woman's victimization becoming "learned responses."²⁰⁶

¹⁹⁷ *Id.* at 91-92. It should be noted that the battered woman's defense strategy has been successfully established for defending battered women who have killed their batterers during a violent episode by the batterer. See R. Rosen, *On Self Defense*, *supra* note 172, at 371, 376. In these cases, defense attorneys have been able to put the battered woman's situation into the traditional elements of a self-defense claim. See *id.* at 376. The defense, however, has not been as successful for battered women who have killed their batterers while the batterer is sleeping or during some other non-aggressive phase. *Id.* Many people argue that this situation does not fit the traditional self-defense requirements because the defendant did not face imminent harm from her batterer. *Id.* There has been discussion by at least one legal scholar as to what exactly constitutes imminence. *Id.*

¹⁹⁸ C. Rosen, *Battered Women's Defense*, *supra* note 14, at 92.

¹⁹⁹ Mihajlovich, *supra* note 12, at 1257.

²⁰⁰ C. Rosen, *Battered Women's Defense*, *supra* note 14, at 91-92. Stereotyped prejudices may include beliefs such as thinking that it is a battered woman's fault that she is battered because she has not left her batterer. See *id.* at 92.

²⁰¹ See *id.*

²⁰² Waits, *supra* note 163, at 292.

²⁰³ Mihajlovich, *supra* note 12, at 1259.

²⁰⁴ *Id.*

²⁰⁵ See *id.*; Waits, *supra* note 163, at 294.

²⁰⁶ See C. Rosen, *Battered Women's Defense*, *supra* note 14, at 92; Waits, *supra* note 163, at 278.

The woman learns to feel helpless, which may explain why she stays in the relationship.²⁰⁷ In addition, this learned helplessness explains why the woman may ultimately feel that her only option is to kill her abuser.²⁰⁸ Ultimately, expert testimony demonstrates why it might be reasonable for a battered woman to kill her abuser when she faces his violence.²⁰⁹

Thus, the defense strategy employed by lawyers defending battered women who have killed their abusers combines a traditional criminal law claim of self-defense with expert testimony on the battered woman syndrome.²¹⁰ Together, the expert testimony and the self-defense theory work to justify the battered woman's actions.²¹¹ Ultimately, if the defense strategy is successful, the battered woman is relieved of criminal liability.²¹²

III. THE CONFLICT BETWEEN THE CULTURAL DEFENSE AND THE BATTERED WOMEN'S DEFENSE

The strategies for defending immigrants whose culture may have played a role in their crimes and for defending battered women who kill their abusers appear to be similar on their faces.²¹³ No formal defense has been created for either the cultural defense or the battered women's defense.²¹⁴ Rather, both defenses incorporate a defendant's subjective background and experiences with traditional criminal law theories.²¹⁵ In addition, both defenses stem from a growing sensitivity in society toward the traditionally oppressed—minorities and women.²¹⁶ But, in many respects, the policies underlying the two strategies conflict. In fact, the violence that the battered woman's defense recognizes is actually condoned and perpetuated by the cultural defense. Respecting cultural diversity through the cultural defense undermines the recognition society has accorded in recent years to the plight of battered women. This Section will compare the theories

²⁰⁷ See Waits, *supra* note 163, at 278–79; Mihajlovich, *supra* note 12, at 1258.

²⁰⁸ See Mihajlovich, *supra* note 12, at 1258.

²⁰⁹ See *id.*

²¹⁰ C. Rosen, *Battered Women's Defense*, *supra* note 14, at 89, 92.

²¹¹ See *id.* at 92.

²¹² See *id.*

²¹³ See *supra* notes 21–212 and accompanying text for a discussion of the cultural defense strategy and the battered women's defense strategy.

²¹⁴ See Choi, *supra* note 1, at 85; C. Rosen, *Battered Women's Defense*, *supra* note 14, at 89.

²¹⁵ See *supra* notes 21–212 and accompanying text for a discussion of the cultural defense strategy and the battered women's defense strategy.

²¹⁶ See *Cultural Defense*, *supra* note 24, at 1299.

behind the two defenses and explore how the cultural defense undermines the policies underlying the battered women's defense.

The cultural defense strategy appears similar to the battered women's defense strategy because both strategies use the defendant's personal circumstances to mitigate the defendant's criminal liability.²¹⁷ With the cultural defense, attorneys use a defendant's cultural background to negate the mental state required to convict the defendant of a particular crime.²¹⁸ A defendant's cultural background is used together with traditional criminal law defenses to argue that a defendant was mistaken as to the facts surrounding the case or was suffering from a diminished mental capacity.²¹⁹ Like the cultural defense, the defense strategy for battered women who have killed their abusers uses an established criminal law defense to argue that defendants should not be held criminally liable for their actions.²²⁰ Battered women argue that the battered woman syndrome explains why they believed they needed to kill their batterers in order to protect themselves from harm.²²¹

Although the impetus behind these two defense strategies appears to be similar because both recognize the plight of the traditionally oppressed and consider a defendant's personal background, the cultural defense actually undermines the policy underlying the battered women's defense. The cultural defense is based on the tolerance of other cultures' values, but it ends up promoting those values at the expense of exactly what the battered women's defense is trying to condemn: violence against women in domestic settings. American society has tried in the last two decades to recognize the problem of domestic abuse and condemn battering.²²² The battered women's defense strategy is part of the effort by the legal community to resolve the injustices that battered women have faced for years.²²³ The concept behind the battered women's defense is to take the perspective of a battered woman to determine when a woman might believe violence is necessary to prevent harm to herself.²²⁴ The cultural defense, on the

²¹⁷ See C. Rosen, *Battered Women's Defense*, *supra* note 14, at 91; *Cultural Defense*, *supra* note 24, at 1299.

²¹⁸ See *supra* notes 21–161 and accompanying text.

²¹⁹ *Id.*

²²⁰ See *supra* notes 162–212 and accompanying text.

²²¹ *Id.*

²²² See *supra* notes 162–212 and accompanying text for a discussion of the plight of battered women and the legal system's development of the battered women's defense.

²²³ *Id.*

²²⁴ See C. Rosen, *Battered Women's Defense*, *supra* note 14, at 91–92.

other hand, uses traditional defenses to help recent immigrants. It frequently does so at the expense of women and children who are also recent immigrants. Ironically, often these women and children have come to the United States to escape the oppression they faced in their own countries.²²⁵ Thus, promoting cultural diversity by using a cultural defense also promotes domestic violence.

By using a cultural defense strategy, defendants have faced drastically reduced charges and sentences due to their cultural background.²²⁶ As a result, members of immigrant communities have interpreted courts' decisions as condoning violence against women, thereby undermining work done to reduce violence against women.²²⁷ Immigrant communities believe the United States will tolerate the crimes that these defendants committed, just as the defendants' native countries condoned the acts.²²⁸ Therefore, immigrant communities may be unwilling to give up these traditional rituals.²²⁹ For example, many Asian men in New York have not listened to their wives' threats to call the police if the men do not stop beating the women.²³⁰ The Asian men have told their wives that the defendant in *Chen* was able to get away with killing his wife because the New York courts respected Mr. Chen's Chinese traditions.²³¹ Consequently, many Asian women have become unwilling to challenge their husbands' abuse.²³² The abuse that the battered women's defense has legally recognized, and that society has tried to dissipate in the last two decades, is actually perpetuated as a result of the cultural defense.

The cultural defense also perpetuates domestic violence by sending immigrants' children the message that battering is a tolerable way of life in the United States. By sanctioning immigrants' continued adherence to cultural traditions that may not comport with American values, a new generation learns that it also may use violence.²³³ Domestic violence tends to repeat itself in families.²³⁴ Because family violence

²²⁵ See *supra* note 153 and accompanying text.

²²⁶ See *supra* notes 21-161 and accompanying text for discussion of the cultural defense strategy.

²²⁷ See Jetter, *supra* note 73, at 4.

²²⁸ See *supra* notes 141-61 and accompanying text for discussion of the effects the cultural defense has had on immigrant communities.

²²⁹ *Id.*

²³⁰ See *supra* notes 145-54 and accompanying text for discussion of the effects the cultural defense has had on immigrant communities.

²³¹ See *supra* notes 145-54 and accompanying text.

²³² *Id.*

²³³ See Waits, *supra* note 163, at 275.

²³⁴ See *id.*

is transmitted through the generations of a family, it is essential that recent immigrants stop engaging in domestic abuse.²³⁵ Children who watch their fathers batter their wives are likely to be batterers or be battered themselves.²³⁶ To prevent immigrants' children from being violent towards their own families, it is important to prevent them from witnessing such violence as children. If it is not entirely possible to prevent the violence, because it is already ingrained in the family culture, then it is important for society to send children the message that their parents' violence will not be tolerated in the United States. Allowing defendants' cultural backgrounds to protect them from criminal liability undermines these goals.

Proponents of the cultural defense argue that a recent immigrant's cultural background should be considered in court because it is inappropriate for American lawmakers to determine what is tolerable behavior for all cultural groups.²³⁷ Individuals are raised in different cultures that have different senses of values and it is difficult to say that values in the United States are superior to those of other societies.²³⁸ In addition, it is inappropriate for Americans to judge other cultures' treatment of women, because the United States has harbored domestic violence for years.²³⁹ It is true that domestic violence went unrecognized in the United States for a long time.²⁴⁰ As demonstrated above, however, many changes have been made in the last two decades to try to prevent such violence.²⁴¹ Simply because American society may have long tolerated domestic violence and has not completely eradicated the problem, does not justify our tolerating the abuse of immigrant women and children in our country today.²⁴² Concededly, encouraging and tolerating cultural diversity is important. There may be cases where taking a defendant's cultural background into account may serve justice. Our society, however, must decide if it is willing to tolerate cultural diversity to the extent that it encourages violence against women and children.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See Young, *supra* note 153.

²³⁸ See *Cultural Defense*, *supra* note 24, at 1311.

²³⁹ See Young, *supra* note 153.

²⁴⁰ See Mihajlovich, *supra* note 12, at 1254.

²⁴¹ See *supra* notes 162–212 and accompanying text for a discussion of the battered women's defense strategy.

²⁴² See Young, *supra* note 153.

IV. CONCLUSION

Due to the recent influx of immigrants into the United States, the legal system has faced defendants who commit crimes that are illegal in this country but are acceptable behavior in the defendants' homelands. To defend these immigrants, attorneys have created a defense strategy that uses the defendants' cultural background as part of their cases. The defense strategy combines traditional criminal law defenses such as the diminished capacity and mistake of fact defenses with the defendants' cultural backgrounds. In an effort to respect cultural diversity, courts often have reduced the charges against these defendants and mitigated their sentences.

The use of a defendant's cultural background as part of an immigrant's defense strategy seems similar to the battered women's defense strategy. The battered women's defense strategy was created by the legal community after society began to recognize the plight of battered women. The defense strategy combines the traditional criminal law theory of self-defense with expert testimony on the battered woman's syndrome to explain why battered women may have killed their batterers.

Although the cultural defense strategy and the battered women's defense strategy may appear to be similar, the cultural defense strategy actually undermines the policies behind the battered women's defense strategy. The cultural defense strategy often is used by immigrants who have committed crimes against women and children. Therefore, immigrant communities receive the message that these acts of violence are condoned in the United States when convicted defendants receive reduced charges and sentences. Consequently, the cultural defense strategy actually promotes the violence that the battered women's defense is attempting to condemn. The judicial acceptance of the cultural defense ultimately could undermine the clear pronouncements that American law has made in recent years to discourage the violence against women and children. It is necessary for our legal system to determine if we value cultural diversity to the point where we are willing to have it undermine society's efforts to prevent domestic violence.

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